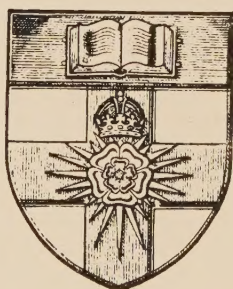


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D
RYLANDS AND ANOTHER *v.* FLETCHER

COURT OF EXCHEQUER CHAMBER (Willes, Blackburn, Keating, Mellor, Montague Smith and Lush, JJ.), February 8, 14, 1866]

E [Reported L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154;
14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799]

[HOUSE OF LORDS (Lord Cairns, L.C., and Lord Cranworth), July 6, 7, 17, 1868]

[Reported L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70]

F Nuisance—*Rylands v. Fletcher doctrine*—*Accumulation on land of matter dangerous to neighbour in event of escape—Liability of owner for damage due to escape.*

G If a person brings or accumulates on his land anything—e.g., water, or filth, or noxious fumes—which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

Animal—Cattle—Trespass—Damage to neighbour's property—Injury to human being—Liability of owner.

H Per LORD BLACKBURN: The owner of cattle must keep them in at his peril or he will be answerable for the natural consequences of their escape, i.e., with regard to tame beasts, for the grass they eat and trample on, although not for any injury to the person of others, for it is not the general nature of horses to kick or bulls to gore, but if the owner knows that the beast has a vicious propensity to attack man he will be answerable for that too.

I **Notes.** Applied: *Jones v. Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733. Distinguished: *The Thetis* (1869), L.R. 2 A. & E. 365; *Saxby v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1869), 38 L.J.C.P. 153; *Carstairs v. Taylor* (1871), L.R. 6 Exch. 217; *Wilson v. Newberry* (1871), L.R. 7 Q.B. 31; *Dunn v. Birmingham Canal Co.* (1872), L.R. 7 Q.B. 244; *Ross v. Fedden* (1872), L.R. 7 Q.B. 661. Applied: *Smith v. Fletcher* (1872), L.R. 7 Exch. 305. Distinguished: *Smith v. Fletcher* (1874), L.R. 9 Exch. 64; *Child v. Hearn* (1874), L.R. 9 Exch. 176. Considered and Applied: *Crompton v. Lea* (1874), L.R. 19 Eq. 115. Considered: *Madras Rail. Co. v. Zeminder of Carvetinagaram* (1874), 30 L.T. 770; *Cattle v. Stockton Waterworks Co.*, [1874-80] All E.R. Rep. 220. Distinguished: *Nichols*

v. *Marsland* (1876), L.R. 2 Ex.D. 1. Considered: *Wilson v. Waddell* (1876), 2 App. Cas. 95; *Humphries v. Cousins*, [1874-80] All E.R. Rep. 313; *Hurdman v. North Eastern Rail. Co.*, [1874-80] All E.R. Rep. 735. Distinguished: *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katherine Docks Co.* (1878), 27 W.R. 267. Considered and Applied: *Crowhurst v. Amersham Burial Board*, [1874-80] All E.R. Rep. 89. Distinguished: *Box v. Jubb*, [1874-80] All E.R. Rep. 741; *Anderson v. Oppenheimer* (1880), 5 Q.B.D. 602. Applied: *Powell v. Fall* (1880), 5 Q.B. 597. Considered: *Dixon v. Metropolitan Board of Works* (1881), 7 Q.B.D. 418. Applied: *Snow v. Whitehead* (1884), 27 Ch.D. 588. Considered: *Whalley v. Lancashire and Yorkshire Rail. Co.* (1884), 13 Q.B.D. 131; *Gas Light and Coke Co. v. St. Mary Abbots, Kensington, Vestry* (1884), Cab. & El. 368. Distinguished: *Snook v. Grand Junction Waterworks Co.* (1886), 2 T.L.R. 308. Considered and Applied: *Evans v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 36 Ch.D. 626. Distinguished: *Abelson v. Brockman* (1889), 54 J.P. 119. Applied: *Filburn v. People's Palace and Aquarium Co.* (1890), 25 Q.B.D. 258. Distinguished: *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Green v. Chelsea Waterworks Co.*, [1891-4] All E.R. Rep. 543; *Gill v. Edouin* (1894), 71 L.T. 762; *Ponting v. Noakes*, [1891-4] All E.R. Rep. 404. Considered: *Grosvenor Hotel Co. v. Hamilton* (1894), 71 L.T. 362. Distinguished: *Price v. South Metropolitan Gas Co.* (1895), 65 L.J.Q.B. 126; *Greenhill v. Low Beechburn Coal Co.*, [1897] 2 Q.B. 165; *Blake v. Woolf*, [1895-9] All E.R. Rep. 185. Applied: *Batcheller v. Tunbridge Wells Gas Co.* (1901), 84 L.T. 765. Considered and Distinguished: *Eastern and South African Telegraph Co. v. Cape Town Tramways Co.*, [1902] A.C. 381. Distinguished: *Ely Brewery Co. v. Pontypridd U.D.C.* (1903) 2 L.G.R. 40. Applied: *Giddy v. Smith* (1904), 20 T.L.R. 596; *Foster v. Warblington U.D.C.*, [1904-7] All E.R. Rep. 366; *Hobart v. Southend-on-Sea Corpn.* (1906), 4 L.G.R. 757. Distinguished: *Chichester Corpn. v. Foster*, [1906] 1 K.B. 167; *Evans v. Liverpool Corpn.*, [1906] 1 K.B. 160. Considered and Explained: *Baker v. Snell*, [1908-10] All E.R. Rep. 398. Applied: *West v. Bristol Tramways Co.*, [1908-10] All E.R. Rep. 215. Explained and Distinguished: *Whitmores (Edenbridge) v. Stanford*, [1909] 1 Ch. 427. Considered and Explained: *Wing v. London General Omnibus Co.*, [1908-10] All E.R. Rep. 496. Applied: *Lowery v. Walker*, [1910] 1 K.B. 173; *Jones v. Llanrwst U.D.C.*, [1908-10] All E.R. Rep. 922. Distinguished: *Baker v. Herbert*, [1911-13] All E.R. Rep. 509. Considered and Distinguished: *Rickards v. Lothian*, [1911-13] All E.R. Rep. 71. Applied: *Charing Cross, West End, and City Electricity Supply Co., Ltd. v. London Hydraulic Power Co.*, [1914-15] All E.R. Rep. 85. Considered and Distinguished: *Goodbody v. Poplar Borough Council* (1914), 84 L.J.K.B. 1230. Considered: *Heath's Garages, Ltd. v. Hodges*, [1916-17] All E.R. Rep. 358; *Holgate v. Bleazard*, [1916-17] All E.R. Rep. 817; *Greenock Corpn. v. Caledonian Rail. Co.*, *Same v. Glasgow and South-Western Rail. Co.*, [1916-17] All E.R. Rep. 426. Applied: *Mansel v. Webb*, [1918-19] All E.R. Rep. 794; *Miles v. Forest Rock Granite Co.* (1918), 34 T.L.R. 500; *Musgrove v. Pandelis*, [1918-19] All E.R. Rep. 589; *A.-G. v. Cory, Kennard v. Cory*, [1921] 1 A.C. 521; *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.*, [1921] All E.R. Rep. 48; *Hoare & Co., Ltd. v. Sir Robert McAlpine, Sons & Co.*, [1922] All E.R. Rep. 759. Distinguished: *Manton v. Brocklebank*, [1923] All E.R. Rep. 416. Considered: *Hines v. Tousley* (1926), 95 L.J.K.B. 773. Distinguished: *St. Anne's Well Brewery Co. v. Roberts*, [1928] All E.R. Rep. 28. Considered: *Pontardawe R.D.C. v. Moore-Gwyn*, [1929] 1 Ch. 656. Distinguished: *Fardon v. Harcourt-Rivington*, [1932] All E.R. Rep. 81; *Wilkins v. Leighton*, [1932] All E.R. Rep. 55. Applied: *A.-G. v. Corke* (on relation of *Bromley R.D.C.*), [1932] All E.R. Rep. 711. Considered: *North-Western Utilities, Ltd. v. London Guarantee and Accident Co., Ltd.*, [1935] All E.R. Rep. 196; *Marchant Manufacturing Co. v. Leonard D. Ford and Teller, Ltd.* (1936), 154 L.T. 430. Applied: *Western Engraving Co. v. Film Laboratories, Ltd.*, [1936] 1 All E.R. 106; *Shiffman v. Venerable Order of Hospital of St. John of*

- A** *Jerusalem*, [1936] 1 All E.R. 557. Distinguished: *Howard v. Furness Houlder Argentine Lines, Ltd.*, and *Brown, Ltd.*, [1936] 2 All E.R. 781; *Collingwood v. Home and Colonial Stores, Ltd.*, [1936] 3 All E.R. 200. Applied: *Hale v. Jennings Bros.*, [1938] 1 All E.R. 579. Considered: *McQuaker v. Goddard*, [1940] 1 All E.R. 471; *Thomas and Evans, Ltd. v. Mid-Rhondda Co-operative Society, Ltd.*, [1940] 4 All E.R. 357. Distinguished: *Peters v. Prince of Wales Theatre (Birmingham), Ltd.*, [1942] 2 All E.R. 533. Explained and Distinguished: *Read v. J. Lyons & Co.*, [1946] 2 All E.R. 471. Considered: *Sutcliffe v. Holmes*, [1946] 2 All E.R. 599. Distinguished: *Burley, Ltd. v. Stepney Corpn.*, [1947] 1 All E.R. 507; *Sochaeki v. Sas*, [1947] 1 All E.R. 344. Considered: *Smeaton v. Ilford Corpn.*, [1954] 1 All E.R. 923. Distinguished: *Penny v. Kendricks Transport, Ltd.*, [1955] 1 All E.R. 154. Considered: *Balfour v. Barty-King (Hyder & Sons Builders, Ltd.)*, [1957] 1 All E.R. 156; *Behrens v. Bertram Mills Circus, Ltd.*, [1957] 1 All E.R. 583; *A.-G. (Glamorgan County Council and Pontardawe R.D.C.) v. P.Y.A. Quarries, Ltd.*, [1957] 1 All E.R. 894. Applied: *Halsey v. Esso Petroleum Co., Ltd.*, [1961] 2 All E.R. 145. Referred to: *Smith v. London and South Western Rail. Co.* (1870), L.R. 6 C.P. 14; *A.-G. v. Tomline* (1879), 48 L.J.Ch. 593; *Fleming v. Manchester Corpn.* (1881), 44 L.T. 517; *Tillet v. Ward* (1882), 10 Q.B.D. 17; *Darley Main Colliery Co. v. Mitchell*, [1886-90] All E.R. Rep. 449; *Ruddiman v. Smith* (1889), 37 W.R. 528; *Prinsep v. Belgravia Estate* (1895), 39 Sol. Jo. 381; *St. Helen's Corpn. v. United Alkali Co.* (1901), Times, June 19; *Canadian Pacific Rail. Co. v. Roy*, [1902] A.C. 220; *Ilford Gas Co. v. Ilford U.D.C.*, [1903] 67 J.P. 365; *Manchester Corpn. v. New Moss Colliery Co.*, [1906] 1 Ch. 278; *Jones v. Lee*, [1911-13] All E.R. Rep. 313; *Remorquage à Hélice (Société Anonyme de) v. Bennetts*, [1911] 1 K.B. 243; *Titterton v. Kingsbury Collieries* (1911), 104 L.T. 569; *Maxey Drainage Board v. Great Northern Rail. Co.* (1912), 76 J.P. 236; *Cheater v. Cater*, [1916-17] All E.R. Rep. 239; *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K.B. 341; *Gayler and Pope, Ltd. v. B. Davies & Son, Ltd.*, [1924] All E.R. Rep. 94; *Booth v. Thomas* (1926), 95 L.J.Ch. 160; *Noble v. Harrison*, [1926] All E.R. Rep. 284; *Smith v. Great Western Rail. Co.*, [1926] All E.R. Rep. 242; *Glanville v. Sutton* (1927), 44 T.L.R. 98; *Great Western Rail. Co. v. Mostyn (Owners), The Mostyn*, [1927] All E.R. Rep. 113; *Sycamore v. Ley*, [1932] All E.R. Rep. 97; *Bartlett v. Tottenham*, [1932] 1 Ch. 114; *Bishop v. Consolidated London Properties, Ltd.*, [1933] All E.R. Rep. 963; *Knott v. L.C.C.*, [1933] All E.R. Rep. 172; *Markland v. Manchester Corpn.*, [1934] 1 K.B. 566; *Deen v. Davies*, [1935] All E.R. Rep. 9; *Greenwood Tileries, Ltd. v. Clapson*, [1937] 1 All E.R. 765; *Ryan v. Youngs*, [1938] 1 All E.R. 522; *Westripp v. Baldcock*, [1938] 2 All E.R. 779; *Hanson v. Wearmouth Coal Co.*, [1939] 3 All E.R. 47; *Mulholland v. Baker*, [1939] 3 All E.R. 253; *Tilley v. Stevenson*, [1939] 4 All E.R. 207; *Rouse v. Gravelworks*, [1940] 1 All E.R. 26; *Sedleigh-Denfield v. O'Callagan*, [1940] 3 All E.R. 349; *Haseldine v. C. A. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; *Brackenborough v. Spalding U.D.C.*, [1942] 1 All E.R. 34; *J. and J. Makin, Ltd. v. London and North Eastern Rail. Co.*, [1943] 1 All E.R. 645; *Haigh v. Deudraeth R.D.C.*, [1945] 1 All E.R. 12; *Rands v. McNeil*, [1954] 3 All E.R. 593; *Cunliffe v. Bankes*, [1945] 1 All E.R. 459; *Newcastle-upon-Tyne Corpn. v. Wolstanton, Ltd.*, [1946] 2 All E.R. 447; *Spice v. Smee*, [1946] 1 All E.R. 489; *Searle v. Wallbank*, [1947] 1 All E.R. 12; *Loughurst v. Metropolitan Water Board*, [1948] 2 All E.R. 834; *Neath R.D.C. v. Williams*, [1950] 2 All E.R. 625; *Bolton v. Stone*, [1951] 1 All E.R. 1078; *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.*, [1953] 1 All E.R. 179; *Beckett v. Newalls Insulation Co.*, [1953] 1 All E.R. 250; *Southport Corpn. v. Esso Petroleum Co.*, [1954] 2 All E.R. 561; *Rands v. McNeil*, [1954] 3 All E.R. 593; *Prosser & Son, Ltd. v. Levy*, [1955] 3 All E.R. 577; *Davey v. Harrow Corpn.*, [1957] 2 All E.R. 305; *Fowler v. Lanning*, [1959] 1 All E.R. 290; *Overseas Tankship (U.K.), Ltd. v. Morts Dock and Engineering Co., Ltd.*, [1961] 1 All E.R. 404.

As to nuisances between neighbouring properties and dangerous property, see 28 HALSBURY'S LAWS (3rd Edn.) 131-149; and for cases see 36 DIGEST (Repl.) 281 et seq. As to the liability of owners of trespassing animals, see 1 HALSBURY'S LAWS (3rd Edn.) 668-680; and for cases see 2 DIGEST (Repl.) 308 et seq.

Cases referred to :

- (1) *Anon.* (1480), Y.B. 20 Edw. 4, fo. 10, pl. 10; 17 C.B.N.S. 251, n.; 2 Digest (Repl.) 309, 126. B
- (2) *Tenant v. Goldwin (or Golding)* (1704), 1 Salk. 21, 360; Holt, K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, 356.
- (3) *Cox v. Burbridge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 319, 187. C
- (4) *May v. Burdett* (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 2 Digest (Repl.) 329, 216.
- (5) *Anon.* (1580), 3 Dyer, 372 b, pl. 10; 73 E.R. 835; 7 Digest (Repl.) 287, 136.
- (6) *Sutton v. Clarke* (1815), 6 Taunt. 29; 1 Marsh. 429; 128 E.R. 943; 42 Digest 975, 57.
- (7) *Hammack v. White* (1862), 11 C.B.N.S. 588; 31 L.J.C.P. 129; 5 L.T. 676; 8 Jur.N.S. 796; 10 W.R. 230; 142 E.R. 926; 2 Digest (Repl.) 317, 171. D
- (8) *Scott v. London Dock Co.* (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 11 Jur.N.S. 204; 13 W.R. 410; 159 E.R. 665, Ex. Ch.; 36 Digest (Repl.) 145, 772.
- (9) *Smith v. Kenrick* (1849), 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 36 Digest (Repl.) 248, 8. E
- (10) *Baird v. Williamson* (1863), 15 C.B.N.S. 376; 3 New Rep. 86; 33 L.J.C.P. 101; 9 L.T. 412; 12 W.R. 150; 143 E.R. 831; sub nom. *Williamson v. Baird*, 10 Jur.N.S. 152; 33 Digest (Repl.) 866, 1146.
- (11) *Lambert and Olliot v. Bessey* (1680), T. Raym. 421, 467; 83 E.R. 220, 244; 1 Digest (Repl.) 34, 259. F

Also referred to in argument :

- Bonomi v. Backhouse* (1859), E.B. & E. 646; 28 L.J.Q.B. 378; 33 L.T.O.S. 331; 5 Jur.N.S. 1345; 7 W.R. 667; 120 E.R. 652, Ex. Ch.; on appeal sub nom. *Backhouse v. Bonomi* (1861), 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 33 Digest (Repl.) 841, 984. G
- Chadwick v. Trower* (1839), 6 Bing. N.C. 1; 8 Scott, 1; 8 L.J.Ex. 286; 133 E.R. 1, Ex. Ch.; 7 Digest (Repl.) 310, 268.
- Hodgkinson v. Ennor* (1863), 4 B. & S. 229; 2 New Rep. 272; 32 L.J.Q.B. 231; 8 L.T. 451; 27 J.P. 469; 9 Jur.N.S. 1152; 11 W.R. 775; 122 E.R. 446; 44 Digest 39, 276. H
- Aldred's Case* (1610), 9 Co. Rep. 57 b; 77 E.R. 816; 36 Digest (Repl.) 267, 183.
- Bagnall v. London and North Western Rail. Co.* (1862), 1 H. & C. 544; 31 L.J.Ex. 480; 9 L.T. 419; 9 Jur.N.S. 254; 10 W.R. 802, Ex. Ch.; 38 Digest (Repl.) 30, 155.
- Williams v. Groucott* (1863), 4 B. & S. 149; 2 New Rep. 419; 8 L.T. 458; 27 J.P. 693; 9 Jur.N.S. 1237; 11 W.R. 886; 122 E.R. 416; sub nom. *Groucott v. Williams*, 32 L.J.Q.B. 237; 2 Digest (Repl.) 303, 107. I
- Chauntler v. Robinson* (1849), 4 Exch. 163; 19 L.J.Ex. 170; 14 L.T.O.S. 107; 154 E.R. 1166; 36 Digest (Repl.) 299, 435.
- Gregory v. Piper* (1829), 9 B. & C. 591; 4 Man. & Ry.K.B. 500; 109 E.R. 220; 34 Digest (Repl.) 187, 1312.
- Turbervill (Tubervil) v. Stamp* (1697), Holt, K.B. 9; Carth. 425; Skin. 681; Comb. 459; 1 Com. 32; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; 90 E.R. 846; 2 Digest (Repl.) 91, 551.

- A** *Filliter v. Phippard* (1847), 11 Q.B. 347; 17 L.J.Q.B. 89; 10 L.T.O.S. 225; 11 J.P. 903; 12 Jur. 202; 116 E.R. 506; 36 Digest (Repl.) 76, 407.
- Butler v. Hunter* (1862), 7 H. & N. 826; 31 L.J.Ex. 214; 10 W.R. 214; 158 E.R. 702; 34 Digest (Repl.) 197, 1386.
- Singleton v. Williamson* (1862), 7 H. & N. 747; 31 L.J.Ex. 287; 5 L.T. 645; 26 J.P. 231; 8 Jur.N.S. 157; 10 W.R. 301; 158 E.R. 670; 18 Digest (Repl.) 444, 1879.
- B** *Barber v. Nottingham and Grantham Railways Canal Co.* (1864), 15 C.B.N.S. 726; 3 New Rep. 510; 33 L.J.C.P. 193; 9 L.T. 829; 10 Jur.N.S. 260; 12 W.R. 376; 143 E.R. 970; 38 Digest (Repl.) 458, 1057.
- Acton v. Blundell* (1843), 12 M. & W. 324; 13 L.J.Ex. 289; 1 L.T.O.S. 207; 152 E.R. 1223, Ex. Ch.; 33 Digest (Repl.) 865, 1139.
- C** *Chasemore v. Richards* (1859), 7 H.L. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 5 Jur.N.S. 873; 23 J.P. 596; 7 W.R. 685; 11 E.R. 140, H.L.; 44 Digest 34, 252.
- Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282; 21 L.J.Ex. 241; 18 L.T.O.S. 258; 16 Jur. 200; 155 E.R. 953; 44 Digest 11, 40.
- D** *Partridge v. Scott* (1838), 3 M. & W. 220; 1 Horn & H. 31; 7 L.J.Ex. 101; 150 E.R. 1124; 19 Digest (Repl.) 74, 420.
- Ellis v. Sheffield Gas Consumers' Co.* (1853), 2 E. & B. 767; 2 C.L.R. 249; 23 L.J.Q.B. 42; 22 L.T.O.S. 84; 17 J.P. 823; 18 Jur. 146; 2 W.R. 19; 118 E.R. 955; 36 Digest (Repl.) 159, 838.
- Peachey v. Rowland* (1853), 13 C.B. 182; 22 L.J.C.P. 81; 20 L.T.O.S. 208; 17 Jur. 764; 138 E.R. 1167; 34 Digest (Repl.) 196, 1381.
- E** *Steel v. South-Eastern Rail. Co.* (1855), 16 C.B. 550; 25 L.T.O.S. 129; 139 E.R. 875; 34 Digest (Repl.) 200, 1406.
- Broadbent v. Imperial Gas Co.* (1857), 7 De G.M. & G. 436; 26 L.J.Ch. 276; 28 L.T.O.S. 329; 21 J.P. 117; 3 Jur.N.S. 221; 5 W.R. 272; 44 E.R. 170, L.C.; on appeal sub nom. *Imperial Gas Light and Coke Co. v. Broadbent* (1859), 7 H.L.Cas. 600; 29 L.J.Ch. 377; 34 L.T.O.S. 1; 23 J.P. 675; 5 Jur. N.S. 1319; 11 E.R. 239, H.L.; 38 Digest (Repl.) 20, 90.
- F**

Appeal from a decision of the Court of Exchequer Chamber by the defendants in an action brought against them by the plaintiff for damage done to his mines through the escape of water from a reservoir on the defendants' land.

- G** The plaintiff was a tenant of Lord Wilton. The defendants, who were proprietors of a mill, made upon land of Lord Wilton's, in pursuance of an arrangement made with him for that purpose, a reservoir, employing competent persons to construct the same. It turned out that beneath the site of the reservoir were old shafts running down into coal workings long disused which communicated with other old workings situate under the land of one Whitehead.
- H** The plaintiff's colliery, called the Red House Colliery, adjoined Whitehead's land, and the plaintiff, soon after he had commenced working the Red House Colliery, made arrangements with Whitehead to get, by means of the Red House pit, the coal lying under Whitehead's land. In pursuance of those arrangements the plaintiff had worked through from the Red House Colliery into the coal lying under Whitehead's land, and so into the old workings situated under
- I** Whitehead's land. As a result the workings of the plaintiff's colliery were made to communicate with the old workings under the reservoir. These underground works were effected several years before the defendants commenced making their reservoir, but the fact of their existence was not known to the defendants or any agent of theirs, or any person employed by them, until the reservoir burst, as is hereinafter mentioned. In the course of constructing the reservoir the shafts were perceived, but it was not known or suspected that they had been made for the purpose of getting coal beneath the site of the reservoir. The Special Case stated in the action contained a finding that there was no

personal negligence or default on the part of the defendants themselves in relation to the selection of the site or the construction of the reservoir, but reasonable and proper care was not used by the persons employed with reference to the shafts so met with to provide for the sufficiency of the reservoir to bear the pressure which, when filled, it would have to bear. The reservoir in consequence burst downwards into the shafts, and the water found its way into the plaintiff's mine. The majority of the Court of Exchequer held that the non-exercise of sufficient care upon the part of the persons employed to construct the reservoir did not, in the absence of any notice to the defendants of the underground communication, affect the defendants with any liability, there being in the absence of such notice no duty cast upon the defendants to use any particular amount of care in the construction of a reservoir upon their own land. **BRAMWELL, B.**, was of opinion that the question of knowledge was immaterial, and that the defendants were, therefore, liable. The plaintiff appealed to the Court of Exchequer Chamber.

Manisty, Q.C., and *J. A. Russell* for the plaintiff.

Mellish, Q.C., and *Jones* for the defendants.

Cur. adv. vult.

May 14, 1866. **BLACKBURN, J.**, read the following judgment of the court: This was a Special Case stated by an arbitrator under an order of nisi prius, in which the question for the court is stated to be whether the plaintiff is entitled to recover any, and, if any, what, damages from the defendants by reason of the matters thereinbefore stated. In the Court of Exchequer, **POLLOCK, C.B.**, and **MARTIN, B.**, were of opinion that the plaintiff was not entitled to recover at all, **BRAMWELL, B.**, being of a different opinion. The judgment in the Court of Exchequer was, consequently, given for the defendants in conformity with the opinion of the majority of the court. The only question argued before us was whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover.

We have come to the conclusion that the opinion of **BRAMWELL, B.**, was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the Case, and consequently that the judgment below should be reversed; but we cannot, at present, say to what damages the plaintiff is entitled. It appears from the statement in the Case, that the plaintiff was damaged by his property being flooded by water which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders and maintained by the defendants. It appears from the statement in the Case, that the coal under the defendants' land had, at some remote period, been worked out, but that this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. It further appears from the Case that the defendants selected competent engineers and contractors to make the reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil, but that the persons employed by them, in the course of the work, became aware of the existence of ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings. It is found that the defendants personally were free from all blame, but that, in fact, proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was, that the reservoir, when filled with water, burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief. The plaintiff, though free from all blame on his part, must bear the loss, unless

A he can establish that it was the consequence of some default for which the defendants are responsible.

The question of law, therefore, arises: What is the liability which the law casts upon a person who, like the defendants, lawfully brings on his land something which, though harmless while it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must
B take care to keep in that which he has brought on the land, and keep it there in order that it may not escape and damage his neighbour's, but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more.—If the first be the law, the
C person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect. Supposing the second to be the correct view of the law, a further question arises
D subsidiary to the first, namely, whether the defendants are not so far identified with the contractors whom they employed as to be responsible for the consequences of their want of skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is that the person who, for his own
E purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to
F the plaintiff's default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes
G and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own
H property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. On authority this, we think, is established to be the law, whether the thing so brought be beasts or water, or filth or stench.

The case that has most commonly occurred, and which is most frequently to be
I found in the books, is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape, that is, with regard to tame beasts, for the grass they eat and trample upon, although nor for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick or bulls to gore, but if the owner knows that the beast has a vicious propensity to attack man he will be answerable for that too. As early as 1480 (*Anon.* (1)), BRIAN, C.J., lays

down the doctrine in terms very much resembling those used by LORD HOLT in *Tenant v. Goldwin* (2), which will be referred to later. It was trespass with cattle. Plea: that the plaintiff's land adjoined a place where the defendant had common; that the cattle strayed from the common, and the defendant drove them back as soon as he could. It was held a bad plea. BRIAN, C.J., says:

"It behoves him to use his common so that it shall do no hurt to another man, and if the land in which he has common be not inclosed, it behoves him to keep the beasts in the common, and out of the land of any other."

He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs,

"that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went."

In *Cox v. Burbidge* (3), WILLIAMS, J., says (13 C.B.N.S. at p. 438):

"I apprehend the law to be perfectly plain. If I am the owner of an animal in which, by law, the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial."

So in *May v. Burdett* (4), the court, after an elaborate examination of the old precedents and authorities, came to the conclusion that a person keeping a mischievous animal is bound to keep it secure at his peril. And in 1 HALE'S PLEAS OF THE CROWN, p. 430, LORD HALE states that where one keeps a beast knowing that its nature or habits were such that the natural consequence of his being loose is that he will harm men, the owner

"must at his peril keep him up safe from doing hurt, for though he uses his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages";

though, as he proceeds to show, he will not be liable criminally without proof of want of care.

In these latter authorities the point under consideration was damage to the person, and what was decided was that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so the owner was not responsible for such damages, but where the damage is like eating grass, and other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. In COMYN'S DIGEST, "Droit" M. 2, it is said that

"if the owner of 200 acres in a common moor enfeoffs B. of fifty acres, B. ought to inclose at his peril to prevent damage by his cattle to the other 150 acres, for if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the fifty acres at his peril."

The authority cited is *Anon.* (5), where the decision was that the cattle might be distrained. The inference from that decision that the owner was bound to keep in his cattle at his peril is, we think, legitimate, and we have the high authority of COMYNS for saying that such is the law. In the note to FITZHERBERT, NATURA BREVIVM, 128, which is attributed to LORD HALE, it is said:

- A** "If A. and B. have lands adjoining, where there is no inclosure, the one shall have trespass against the other on an escape of their beasts respectively (3 Dyer, 372b, pl. 10; Rastal Ent. p. 621; and Y.B. 20 Edw. 4, fo. 10, pl. 10), although wild dogs, etc., drive the cattle of the one into the lands of the other."
- B** No case is known to us in which, on replevin, it has even been attempted to plead in bar to an avowry for distress damage feasant that the cattle had escaped without any negligence on the part of the plaintiff; and surely, if that could have been a good plea in bar, the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify WILLIAMS, J., in saying, as he does in *Cox v. Burbidge* (3), that
- C** "the law is clear that in actions for damage occasioned by animals that not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not."

As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour. *Tenant v. Goldwin* (2) is an express authority that the duty is the same, and is to keep them in at his peril. As MARTIN, B., in his judgment below, appears not to have understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and, therefore, all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod. 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant,

- F** "and used (solebat) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (de jure debuit reparari)."

Yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar.

- G** The case is reported both by SALKELD, who argued it, in 6 MODERN REPORTS, and by LORD RAYMOND whose report is the fullest. The objection taken was that there was nothing to show that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of common right, and the allegation that the defendant de jure debuit reparari being an inference of law which did not arise from the facts alleged. SALKELD argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did, of common right, result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that LORD HOLT, during the argument, intimated an opinion against him on that, but that after consideration the court
- I** gave judgment for him on the second ground.

In the report in 6 Mod. Rep. at p. 314, it is stated :

"And at another day per totam curiam the declaration is good, for there is a sufficient cause of action appearing in it, but not upon the word solebat. If the defendant has a house of office enclosed with a wall which is his, he is, of common right, bound to use it so as not to annoy another. . . . The reason here is, that one must use his own so as thereby not to hurt another, and as of common right one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his so

as not to hurt another by such user. . . . Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else."

There is here an evident allusion to the same case in DYER as is referred to in COMYNS DIGEST, "Droit" M. 2.

LORD RAYMOND, in his report, says (2 Ld. Raym. at p. 1092):

"The last day of term, HOLT, C.J., delivered the opinion of the court that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; that they did not go upon the solebat or the jure debuit reparari, as if it were enough to say that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is, of common right, bound to repair it. . . . The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbour. . . . So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbour, and the reason of these cases is because every man must so use his own as not to damnify another."

SALKELD, who had been counsel in the case, reports the judgment much more concisely, but to the same effect. He says (1 Salk. at p. 361):

"The reason he gave for his judgment was because it was the defendant's wall, and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's . . . he must repair the wall of his house of office, for he whose dirt it is must keep it, that it may not trespass."

It is worth noticing how completely the reason of LORD HOLT corresponds with that of BRIAN, C.J., in *Anon.* (1), already cited.

MARTIN, B., in the court below says that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will show that it was because LORD HOLT and his colleagues thought (no matter, for this purpose, whether rightly or wrongly) that the liability was not admitted that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does, therefore, seem to us to be a very weighty authority in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung, on his premises, must at his peril prevent it from getting on his neighbour's, or make good all the damage which is the natural consequence of its doing so.

No case has been found in which the question of the liability for noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved

A that they had, at great expense, erected a contrivance by which the fumes of chlorine were condensed, and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the juries that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood. The juries, however, being

B satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless

C negligence were shown, yet if the law be as laid down by the majority of the Court of Exchequer it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions for such nuisances is to say that the defendant caused the noisome vapours to arise on his premises and suffered them to come on the plaintiff's without stating that there was any want of care or skill on the defendant's part; and that *Tenant v. Goldwin* (2) showed that this was founded

D on the general rule of law that he whose stuff it is must keep it so that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching and the other by drowning, and he who brings them on his land must at his peril see that they do not escape and do that mischief.

E What is said by GIBBS, C.J., in *Sutton v. Clarke* (6), 6 Taunt. at p. 44, though not necessary for the decision of the case, shows that that very learned judge took the same view of the law that was taken by LORD HOLT. But it was further said by MARTIN, B., that when damage is done to personal property, or even to the person by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible.

F This is no doubt true, and this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: *Hammack v. White* (7), or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering: *Scott v. London Dock Co.* (8). Many other similar cases may be found. But we

G think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger, and persons who, by the licence of the owners, pass near to

H warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass can be explained on the same principle, namely, that the circumstances were such as to show that the plaintiff

I had taken the risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what there might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care

and skill in the persons employed by them. We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle the case may be mentioned again.

The defendants appealed to the House of Lords.

Sir Roundell Palmer, Q.C., and Jones, Q.C., for the defendants.
Manisty, Q.C., and Russell, Q.C., for the plaintiff.

Their Lordships took time for consideration.

July 17, 1868. The following opinions were read.

LORD CAIRNS, L.C.—The plaintiff in this case is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish; and, it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally the defendants appear to have taken no part in the works, nor to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the Case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water, bearing upon the imperfectly filled-up and disused vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings and from the horizontal workings under the close of the defendants, it passed on into the workings under the close of the plaintiff and flooded his mine, causing considerable damage, for which this action was brought. The Court of Exchequer, when the Special Case stating the facts to which I have referred was argued before them, were of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before whom an appeal from their judgment was argued, were of a contrary opinion, and unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used, and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have

A complained that that result had taken place. If he had desired to guard himself against it, it would have lain on him to have done so by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, *Smith v. Kenrick* (9) in the Court of Common Pleas. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it—for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred—the evil, namely, of the escape of the water, and its passing away to the close of the plaintiff and injuring the plaintiff—then for the consequence of that, in my opinion, the defendants would be liable. As *Smith v. Kenrick* (9) is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same court, *Baird v. Williamson* (10), which was also cited in the argument at the Bar.

E These simple principles, if they are well founded, as it appears to me they are, really dispose of this case. The same result is arrived at on the principles referred to by BLACKBURN, J., in his judgment in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words :

F “We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of vis major or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. On authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.”

In that opinion, I must say, I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH.—I concur with my noble and learned friend in thinking A
that the rule of law was correctly stated by BLACKBURN, J., in delivering the
opinion of the Exchequer Chamber. If a person brings or accumulates on his
land anything which, if it should escape, may cause damage to his neighbour, he
does so at his peril. If it does escape and cause damage, he is responsible,
however careful he may have been, and whatever precautions he may have taken
to prevent the damage. In considering whether a defendant is liable to a B
plaintiff for damage which the plaintiff may have sustained, the question in
general is, not whether the defendant has acted with due care and caution, but
whether his acts have occasioned the damage. This is all well explained in the
old case of *Lambert and Olliot v. Bessey* (11). The doctrine is founded on good
sense, for when one person in managing his own affairs causes, however innocently, C
damage to another, it is obviously only just that he should be the party to
suffer. He is bound sic uti suo ut non lædat alienum. This is the principle
of law applicable to cases like the present, and I do not discover in the
authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two cases in the
Court of Common Pleas referred to by my noble and learned friend—I allude D
to *Smith v. Kenrick* (9), and *Baird v. Williamson* (10). In the former, the
owner of a coal mine on the higher level worked out the whole of his coal,
leaving no barrier between his mine and the mine on the lower level, so that
the water percolating through the upper mine flowed into the lower mine, and
obstructed the owner of it in getting his coal. It was held that the owner
of the lower mine had no ground of complaint. The defendant, the owner of the E
upper mine, had a right to remove all his coal; the damage sustained by
the plaintiff was occasioned by the natural flow or percolation of water from the
upper strata. There was no obligation on the defendant to protect the plaintiff
against this. It was the plaintiff's business to erect or leave a sufficient barrier
to keep out the water, or to adopt proper means for so conducting the water
that it should not impede him in his workings. The water in that case was only F
left by the defendant to flow in its natural course. But in the later case of
Baird v. Williamson (10) the defendant, the owner of the upper mine, did not
merely suffer the water to flow through his mine without leaving a barrier
between it and the mine below, but in order to work his own mine beneficially
he pumped up large quantities of water, which passed into the plaintiff's mine in
addition to that which would have naturally reached it, and so occasioned him G
damage. Though this was done without negligence, and in the due working of his
own mine, yet he was held to be responsible for the damage so occasioned.
It was in consequence of his act, whether skilfully or unskilfully performed,
that the plaintiff had been damaged, and he was, therefore, held liable for the
consequences. The damage in the former case may be treated as having arisen
from the act of God—in the latter from the act of the defendant. H

Applying the principles of these decisions to the case now before the House,
I come without hesitation to the conclusion that the judgment of the Ex-
chequer Chamber was right. The plaintiff had a right to work his coal through
the lands of Mr. Whitehead and up to the old workings. If water naturally
rising in the defendants' land (we may treat the land as the land of the
defendants for the purpose of this case) had by percolation found its way down I
to the plaintiff's mine through the old workings and so had impeded his
operations, that would not have afforded him any ground of complaint. Even
if all the old workings had been made by the defendants they would have done
no more than they were entitled to do, for, according to the principle acted
on in *Smith v. Kenrick* (9), the person working the mine under the close in
which the reservoir was made had a right to win and carry away all the coal
without leaving any wall or barrier against Whitehead's land. But that is not
the real state of the case. The defendants, in order to effect an object of their

A own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible. I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Appeal dismissed.

C

D

INDERMAUR v. DAMES

[COURT OF COMMON PLEAS (Erle, C.J., Willes, Keating and Montague Smith, JJ.), February 26, 1866]

E

[Reported L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586]

[COURT OF EXCHEQUER CHAMBER (Kelly, C.B., Channell and Pigott, BB., Blackburn and Mellor, JJ.), February 6, 1867]

F

[Reported L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434]

Negligence—Duty of occupier of premises to visitor—Invitee—Person on premises fulfilling contract—Mutual interest with occupier—Customer in shop.

A person was an invitee at common law if he was on premises on lawful business in the course of fulfilling a contract in which both he and the occupier of the premises had an interest, and not on a bare permission.

G

Per WILLES, J.: The common case of a person resorting to a building in the course of business on the invitation of the occupier, express or implied, is that of a customer in a shop. Whether the customer is chattering or actually buys or not he is entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know. This protection does not depend on the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but on the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns him. And, if the customer were, after buying goods, to go back to the shop to complain of the quality or that the change was not right he would be just as much there on business which concerned the shopkeeper and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. If, instead of going himself, he were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go on business which concerns the occupier, and on his invitation, express or implied.

H

I

Notes. The duty owed by the occupier of premises to persons coming thereon in respect of dangers due to the state of the premises is now regulated by the Occupiers' Liability Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 832), which substitutes for the duty prescribed by the common law a "common duty of care" to all "visitors" which, under the Act (s. 1 (2) are those "persons who would at common law be treated as . . . invitees or licensees." The present case is the leading authority on what is an invitee.

Followed: *Smith v. London and St. Katherine Docks Co.* (1868), L.R. 3 C.P. 326. Distinguished: *Brooks v. Courtney* (1869), 20 L.T. 440. Applied: *Manchester, Sheffield and Lincolnshire Rail. Co. v. Woodcock* (1871), 25 L.T. 335. Considered: *King v. Great Western Rail. Co.* (1871), 24 L.T. 583. Applied: *Smith v. Steele* (1875), L.R. 10 Q.B. 125; *Watkins v. Great Western Rail. Co.* (1877), 46 L.J.Q.B. 817. Followed: *White v. France* (1877), 2 C.P.D. 308. Considered: *Elliott v. Hall* (1885), 15 Q.B.D. 315; *O'Neil v. Everest* (1892), 61 L.J.Q.B. 453. Applied: *Marney v. Scott*, [1899] 1 Q.B. 986. Distinguished: *Cavalier v. Pope*, [1906] A.C. 428. Applied: *Lewis v. Ronald*, [1908-10] All E.R. Rep. 782. Distinguished: *Lucy v. Bawden*, [1914] 2 K.B. 318. Considered: *Elliott v. Roberts* (1915), 32 T.L.R. 71; *Norman v. Great Western Rail. Co.*, [1915] 1 K.B. 584; Distinguished: *Maclean v. Segar*, [1917] 2 K.B. 325. Applied: *Pritchard v. Peto*, [1917] 2 K.B. 173. Considered: *Cole v. De Trafford* (No. 2), [1918-19] All E.R. Rep. 290. Applied: *Anchor Line (Henderson) v. Dundee Harbour Trustees, Ellerman Lines v. Dundee Harbour Trustees, Thomson, Shepherd v. Dundee Harbour Trustees* (1922), 38 T.L.R. 299; *Mercer v. South Eastern and Chatham Co.'s Managing Committee*, [1922] All E.R. Rep. 459. Considered: *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; *Mersey Docks and Harbour Board v. Procter*, [1923] All E.R. Rep. 134. Followed: *Sutcliffe v. Clients Investment Co.*, [1924] 2 K.B. 746. Considered: *Silverman v. Imperial London Hotels, Ltd.*, [1927] All E.R. Rep. 712; *Forbes, Abbott and Lennard v. Great Western Rail. Co.* (1927), 138 L.T. 286. Applied: *Compania Mexicana de Petroleo "El Aguila" v. Essex Transport and Trading Co., Ltd.*, [1929] All E.R. Rep. 589. Considered: *The Hayle*, [1929] P. 275; *Hillen v. I.C.I. (Alkali), Ltd.*, [1934] 1 K.B. 455; *Howard v. Furness Houlder Argentine Lines, Ltd. and Brown, Ltd.*, [1936] 2 All E.R. 781; *Simons v. Winslade*, [1938] 3 All E.R. 774; *Naismith v. London Film Productions, Ltd.*, [1939] 1 All E.R. 794; *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637; *Canter v. Gardner & Co.*, [1940] 1 All E.R. 325; *Jacobs v. London County Council*, [1949] 1 All E.R. 790; *Jennings v. Cole*, [1949] 2 All E.R. 191; *Denny v. Supplies and Transport Co. and Scruttons, Ltd.* (1950), 66 (pt. 1) T.L.R. 1168. Applied: *London Graving Dock Co. v. Horton*, [1951] 2 All E.R. 1. Considered: *Hunwick v. Essex Rivers Catchment Board*, [1952] 1 All E.R. 765. Referred to: *Gautret v. Egerton, Jones v. Egerton* (1867), L.R. 2 C.P. 371; *Paddock v. North Eastern Rail. Co.* (1868), 18 L.T. 60; *John v. Bacon* (1870), L.R. 5 C.P. 437; *Woodley v. Metropolitan District Rail Co.* (1877), 2 Ex.D. 384; *Sandys v. Florence* (1878), 47 L.J.Q.B. 598; *Burchell v. Hickisson* (1880), 50 L.J.Q.B. 101; *Batchelor v. Fortescue* (1883), 11 Q.B.D. 474; *Heaven v. Pender*, [1881-5] All E.R. Rep. 35; *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; *Caledonian Rail Co. v. Mulholland*, [1898] A.C. 216; *Earl v. Lubbock* (1904), 74 L.J.K.B. 121; *Blacker v. Lake and Elliott* (1912), 106 L.T. 533; *Clinton v. J. Lyons & Co., Ltd.*, [1911-13] All E.R. Rep. 577; *Bates v. Batey*, [1913] 3 K.B. 35; *Latham v. R. Johnson & Nephew, Ltd.*, [1911-13] All E.R. Rep. 117; *Brackley v. Midland Rail. Co.*, [1916-17] All E.R. Rep. 220; *Cox v. Coulson*, [1916] 2 K.B. 177; *Wilson v. Barry Rail Co.* (1916), 116 L.T. 71; *Walker v. Crab* (1916), 33 T.L.R. 119; *Hayward v. Drury Lane Theatre and Moss' Empire*, [1916-17] All E.R. Rep. 405; *Dunster v. Hollis*, [1918-19] All E.R. Rep. 949; *Scrutton v. A.-G. for Trinidad* (1920), 90 L.J.P.C. 80; *Cockburn v. Smith* (1923), 40 T.L.R. 113; *Sheehan v. Dreamland, Margate* (1923), 40 T.L.R. 155; *Letang v. Ottawa Electric Rail. Co.*, [1926] All E.R. Rep. 546; *Coleshill v. Manchester*

- A** *Corpn.*, [1928] 1 K.B. 776; *Hall v. Brooklands Auto-Racing Club*, [1932] All E.R. Rep. 208; *Knott v. London County Council*, [1933] All E.R. Rep. 172; *Marshall v. Lindsey County Council*, [1935] 1 K.B. 516; *Weigall v. Westminster Hospital*, [1936] 1 All E.R. 232; *Ellis v. Fulham Corpn.*, [1937] 2 All E.R. 454; *Woodman v. Richardson and Concrete, Ltd.*, [1937] 3 All E.R. 866; *Fraser and Wallis v. Elsie and Doris Waters*, [1939] 4 All E.R. 609; *Wringe v. Cohen*, [1939] 4 All E.R. 241; *Griffiths v. Smith*, [1941] 1 All E.R. 66; *Wilkinson v. Rea, Ltd.*, [1941] 2 All E.R. 50; *Haseldene v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; *Brackenhorough v. Spalding Urban District Council*, [1942] A.C. 310; *Glasgow Corpn. v. Muir*, [1943] 2 All E.R. 44; *Duncan v. Cammell Laird & Co., Craven v. Cammell Laird & Co., Duncan v. Wailes Dove Bitumastic, Ltd., Craven v. Wailes Dove Bitumastic, Ltd.*, [1945] 1 All E.R. 106; *Colman v. Isaac Croft & Son, Ltd.*, [1946] 2 All E.R. 401; *Rochman v. Hall*, [1947] 1 All E.R. 895; *Hartwell v. Grayson, Rollo & Clover Docks, Ltd.*, [1947] L.J.R. 1038; *Stowell v. Railway Executive*, [1949] 2 All E.R. 193; *Pearson v. Lambeth Borough Council*, [1950] 1 All E.R. 682; *Protheroe v. Railway Executive*, [1950] 2 All E.R. 1093; *Pratt v. Richards*, [1951] 1 All E.R. 90; *Tinsley v. Dudley*, [1951] 1 All E.R. 252; *Murray v. Harringay Arena, Ltd., Ecker v. Old Quebec Club Co.* (1952), 96 Sol. Jo. 73; *Street v. British Electricity Authority*, [1952] 1 All E.R. 679; *Wingrove v. Prestige & Co.*, [1953] 1 All E.R. 694; *Thomson v. Cremin*, [1953] 2 All E.R. 1185; *Hawkins v. Coulsdon and Purley Urban District Council*, [1954] 1 All E.R. 97; *Green v. Fibreglass, Ltd.*, [1958] 2 All E.R. 521; *Davie v. New Merton Board Mills, Ltd.*, [1959] 1 All E.R. 346; *Riverstone Meat Co., Pty., Ltd. v. Lancashire Shipping Co., Ltd.*, [1960] 1 All E.R. 193.

As to the duty of an occupier to visitors, see 28 HALSBURY'S LAWS (3rd Edn.) 40-56; and for cases see 36 DIGEST (Repl.) 45 et seq.

Cases referred to :

- F** (1) *Hounsell v. Smyth* (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 6 Jur.N.S. 897; 8 W.R. 277; 141 E.R. 1003; 36 Digest (Repl.) 65, 356.
- (2) *Southcote v. Stanley* (1856), 1 H. & N. 247; 25 L.J.Ex. 339; 27 L.T.O.S. 173; 156 E.R. 1195; 34 Digest (Repl.) 275, 1948.
- (3) *MacCarthy v. Young* (1861), 6 H. & N. 329; 30 L.J.Ex. 227; 3 L.T. 785; 9 W.R. 439; 158 E.R. 136; 34 Digest (Repl.) 239, 1755.
- G** (4) *Farrant v. Barnes* (1862), 11 C.B.N.S. 553; 31 L.J.C.P. 137; 8 Jur.N.S. 868; 142 E.R. 912; 8 Digest (Repl.) 148, 937.
- (5) *Seymour v. Maddox* (1851), 16 Q.B. 326; 20 L.J.Q.B. 327; 16 L.T.O.S. 387; 15 Jur. 723; 117 E.R. 904; 34 Digest (Repl.) 263, 1867.
- H** (6) *Clarke v. Holmes* (1862), 7 H. & N. 937; 8 Jur.N.S. 992; 158 E.R. 751; sub nom. *Holmes v. Clarke*, 31 L.J.Ex. 356; 9 L.T. 178; 10 W.R. 405, Ex. Ch.; 34 Digest (Repl.) 241, 1770.
- (7) *Bolch v. Smith* (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 8 Jur.N.S. 197; 10 W.R. 387; 158 E.R. 666; sub nom. *Bolett v. Smith*, 6 L.T. 158; 36 Digest (Repl.) 66, 358.
- (8) *Lancaster Canal Co. v. Parnaby, Parnaby v. Lancaster Canal Co.* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex.Ch.; 36 Digest (Repl.) 57, 311.
- I** (9) *Chapman v. Rothwell* (1858), E.B. & E. 168; 27 L.J.Q.B. 315; 4 Jur.N.S. 1180; 120 E.R. 471; 36 Digest (Repl.) 57, 313.
- (10) *Wilkinson v. Fairrie* (1862), 1 H. & C. 633; 32 L.J.Ex. 73; 7 L.T. 599; 9 Jur.N.S. 280; 158 E.R. 1038; 36 Digest (Repl.) 12, 39.

Also referred to in argument :

Mellish v. Richardson (1832), 1 Cl. & Fin. 224; 6 Bli.N.S. 80, n.; 6 E.R. 900, H.L.; 36 Digest (Repl.) 371, 113.

Toomey v. London, Brighton & South Coast Rail. Co. (1857), 3 C.B.N.S. 146; 6 W.R. 44; 140 E.R. 694; sub nom. *Tooney v. London, Brighton & South Coast Rail. Co.*, 27 L.J.C.P. 39; 30 L.T.O.S. 135; 36 Digest (Repl.) 133, 682.

Sullivan v. Waters (1864), 14 I.C.L.R. 460; 36 Digest (Repl.) 69, *366.

Cairns v. Robins (1841), 8 M. & W. 258; 10 L.J.Ex. 452; 151 E.R. 1034; 3 Digest (Repl.) 62, 44.

Barnes v. Ward (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, 1100.

Hadley v. Taylor (1865), L.R. 1 C.P. 53; 13 L.T. 368; 11 Jur.N.S. 979; 7 Digest (Repl.) 290, 152.

Mersey Docks Trustees v. Gibbs, *Mersey Docks Trustees v. Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 36 Digest (Repl.) 25, 111.

Appeal from a decision of the Court of Common Pleas, discharging a rule obtained by the defendant to enter a nonsuit in an action by the plaintiff for damages for personal injuries on the ground that the evidence did not disclose any cause of action, or to arrest judgment on the ground that the declaration showed no breach of contract or breach of duty on the part of the defendant.

The action was brought by the plaintiff, a gasfitter, to recover damages for injuries sustained in consequence of his falling down an unfenced shaft in the defendant's sugar refinery, where, by the permission of the defendant, he was inspecting some gasfittings, which he had put up a few days before, in order to see that they were working properly. The plaintiff was in the employment of one Duckham, a gasfitter, who was the patentee of a gas regulator. Prior to the accident to the plaintiff, the defendant, a sugar refiner, had employed Duckham to fix regulators in his refinery, which regulators were to be considered as purchased if, after test, a certain saving was effected in the consumption of gas. The work having been finished on a Saturday, Duckham sent the plaintiff and one Hargreaves to the defendant's premises to test the regulators and see that they worked properly, and, as neither the defendant, nor Wood his manager, were able to go with them round the refinery, a German, who could not speak English, was sent with them to act as guide. The German went first with a lamp, Hargreaves and the plaintiff following him to the upper floors. On getting to the floor, which was dark, they examined some of the gas regulators, and lit some burners, but it was not clearly proved how many burners were actually lighted, or were alight at the time of the accident. They then crossed the floor, with the intention of going up to the next floor, the German going first with the lamp, but the plaintiff, finding that he had left some of his tools under one of the gas burners, went back a few yards to fetch them. Having got them, he went back in a straight line for the light, but before he reached it he fell down a shaft, a depth of about 30 ft. The hole through which he fell was about 4 ft. square, two sides of it being protected by walls running up to the ceiling, the other sides being entirely unfenced, though there were hinges upon which doors had hung, but which had been removed for purposes of ventilation. It was proved that when the shaft was not actually in use, it might have been fenced without interfering with the business, but it was also proved that the shaft was necessary for the business. The defendant's manager had refused to let the plaintiff come on to the premises on the previous Saturday, as he was tipsy; and at the trial he swore that, although he knew that Duckham would send some men on the Tuesday to test the regulators, yet if he had known that plaintiff was to be one of the men, he should not have allowed him to come on the premises.

The plaintiff alleged

A "that the defendant was possessed of a high building, containing several floors, and used by the defendant as a sugar refinery, in the interior of which was a shaft or shoot passing from the basement upwards through the several floors thereof, which shaft or shoot was highly dangerous to persons entering the building who might be unacquainted with the same, as the defendant then well knew; and the plaintiff, being unacquainted with the premises, was
B employed by the defendant to enter the building and execute certain work in his trade of a gasfitter after darkness had set in in the evening, for the defendant, upon one of the upper floors of the said building. Yet the defendant wrongfully, negligently [&c.] allowed the shaft or shoot to remain and be open, unfenced, unguarded, and unlighted, while the plaintiff was executing the said work, whereby the plaintiff whilst so employed as afore-
C said, fell down the shaft or shoot, and was precipitated through the basement of the building, and was greatly hurt. . . ."

The defendant pleaded not guilty, that there was no such shaft as alleged, that it was not dangerous as alleged, that he had no knowledge of the danger, and that the plaintiff was not employed by him as alleged. The action was tried by ERLE, C.J., the jury returning a verdict for the plaintiff for £400.

A rule having been obtained on a former day pursuant to leave reserved to enter a nonsuit on the ground that the evidence did not disclose any cause of action, or to arrest the judgment, on the ground that the declaration showed no cause of action, or for a new trial on the ground that the verdict was against the weight of evidence,

E *Serjt. Ballantine and Raymond* showed cause.

Huddleston, Q.C., and J. O. Griffiths in support of the rule.

Cur. adv. vult.

February 26, 1866. **WILLES, J.**, read the following judgment of the court.—

F This was an action to recover damages for injuries sustained by the plaintiff's falling down a shaft at the defendant's place of business through the actionable negligence, as it was alleged, of the defendant and his servants. At the trial before ERLE, C.J., at the sittings here after last Michaelmas Term, the plaintiff got a verdict for £400 damages, subject to leave reserved to enter a nonsuit. A rule was obtained by the defendant in last term to enter a nonsuit, or
G to arrest the judgment, or for a new trial on the ground that the verdict was against evidence. The rule was argued last term before ERLE, C.J., KEATING, MONTAGUE SMITH, J.J., and myself, when we took time to consider our judgment.

It appears that the defendant was a sugar refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper
H in the way of defendant's business. While it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use it was sometimes necessary for the purposes of ventilation that it should be open. It was not necessary that it should, when not in use, be unfenced, and it might then, without injury to the business, have been fenced by a rail. Whether it was usual to fence similar shafts when not in use did not distinctly appear,
I nor is it very material, because such protection was unquestionably proper, in the sense of reasonable with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use, and it was open and unfenced. The plaintiff was a journeyman gasfitter, in the employ of a patentee, who had supplied the defendant with his patent gas regulator, to be paid for upon the terms that it effected a certain saving, and for the purpose of ascertaining whether such saving had been effected the plaintiff's employer required to test the action of the regulator. He, accord-

ingly, sent the plaintiff to the defendant's place of business for that purpose, and while the plaintiff was engaged upon the floor where the shaft was, he, under circumstances as to which the evidence was conflicting, but accidentally, and, as the jury found without any default or negligence on his part, fell down the shaft and was seriously hurt. It was argued that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident, but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman; and the employment and the implied authority resulting therefrom to test the apparatus were not of a character involving personal preference (*dilectus personæ*) so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work. It was also argued that the plaintiff was at best in the condition of a bare licensee or guest, who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude so long as there is no design to injure him: see *Hounsell v. Smyth* (1).

We think this argument fails because the capacity in which the plaintiff was there was that of a person on lawful business in the course of fulfilling a contract, in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment and that of a person testing the work which he had stipulated with defendant to be paid for, if it stood the test; whereby, impliedly, the workman was to be allowed an onstand to apply that test and reasonable opportunity for so doing. Any duty, to enable the workman to do the work in safety, seems equally to exist during the accessory employment of testing; and any duty to provide for the safety of the master workman seems equally owing to the servant workman, whom he may lawfully send in his place.

It is observable that, in *Southcote v. Stanley* (2), upon which much reliance was properly placed for the defendant, ALDERSON, B., drew the distinction between a bare licensee and a person coming on business, and BRAMWELL, B., between active negligence in respect of unusual danger, known to the host and not to the guest, and a bare defect of construction or repair which the host was only negligent in not finding out or anticipating the consequence of. There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule, as to voluntary loans and gifts, that there is no remedy against the lender or giver for damage sustained from the loan or gift, except in cases of unusual danger known to and concealed by the lender or giver: *MacCarthy v. Young* (3). The case of the carboy of vitriol (*Farrant v. Burnes* (4)) was one in which this court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage. The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposed them to danger, as in *Seymour v. Maddox* (5), also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants; not, however, including those which can be traced to mere breach of duty on the part of the master.

A In the case of a statutory duty only to fence, even the knowledge and reluctant submission of the servant who has sustained an injury are held to be only elements to determine whether there has been contributory negligence. How far this is the law between master and servant, where there is danger known to the servant and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant but the servant of the patentee. The question was adverted to but not decided in *Clarke v. Holmes* (6); and see *Bolch v. Smith* (7).

B The authorities respecting guests and other bare licensees and those respecting servants and others who consent to incur the risk, being, therefore, inapplicable, we are to consider what is the law regulating the duty of the occupier of a building with reference to persons resorting thereto in the course of business upon his invitation, express or implied. The common case is that of a customer in a shop, but it is obvious that this is only one of a class, for whether the customer is actually chattering at the time or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted: *Lancaster Canal Co. v. Parnaby* (8); per nom. *Chapman v. Rothwell* (9), where *Southcote v. Stanley* (2) was cited, and ERLE, J., said:

E "The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley* (2)) who must take care of himself, and a customer who, as one of the public, is invited for the purpose of business carried on by the defendant."

This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns him. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during his accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit which was. If, instead of going himself, he were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. With respect to such a visitor, at least we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know, and this where there is evidence of neglect. The question whether such reasonable care has been taken by notice, lighting, guiding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

I In *Wilkinson v. Fairrie* (10), relied upon for the defendant, this distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual covert danger, such as that of falling into a pit. It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction; and this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only

duty to make the place as little dangerous as such a place could reasonably be, A
having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case: First, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved that where the shaft B
was not in use a fence might be resorted to without inconvenience, and no usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant upon business in which he was concerned, that there was, by reason of this shaft, unusual danger known to the defendant, and that the plaintiff sustained damage by reason of that danger and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it. We cannot say that the proof of contributory negligence was so clear that we ought on that ground to set aside the verdict of the jury. For these reasons we think there was evidence of a cause of action in respect of which the jury were properly directed, and as every reservation of leave to enter a nonsuit carries with it an implied condition that the court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff in the event of the defendant desiring to appeal or to bring a writ of error to amend the declaration by stating the facts as proved— in effect that the defendant was the occupier of, and carried on business at, the place, that there was a shaft dangerous to persons in the place which the defendant knew and the plaintiff did not know, that he, by invitation and permission of the defendant, was there, near the shaft, upon business of the defendant in the way of his own craft as a gasfitter for hire, &c., stating the circumstances of negligence, and that, by reason thereof, the plaintiff was injured. As to the motion to arrest the judgment, for the reasons already given, and upon condition that an amendment is to be made if, and when, required by the defendant, it will follow the fate of the motion to enter the nonsuit. E F

A summons was taken out; the defendant appeared and opposed it; but WILLES, J., made the order, and the following was the amended declaration :

“That the defendant was the occupier of and possessed of a high building, containing several floors, which the defendant used as a sugar refinery, and in which he carried on his business of a sugar refiner, in the interior of which building there was a shaft or shoot passing from the basement upward through the said several floors thereof, and which said shaft or shoot was very dangerous to persons entering the said building, and passing along the said floors thereof, in which the said shaft or shoot was as the defendant then well knew, and the plaintiff when he entered and passed along the same did not know. And the plaintiff being then unacquainted with the said premises was employed for the defendant to enter the said building, and execute certain work in his trade of a gasfitter after darkness had set in in the evening for the defendant upon one of the upper floors of the said building through which the said shaft or shoot passed and in which it was, and the plaintiff then was, by the invitation and permission of the defendant, lawfully in and upon the said building and the said floors thereof in the way of his said business of a gasfitter, and doing work there as such gasfitter for the defendant; yet the defendant wrongfully, negligently, and improperly allowed the said shaft or shoot to remain and be in such dangerous condition as aforesaid, and without taking, or causing to be taken, any sufficient precaution to protect the plaintiff therefrom, and without giving the plaintiff any notice thereof, or using reasonable care or means to prevent injury to the plaintiff from the said danger, whereby, and in consequence G H I

A whereof, and not otherwise, the plaintiff whilst so employed as aforesaid by and for the defendant on the said premises, without any default or negligence whatever on his part, fell down the said shaft or shoot, &c."

Special damage was stated as in the original declaration.

The defendant appealed to the Court of Exchequer Chamber.

B February 26, 1867. *J. O. Griffiths* (Huddleston, Q.C., with him) for the defendant.

Raymond (Jenkins with him) for the plaintiff, was not called on to argue.

C **KELLY, C.B.**—We are of opinion that the judgment of the Court of Common Pleas ought not to be disturbed. The grounds on which that judgment was pronounced are very concisely stated by WILLES, J. [pp. 19 *et seq.* ante.] There, after referring to the facts of the case and observing that, in the case of a customer and a shopkeeper, if instead of going himself the customer were to send his servant, the servant would be entitled to the same consideration as his master, he proceeds as follows:

D "The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied."

E The question here raised is whether the plaintiff at the time of the accident, and under the special circumstances of the case was more than a mere volunteer. The defendant had contracted with the employer of the plaintiff that he should do certain work on the premises. That work was completed on the Saturday, and on that day an appointment was made that the plaintiff or his employer should go on the following Tuesday to see how the gas worked, and he went accordingly. F I see no distinction between a person going during the performance of a contract, and going after it is completed, but for a purpose incidental to the contract. It was under those circumstances that the plaintiff went on the premises, and I can see no distinction between the circumstances under which he went and those existing if he had gone while the work was in course of completion.

G What duty is imposed by law on the defendant? It appears that the place was a sugar refinery, and the defendant's counsel was correct in alleging that places of that sort have shoots and holes of this description which are without any fence or safeguard. That may well be so, but the question is: If a person having premises of that sort enters into a contract for the performance of work, and if in the course of the performance of that work workmen have to go H by these places and know nothing of the premises, the employer or occupier is not bound to put up a fence or some safeguard, or to give reasonable and intelligible notice to persons going on the spot—in fact, to give notice that there is an unfenced hole, and so to put them on their guard. We find that WILLES, J., took that view of the case, that there was such an obligation. He says:

I "With respect to such a visitor, at least we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know, and this where there is evidence of neglect. The question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

It was so determined in this case.

I am far from saying that there was not evidence that the plaintiff contributed to the accident by negligence of his own, but that was entirely for the jury, and they having found, on the charge of the judge, against which we see no objection, that the defendant had not used reasonable care, we think that there was a case for the jury, and that the verdict should not be disturbed, and that the judge would have done wrong if he had directed a nonsuit. Therefore, we are all of opinion that the judgment of the court below should be affirmed.

Appeal dismissed.

TAYLOR AND ANOTHER v. CALDWELL AND ANOTHER

[COURT OF QUEEN'S BENCH (Blackburn, J.), May 6, 1863]

[Reported 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356;
27 J.P. 710; 11 W.R. 726; 122 E.R. 309]

Contract—Frustration—Implication of term—Continued existence of thing—Destruction—Impossibility of performance—Contract for use of building—Destruction by fire.

Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accident, the performance of his contract has become impossible. But that rule is only applicable when the contract is positive and absolute and not subject to any condition express or implied. Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, there, in the absence of any expressed or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

Bailee—Duty to return goods bailed—Non-performance—Excuse—Destruction of chattel bailed.

Per Curiam: In all contracts of loan of chattels or bailment, if the performance of the promise of the borrower or bailee to return the thing lent or borrowed becomes impossible because it has perished, this impossibility, if not arising from the fault of the borrower or bailee, or from some risk which he has taken on himself, excuses the borrower or bailee from the performance of his promise to re-deliver the chattel.

Notes. Under the Law Reform (Frustrated Contracts) Act, 1943 (4 HALSBURY'S STATUTES (2nd Edn.) 662), where a contract, with some exceptions set out in s. 2 (5) of the Act, is discharged by frustration money paid under it can be recovered and compensation obtained in the case of partial performance before frustration.

Considered: *Appleby v. Myers* (1867), L.R. 2 C.P. 651. Applied: *Boast v. Firth* (1868), L.R. 4 C.P. 1; *Robinson v. Davison* (1871), L.R. 6 Exch. 269;

- A** *Howell v. Coupland* (1876), 1 Q.B.D. 258. Considered: *Re Arthur, Arthur v. Wynne* (1880), 14 Ch.D. 603; *Marshall v. Schofield* (1882), 52 L.J.Q.B. 58; *Turner v. Goldsmith*, [1891-4] All E.R. Rep. 384; *Blum v. Ansley* (1900), 64 J.P. 184. Applied: *Nicholl and Knight v. Ashton*, [1900-3] All E.R. Rep. 928; Explained: *Blakeley v. Muller, Hobson v. Pattenden*, [1903] 2 K.B. 760, n.; *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K.B. 756. Applied:
- B** *Elliott v. Crutchley*, [1903] 2 K.B. 476; *Krell v. Henry*, [1900-3] All E.R. Rep. 20. Distinguished: *Herne Bay Steam Boat Co. v. Hutton*, [1900-3] All E.R. Rep. 20. Considered: *Chandler v. Webster*, [1904] 1 K.B. 493; *Associated Portland Cement Manufacturers* (1900), Ltd. v. *Cory* (1915), 31 T.L.R. 442; *Smith, Coney and Barrett v. Becker*, [1914-15] All E.R. Rep. 398; *Horlock v. Beal*, [1916-17] All E.R. Rep. 81; *Leiston Gas Co., Ltd. v. Leiston-cum-Sizewell Urban District Council*, [1916-17] All E.R. Rep. 329. Applied: *Re Newman, Raphael's Claim*, [1916] 2 Ch. 309; *Metropolitan Water Board v. Dick Kerr Co., Ltd.*, [1917] 2 K.B. 1. Considered: *Scottish Navigation Co. v. Souter, Admiral Shipping Co. v. Weidner, Hopkins*, [1917] 1 K.B. 222; *Blackburn Bobbin Co. v. Allen*, [1918] 2 K.B. 467; *First Russian Insurance v. London and Lancashire Insurance*, [1928] Ch. 922; *The Penelope*, [1928] P. 180; *New System Private Telephones* (London), Ltd. v. *Hughes & Co.*, [1939] 2 All E.R. 844; *Swift v. Macbean and Wife*, [1942] 1 All E.R. 126; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122. Referred to: *Castle v. Playford* (1872), 26 L.T. 315; *Jackson v. Union Marine Insurance* (1874), L.R. 10 C.P. 125; *Chapman v. Withers* (1888), 20 Q.B.D. 824; *Re Jamieson and Newcastle Steamship Freight Insurance Association*, [1895] 1 Q.B. 510; *Lumsden v. Barton* (1902), 19 T.L.R. 53; *Scott v. Coulson*, [1903] 2 Ch. 249; *Re Hull and Meux*, [1905] 1 K.B. 588; *Grimsdick v. Sweetman*, [1909] 2 K.B. 740; *The Salvador* (No. 2) (1909), 25 T.L.R. 727; *Stephens v. Junior Army and Navy Stores*, [1914] 2 Ch. 309; *Re Worthington, Ex parte Pathé Frères*, [1914] 2 K.B. 299; *Re Shipton Anderson and Harrison*, [1915] 3 K.B. 676; *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916-17] All E.R. Rep. 104; *Lloyd Royal Belge Société Anonyme v. Stathatos* (1917), 33 T.L.R. 390; *Re An Arbitration Between Comptoir Commercial Anversois and Power, Son & Co., Ltd.*, [1918-19] All E.R. Rep. 661; *Lebeaupin v. Richard Crispin & Co.*, [1920] All E.R. Rep. 353; *Mertens v. Home Freeholds Co.*, [1921] 2 K.B. 526; *Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Medulla, Paris*, [1923] All E.R. Rep. 1; *Kursell v. Timber Operators and Contractors* (1926), 95 L.J.K.B. 569; *Re Wait*, [1926] Ch. 962; *May v. May*, [1929] All E.R. Rep. 484; *Graves v. Cohen* (1929), 46 T.L.R. 121; *Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1930] All E.R. Rep. 465; *A.-G. of Trinidad and Tobago v. Gordon Grant & Co.*, [1935] A.C. 532; *Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 242; *D/S A/S Gulnes v. Imperial Chemical Industries, Ltd.*, [1938] 1 All E.R. 24; *Tatem, Ltd. v. Gamboa*, [1938] 3 All E.R. 135; *Cooper v. Luxor (Eastbourne), Ltd.*, [1939] 4 All E.R. 411; *Broome v. Pardess Co-operative Society of Orange Growers (Established 1900), Ltd.*, [1940] 1 All E.R. 603; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., Ltd., The Kingswood*, [1941] 2 All E.R. 165; *Ungar v. Preston Corp.*, [1942] 1 All E.R. 200; *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252; *Denman v. Brisc*, [1948] 2 All E.R. 141; *Podar Trading Co., Bombay v. Francis Tagher, Barcelona*, [1949] 2 All E.R. 62; *Blane Steamships, Ltd. v. Ministry of Transport*, [1951] 2 K.B. 965; *Tsakiraglou & Co., Ltd. v. Noble and Thorl*, [1960] 2 All E.R. 160; *Hong Kong Fir Shipping Co., Ltd. v. Kawasaki Kisen Kaisha*, [1962] 1 All E.R. 474.
- C**
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As to frustration of contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 191-194; and for cases see 12 DIGEST (Repl.) 417 et seq.

Cases referred to:

- (1) *Walton v. Waterhouse* (1672), 2 Wms. Saund. 421.

- (2) *Hall v. Wright* (1859), E.B. & E. 746, 765; 29 L.J.Q.B. 43; 1 L.T. 230; 6 Jur.N.S. 193; 8 W.R. 160; 120 E.R. 695, Ex. Ch.; 12 Digest (Repl.) 426, 3281.
- (3) *Dean and Chapter of Windsor v. Hyde* (1601), 5 Co. Rep. 24a; 77 E.R. 87; sub nom. *Hyde v. Dean and Canons of Windsor*, Cro. Eliz. 552; sub nom. *Hide v. Dean and Canons of Windsor*, Moore, K.B. 399; 31 Digest (Repl.) 389, 5145.
- (4) *Marshall v. Broadhurst* (1831), 1 Cr. & J. 403; 1 Tyr. 348; 9 L.J.O.S.Ex. 105; 148 E.R. 1480; 24 Digest (Repl.) 610, 6080.
- (5) *Wentworth v. Cock* (1839), 10 Ad. & El. 42; 2 Per. & Dav. 251; 8 L.J.Q.B. 230; 3 Jur. 340; 113 E.R. 17; 24 Digest (Repl.) 673, 6612.
- (6) *Rugg v. Minett* (1809), 11 East, 210; 103 E.R. 985; 39 Digest 405, 404.
- (7) *Sparrow v. Sougate* (1621), W. Jo. 29; Win. 61; 82 E.R. 16; 26 Digest (Repl.) 215, 1647.
- (8) *Williams v. Lloyd* (1628), W. Jo. 179; 82 E.R. 95; 3 Digest (Repl.) 66, 76.
- (9) *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; Holt, K.B. 131; 3 Salk. 11; 92 E.R. 107; 3 Digest (Repl.) 64, 52.

Also referred to in argument :

Christie v. Lewis (1821), 2 Brod. & Bing. 410; 5 Moore, C.P. 211; 129 E.R. 1025; 41 Digest 586, 4098.

Paradine v. Jane (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236.

Rule Nisi for an order entering a verdict for the defendants in an action for breach of an agreement made in 1861, whereby the defendants, the lessees of the Surrey Gardens and music hall, agreed to let the plaintiffs have the use of them on four specified days, for the purpose of giving four concerts and day and night fetes. The plaintiffs agreed to take the gardens and hall on those days, and pay £100 for each day's use.

The plaintiffs sought to recover the preliminary expenses of printing and advertising, and other expenses necessarily incidental to such an engagement. The defence to the action was that before the day for the first concert arrived a fire occurred without the fault of the defendants, and the hall was destroyed, so that it was impossible for the parties to carry out the agreement. At the trial before BLACKBURN, J., these facts were proved, and the expenses incurred by the plaintiffs were agreed at £58. The verdict was entered for the plaintiffs for that amount, with leave reserved to the defendants to move to enter the verdict for them. A rule nisi was, accordingly, obtained.

Tindal Atkinson showed cause.

Pearce supported the rule.

Cur. adv. vult.

May '6, 1863. **BLACKBURN, J.**, read the following judgment.—In this case the plaintiffs and the defendants, on May 27, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of the Surrey Gardens and music hall on four days then to come, namely, June 17, July 15, Aug. 5 and Aug. 17, for the purpose of giving a series of four concerts and day and night fetes at the gardens and hall on those days, and the plaintiffs agreed to take the gardens and hall on those days, and pay £100 for each day. The parties indirectly call this a letting, and the money to be paid a rent, but the whole agreement is such as to show that the defendants were to retain the possession of the hall and gardens, so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing, however, in our opinion depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for the concerts and the entertainments, and as to the manner in which they should be carried on.

A The effect of this is to show that the existence of the music hall in the Surrey Gardens in a fit state for a concert was essential for the fulfilment of the contract; such entertainments as the parties contemplated in their agreement could not be given without it. After the making of the agreement, and before the first day on which a concert was to be given, the hall was destroyed by fire. This destruction, we must take it on the evidence, was without fault on either party, and was so complete that in consequence the concerts could not be given as intended; and the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties, when framing their agreement, evidently had not present to their minds the possibility of such a disaster, and they made no express stipulation with reference to it, so that the answer to the question must depend on the general rules of law applicable to such a contract.

C There seems no doubt that, where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accident, the performance of his contract has become unexpectedly burdensome, or even impossible. The law is so laid down in 1 *ROLLE'S ABRIDGEMENT*, Condition G.; and in the notes to *Walton v. Waterhouse* (1), and is recognised as the general rule by all the judges in the much-discussed case of *Hall v. Wright* (2). But this rule is only applicable when the contract is positive and absolute and not subject to any condition either expressed or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, there, in the absence of any expressed or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

F There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who enter into the contract, for, in the course of affairs, men, in making such contracts, in general, would, if it were brought to their minds, say that there should be such a condition. Accordingly, in the civil law, such an exception is implied in every obligation of the class, which they call *obligatio de certo corpore*. The rule is laid down in the *Digest XLV, title 1, De verborum obligationibus*, Article 33: "*Si Stichus certo die dari promissus, ante diem moriatur, non tenetur promissor.*" The principle is more fully developed in Article 23.

G The examples are all contracts respecting a slave, which was the common illustration of a certain subject used by the Roman lawyers, just as we are apt to take a horse; and, no doubt, the implied condition, is more obvious when it relates to a living animal, whether man or brute, than when it relates to some inanimate thing, such as in the present case—a theatre, the existence of which is not so obviously precarious as that of the life of the animal; but the principle is adopted in the civil law as applicable to every obligation of which the subject is a certain thing. The general subject is treated of by *POTHIER*, who, in his "*Traite des Obligations*," partie 3, chap. 6, art. 668, states the result to be, that the debtor *corporis certi* is freed from his obligation, when the thing has perished neither by his act nor his neglect, and before he has committed any default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred. Though the civil law is not of itself an authority in an English court, it affords great assistance in investigating the principles on which the law is grounded, and it seems to us that the

common law authorities establish that, in such a contract, the same condition of the continued existence of the thing is implied by English law. A

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person, and such promises—for example, promises to marry, or promises to serve for a certain time—are never in practice qualified by an express exception of the death of the party, and, therefore, in such cases, the contract is in terms broken if the promisor dies before fulfilment; yet it was very early determined that, if the performance is personal, the executors are not liable: *Hyde v. Dean and Canons of Windsor* (3); 2 WILLIAMS ON EXECUTORS 1353, where a very apt illustration is given. The learned author says: B

“Thus, if an author undertakes to compose a work and dies before completing it, his executors are discharged from the contract, for the undertaking is merely personal in its nature, and by the intervention of the contractor’s death has become impossible to be performed.” C

For this, he cites a dictum of LORD LYNTHURST, in *Marshall v. Broadhurst* (4), 1 Tyr. at p. 349, and a case mentioned by PATTESON, J., in *Wentworth v. Cock* (5). In *Hall v. Wright* (2), CROMPTON, J., in his judgment puts another case (E.B. & E. at p. 749): D

“Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture, who is struck blind, it may be that the performance might be excused.” E

It seems that, in these cases, the only ground on which the parties or their executors can be excused from the consequences of the breach of the contract is that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and, perhaps, in the case of the painter of his sight. In the instance just given, the person—the continued existence of whose life is necessary to the fulfilment of the contract—is himself the contractor, but that does not seem in itself to be necessary to the application of the principle, as is illustrated by the following example. In the ordinary form of an apprentice deed the apprentice binds himself in unqualified terms to serve until the full end and term of seven years, to be fully complete and ended, during which term it is covenanted that the apprentice his master faithfully shall serve, and the father of the apprentice in equally unqualified terms binds himself for the performance, by the apprentice, of all and every covenant on his part. See the form 2 CHITTY ON PLEADING (7th Edn.) 370. It is undeniable that, if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father, yet the only reason why it would not, is, that he is excused because of the apprentice’s death. F G H

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day. There, if the chattels, without the fault of the vendor, perished in the interval, the vendor is excused from performing his contract to deliver, which has thus become impossible. That this is the rule of the English law is established by *Rugg v. Minett* (6), where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed, but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not I

A delivered, and though, in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment. This also is the rule in the civil law, and it is worth noticing that POTHIER, in his celebrated *TRAITE DU CONTRAT DE VENTE*, treats this as merely an example of the more general rule, that every obligation *de certo corpore* is extinguished when the thing ceases to exist: see BLACKBURN ON CONTRACTS FOR SALE, p. 137.

C The same principle seems to be involved in the decision of *Sparrow v. Sowgate* (7), where, to an action for debt on an obligation by bail conditioned for the payment of the debt or the rendering of the debtor, it was held a good plea that before any default in rendering him the principal debtor died. It is true that was the case of a bond, with a condition put and a distinction is sometimes made in this respect between a condition and a contract; but this observation does not apply to *Williams v. Lloyd* (8). In that case, the count, which was in *assumpsit*, alleged that the plaintiff had delivered a horse to the defendant who promised to re-deliver it on request. Breach, that they requested to re-deliver the horse, he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death; and, on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. The court said:

E "Let it be admitted that he promised to deliver it on request, if the horse die before, that has become impossible by the act of God, so the party shall be discharged as much as if an obligation were made conditioned to deliver a horse on request, and he died before it."

F And JONES, adds the report, cited 22 Assize, 44, in which it was held, that a ferryman, who had promised to carry a horse safe across the ferry, was held chargeable for the drowning of the animal, only because he had overloaded the boat, and it was agreed that, notwithstanding the promise, no action would have lain had there been no neglect or default on his part.

G It may, I think, be safely asserted to be now English law that in all contracts of loan of chattels or bailment, if the performance of the promise of the borrower or bailee to return the thing lent or borrowed becomes impossible because it has perished, this impossibility, if not arising from the fault of the bailee, or from some risk which he has taken upon himself, excuses the borrower or bailee from the performance of his promise to re-deliver the chattel. The great case of *Coggs v. Bernard* (9), is now the leading case on the law of bailments, and LORD HOLT, in that case, referred so much to the civil law that it might, perhaps, be thought that this principle was there derived direct from the civilians, and was not generally applicable in English law, except in the case of bailment; but *Williams v. Lloyd* (8), above cited, shows that the same law had been already adopted by the English law as early as the Book of Assizes. The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.

I In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the music hall at the time

when the concerts were to be given, that being essential to their performance. A We think, therefore, that, the music hall having ceased to exist without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the hall and gardens, and other things. The rule must be made absolute to enter the verdict for the defendants.

Rule absolute. B

READHEAD v. MIDLAND RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Kelly, C.B., Keating, Byles and Sir Montague Smith, JJ., Bramwell and Channell, BB.), November 26, 27, 1868, May 10, 1869]

[Reported L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 9 B. & S. 519; 20 L.T. 628; 17 W.R. 737]

Carriage of Passengers—Safety of passengers—Duty of care—High degree of care, skill, and diligence.

There is no warranty to be implied in the contract of a general carrier of passengers insuring that he will convey the passenger safely to his journey's end or that the conveyance in which he travels shall be in all respects perfect for its purpose, i.e., free from all defects likely to cause peril although those defects are such that no skill, care, or foresight could have detected their existence. The obligation undertaken by a carrier of passengers is to take a high degree of care and skill, and it casts on the carrier a duty to exercise all diligence to see that whatever is required for the safe conveyance of his passengers is in fit and proper order. The absence of such care—in other words negligence—could alone constitute a breach of his contract.

Distinction drawn between the liability of a common carrier of goods and that of a carrier of passengers.

Warranty—Implied warranty—Foundation—Presumed intention of parties—Regard to interests of parties.

Per Curiam: Warranties implied by law are for the most part founded on the presumed intention of the parties and ought certainly to be founded on reason and with a just regard to the interests of the party who is supposed to give the warranty as well as of the party to whom it is supposed to be given.

Notes. Considered: *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501; *John v. Brown* (1870), L.R. 5 C.P. 537; *Wright v. Midland Rail. Co.* (1873), L.R. 8 Exch. 137. Distinguished: *Thorn v. London Corpn.* (1874), 43 L.J.Ex. 115. Considered: *Searle v. Laverick* (1874), L.R. 9 Q.B. 122; *Kopitoff v. Wilson* (1876), 1 Q.B.D. 377. Applied: *The Virgo* (1876), 35 L.T. 519. Distinguished: *Randall v. Newson* (1877), 2 Q.B.D. 102. Considered: *Steel v. State Line Steamship Co.* (1877), 3 App. Cas. 72; *Hayman v. Nye* (1881), 6 Q.B.D. 685; *Robertson v. Amazon Tug and Lighterage Co.* (1881), 7 Q.B.D. 598; *Jackson v. Mumford* (1902), 8 Com. Cas. 61; *Clarke v. West Ham Corpn.*, [1909] 2 K.B. 858; *Maclean v. Segar*, [1917] 2 K.B. 325; *Hall v. Brooklands Auto-Racing Club*, [1932] All E.R. Rep. 208; *O'Connor v. British Transport Commission*, [1958] 1 All E.R. 558. Referred to: *Buxton v. North Eastern Rail. Co.* (1868), 9 B. & S. 824; *Stanton v. Richardson*, *Richardson v. Stanton* (1872), L.R. 7 C.P. 421; *Richardson v. Great Eastern Rail. Co.* (1875), L.R. 10 C.P. 486; *Pounder v. North Eastern Rail. Co.*, [1892]

- A** 1 Q.B. 385; *Smitton v. Orient Steam Navigation Co.* (1907), 23 T.L.R. 359; *Wing v. London General Omnibus Co.*, [1908-10] All E.R. Rep. 496; *Newberry v. British Tramways and Carriage Co.*, [1911-13] All E.R. Rep. 747; *Cox v. Coulson*, [1916] 2 K.B. 177; *Liebigs Extract of Meat Co. v. Mersey Docks and Harbour Board and Nelson*, [1918] 2 K.B. 381; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; *Aslan v. Imperial Airways, Ltd.*, [1933] All E.R. 567; *Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1933] All E.R. Rep. 9; *Ludditt v. Ginger Coote Airways, Ltd.*, [1947] 1 All E.R. 328; *Barkway v. South Wales Transport Co.*, [1948] 2 All E.R. 460; *Scruttons, Ltd. v. Midland Silicones, Ltd.*, [1962] 1 All E.R. 1.

As to the degree of care necessary in the carriage of passengers, see 4 HALSBURY'S LAWS (3rd Edn.) 174-185; and for cases see 8 DIGEST (Repl.) 75 et seq.

Cases referred to:

- (1) *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; Holt, K.B. 13, 131; 1 Salk. 26; 3 Salk. 11; 92 E.R. 107; 8 Digest (Repl.) 18, 92.
- (2) *Mors v. Slew* (1672), 2 Keb. 866; 3 Keb. 72, 112, 135; 2 Lev. 69; 1 Mod. Rep. 85; T. Raym. 220; 1 Vent. 190, 238; 84 E.R. 548, 601, 624, 678; 8 Digest (Repl.) 20, 106.
- (3) *Brazier v. Polytechnic Institution* (1859), 1 F. & F. 507; 42 Digest 908, 44.
- (4) *Pike v. Polytechnic Institution* (1859), 1 F. & F. 712; 42 Digest 908, 46.
- (5) *Parnaby v. Lancaster Canal Co., Lancaster Canal Co. v. Parnaby* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex. Ch.; 36 Digest (Repl.) 57, 311.
- (6) *Bigge v. Parkinson* (1862), 7 H. & N. 955; 31 L.J.Ex. 301; 8 Jur.N.S. 1014; 10 W.R. 349; sub nom. *Smith v. Parkinson*, 7 L.T. 92, Ex. Ch.; 39 Digest 465, 908.
- (7) *Sharp v. Grey* (1833), 9 Bing. 457; 2 Moo. & S. 620; 2 L.J.C.P. 45; 131 E.R. 684; 8 Digest (Repl.) 80, 535.
- (8) *Bremmer v. Williams* (1824), 1 C. & P. 414, N.P.; 8 Digest (Repl.) 80, 534.
- (9) *Israel v. Clark* (1803), 4 Esp. 259, N.P.; 8 Digest (Repl.) 79, 530.
- (10) *Crofts v. Waterhouse* (1825), 3 Bing. 319; 11 Moore, C.P. 133; 4 L.J.O.S.C.P. 75; 130 E.R. 536; 8 Digest (Repl.) 76, 501.
- (11) *Benett v. Peninsular Steam Boat Co.* (1848), 6 C.B. 775; 18 L.J.C.P. 85; 13 Jur. 347; 136 E.R. 1453; 41 Digest 671, 5030.
- (12) *Aston v. Heaven* (1797), 2 Esp. 533, N.P.; 8 Digest (Repl.) 76, 499.
- (13) *Christie v. Griggs* (1809), 2 Camp. 79, N.P.; 8 Digest (Repl.) 79, 531.
- (14) *Grote v. Chester and Holyhead Rail. Co.* (1848), 2 Exch. 251; 5 Ry. & Can. Cas. 649; 154 E.R. 485; 8 Digest (Repl.) 96, 636.
- (15) *Ford v. London and South Western Rail. Co.* (1862), 2 F. & F. 730, N.P.; 8 Digest (Repl.) 77, 510.
- (16) *Stokes v. Eastern Counties Rail. Co.* (1860), 2 F. & F. 691, N.P.; 8 Digest (Repl.) 80, 540.
- (17) *Lyon v. Mells* (1804), 5 East, 428; 1 Smith, K.B. 478; 102 E.R. 1134; 8 Digest (Repl.) 46, 274.
- (18) *Burns v. Cork and Bandon Rail. Co.* (1863), 13 I.C.L.R. 543; 8 Digest (Repl.) 81, *346.
- (19) *Ingalls v. Bills*, 9 Metcalf, 1, 15.
- (20) *Alden v. New York Central Railroad Co.*, 12 Smith, 102.

Also referred to in argument:

- Brown v. Edgington* (1841), 2 Man. & G. 279; Drinkwater, 106; 2 Scott, N.R. 496; 10 L.J.C.P. 66; 5 J.P. 276; 133 E.R. 751; 39 Digest (Repl.) 470, 940.
- Jones v. Bright* (1829), 5 Bing. 533; Dan. & Ll. 304; 3 Moo. & P. 155; 7 L.J.O.S.C.P. 213; 180 E.R. 1167; 39 Digest 449, 766.
- Laing v. Fidgeon* (1815), 4 Camp. 169; 6 Taunt. 108; 128 E.R. 974; 39 Digest 449, 765.

Shepherd v. Pybus (1842), 3 Man. & G. 868; 4 Scott, N.R. 434; 11 L.J.C.P. A 101; 133 E.R. 1390; 39 Digest 441, 700.

Jones v. Just (1868), L.R. 3 Q.B. 197; 9 B. & S. 141; 37 L.J.Q.B. 89; 18 L.T. 208; 16 W.R. 643; 39 Digest 434, 632.

Lewis v. Peake (Peat) (1816), 7 Taunt. 153; 2 Marsh. 431; 129 E.R. 61; 2 Digest (Repl.) 353, 360.

Hageman v. Western Railroad Corpn., 3 Kern, 9.

McPadden v. New York Central Railroad Co., 47 Barbour, 247.

Warner v. Erie Rail. Co., 49 Barbour, 558.

Faulkner v. Erie Rail. Co., 49 Barbour, 324.

Manser v. Eastern Counties Rail. Co. (1860), 3 L.T. 585; 8 Digest (Repl.) 80, 539.

Amies v. Stevens (1718), 1 Stra. 127; 93 E.R. 428; 8 Digest (Repl.) 21, 117.

Bluett v. Osborne (1816), 1 Stark. 384; 171 E.R. 504, N.P.; 39 Digest 651, 2450.

Foley v. Tabor (1861), 2 F. & F. 663; 29 Digest (Repl.) 64, 189.

Bowen v. New York Central Rail. Co., 4 Smith, N.Y. Rep. 408.

Appeal by the plaintiff from a decision of the Court of Queen's Bench (MELLOR and LUSH, JJ.), reported L.R. 2 Q.B. 412, in an action brought by him to recover from the defendants damages for injuries suffered by him while travelling as a passenger on their railway.

On May 4, 1865, the plaintiff took a second class ticket as passenger from Nottingham to South Shields and travelled by express train. During the journey the carriage in which he was ran off the line, broke away from the first part of the train, and rolled over, thereby severely injuring the plaintiff. It was proved that the accident was caused by the giving way of one of the wheels of the carriage in which the defendant was, owing to a defect in the welding of the tyre, caused by an air bubble; that the defect was not discoverable by the eye or the ear; that the wheels were examined during the journey, in the usual way, by inspection and sounding them with a hammer; that the tyre of the wheel in question was of the usual thickness; and that such defects might exist without any fault on the part of the manufacturer.

Manisty, Q.C., and *C. Crampton* for the plaintiff.

Kemplay (Aspinall, Q.C.), with him for the defendants.

Cur. adv. vult.

May 10, 1869. **SIR MONTAGUE SMITH, J.**, read the following judgment of the court.—In this case the plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he was travelling getting off the line and upsetting. The accident was caused by the breaking of the tyre of one of the wheels of the carriage owing to a latent defect in the tyre, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking.

Does an action lie against the company under the circumstances? This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious that, for the plaintiff on this state of facts to succeed in this action, he must establish either that there was a warranty by way of insurance on the part of the carrier to convey the passenger safely to his journey's end, or, as his learned counsel mainly insisted, a warranty that the carriage in which he travels should be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril although those defects were such that no skill, care, or foresight could have detected their existence. We are of opinion, after consideration of the authorities, that there is no such contract either of general or limited warranty and insurance entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care, including in that term the use of skill and foresight, to

A carry the passenger safely. It, of course, follows that the absence of such care, in other words negligence, would alone be a breach of this contract; and as the facts of this case do not disclose such a breach, and, on the contrary, negative any want of skill, care, or foresight, we think the plaintiff has failed to sustain his action, and that the judgment of the court below in favour of the defendants ought to be affirmed.

B The law of England has, from the earliest times established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to re-deliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm, or the common law declared long ago, that carriers of goods should be so liable it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiff to do in the case of carriers of passengers. The liability of the common carrier of goods attached upon the particular bailment of the goods to him in his capacity of common carrier, and the rules which govern the rights of bailors and bailees of things are of course applicable only to things capable of bailment.

C The law, and the reasons for it, in the cases of bailments to carriers are found in the great judgment of HOLT, C.J., in *Coggs v. Bernard* (1) and are thus stated (2 Ld. Raym. at pp. 917, 918):

E "As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage for a reward to be paid to the bailee—those cases are of two sorts, either a delivery to one that exercises a public employment or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events; and this is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged (26 Car. 2) in the case of *Mors v. Slew* (2). The law charges this person thus entrusted to carry goods against all events but acts of God, and of the enemies of the king; for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing, for else these carriers may have an opportunity of undoing all persons that had any dealing with them by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."

H The same law is found in numerous textbooks (some of which are referred to in the judgments of my brothers MELLOR and LUSH in their judgments below), and has been acted on for centuries in the case of carriers of goods.

I The court is now asked to declare the same law to be applicable to contracts to carry passengers. The learned counsel for the plaintiff felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers; but he contended for and mainly relied on the proposition, that there was at least a warranty that the carriage in which the passenger travelled was roadworthy, and that the liability of the carriers of goods in this respect ought to be imported into the contract with the passenger. But first it is extremely doubtful whether such a warranty can be predicated to exist in the contract of the common carrier of goods. His obligation is to carry and re-deliver the goods in safety, whatever happens. In the words of HOLT, C.J.,

"he is bound to answer for the goods at all events." Again: "The law charges this person thus entrusted to carry goods against all events but acts of God and the enemies of the King"; and this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle, for, if the goods are safely carried and re-delivered, it would be immaterial whether the carriage was roadworthy or not, and if the goods are lost or damaged the carrier is liable on his broad obligation to be answerable at all events and it is unnecessary to inquire how that loss or damage arose.

However that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers is to be dissected, and a particular part severed and attached to what, on the hypothesis, is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied with equal force to impose the limited warranty of the soundness of the carriage in favour of the passengers. The reason suggested was, as we understand it, that a passenger, when placed in a carriage, was as helpless as a bale of goods, and, therefore, entitled to have for his personal safety a warranty that the carriage was sound; but this is not the reason, or anything like the reason, given by *HOLT, C.J.*, for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is, no doubt, dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train, and of the engine drawing them; on the soundness of the rails, of the points, of the signals, of the masonry; in fact, of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all. If, then, there is force in the above reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things; and, if so, it must follow as a consequence of the argument that there is a warranty that all these things shall be and remain absolutely sound and free from defects.

This, which appears to be the necessary consequence of the argument, tries the value of it. But surely if the law really be as it was contended to be, it would have been so declared long ago. No actions have been more frequent of late years than those against railway companies in respect of injuries sustained by passengers. Some of these injuries have been caused by accidents arising from defects in the rolling stock, others from defects in the permanent works. Long inquiries have taken place as to the causes of these defects and whether they were due to want of care and skill, which would have been altogether immaterial if warranties of the kind contended for formed part of the contract. An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from defects likely to cause peril, when from the nature of the things defects must exist which no skill can detect and the effects of which no care or foresight can avert, would be to compel a man by implication of law, and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to two maxims of law—*Lex non cogit ad impossibilia*, *Nemo tenetur ad impossibilia*.

If the principle of implying a warranty is to prevail in the present case there seems to be no good reason why it should not be equally applied to a variety of other cases, as, for instance, to the managers of theatres or other places of public resort who provide seats or other accommodation for the public for reward. Why are they not to be equally held to insure by implied warranty

A the soundness of the structures to which they invite the public. But we apprehend it to be clear that such persons do no more than undertake to use due care that their buildings shall be in a fit state. Thus a staircase in the Polytechnic Institution fell and injured several persons attending a public exhibition there. Two actions were brought by separate plaintiffs who had paid money for their entrance. The first was tried before WIGHTMAN, J., the second before
B ERLE, C.J. No one seems to have supposed there was any warranty of the soundness of the staircase, yet the persons using it were helpless to detect or prevent the accident as the traveller. Both learned judges put the liability entirely on the question whether there was want of due care in maintaining the staircase, and ERLE, C.J., told the jury that the defendants would not
C be liable for latent defects: *Brazier v. Polytechnic Institution* (3); *Pike v. Polytechnic Institution* (4). So, in stating the liability of a canal company who made the canal for profit, and allowed the public to use the canal on payment of tolls, TINDAL, C.J., in delivering the judgment of the Court of Exchequer Chamber in *Parnaby v. Lancaster Canal Co.* (5), says (11 Ad. & El. at p. 248):

D "The common law in such a case imposes a duty upon the proprietors not, perhaps, to repair the canal or absolutely to free it from obstruction, but to take reasonable care so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property."

E The liability in that case was not put in any degree upon a warranty that the canal should be free from perilous defects, but upon the rational obligation to use due care that it should be so. The common law, with regard to carriers of goods and innkeepers stands, as I have said, on its own special grounds. But it has been found so stringent, not to say unjust, in the liabilities it imposed on persons carrying on those trades that the legislature has found it necessary in both cases to modify its stringency.

F It will now be necessary to examine the leading authorities cited during the argument. Counsel for the plaintiff, in the first place, referred to some of the cases in which it has been held that in contracts for the supply of goods for a particular purpose there is an implied warranty that the goods supplied shall be reasonably fit for the purpose. *Bigge v. Parkinson* (6), is a case of that
G class. But the agreement to sell and supply goods for a price which may be supposed to represent their value is a contract of a different nature from a contract to carry, and has essentially different incidents attached to it. Indeed, the learned counsel did not cite these cases as directly governing the present. Even in the cases of contracts to supply goods it may be a question, on which
H it is not now necessary to express an opinion, how far, and to what extent, the vendor would be liable to the vendee in the case of a latent defect of the kind existing in the present case, which no skill or care could prevent or detect—that is to say, where an article is supplied which has been manufactured and tested in the most careful manner so as to be turned out as perfect as in the nature of things it could be. It is clear that, if the manufacturer is liable for such an inevitable and undiscoverable defect, he can never sell what
I he makes without the risk of an action attaching itself to every contract he enters into—without in fact becoming an insurer unless he limits his liability expressly. In cases of express warranties the compact of the parties is to be gathered from the words they use in making them. When warranties are expressly made, the parties themselves may guard against excessive liability by any exceptions they please, and in those implied by law the law itself must take care to keep them within the boundaries of reason and justice so as not to impose impracticable obligations.

It is now proposed to consider the authorities relied on as having a direct bearing on the question before us. The case which the plaintiff's counsel relied

on as the strongest in his favour is *Sharp v. Grey* (7). But that case when examined furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose on the defendants. There the plaintiff was injured by an accident caused by the breaking of an axle-tree of a stage coach. The defect might have been discovered if a certain examination had taken place, and it was made a question of fact at the trial whether it would have been prudent or not to make that examination. TINDAL, C.J., who tried the cause, is reported to have directed the jury to consider "whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely." If the learned Chief Justice had supposed there was an absolute warranty of roadworthiness this direction could not have been given, as it would then have been immaterial whether the defendant had used vigilance or not, and the degree of vigilance would have been an utterly immaterial consideration. The jury having found, on his direction, for the plaintiff, a motion was made, in the absence of TINDAL, C.J., for a new trial. Two of the learned judges, in refusing the rule (GASELEE and BOSANQUET, JJ.) are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a roadworthy vehicle. PARK, J., uses language which, as reported, is ambiguous. But the judgment of ALDERSON, J., is distinctly opposed to the notion of a warranty against latent and undiscoverable defects. He says:

"A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction as well as for such as may exist afterwards and be discovered by investigation."

We have referred somewhat fully to this case, because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English courts, and because it was relied on by the judges of the Court of Appeal in New York, in a decision which will be referred to later. But the case, when examined, furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision, and the authority of TINDAL, C.J., and ALDERSON, J., is against the plaintiff.

The dictum of BEST, C.J., in *Bremner v. Williams* (8), was not necessary to the decision of the case. The ruling of LORD ELLENBOROUGH in *Israel v. Clark* (9), was also relied on. Of these two last authorities BLACKBURN, J., says, in his judgment below:

"These are, it is true, only *nisi prius* decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood."

We find also, that BEST, C.J., certainly makes observations in the opposite sense in *Crofts v. Waterhouse* (10).

These cases are really the only English authorities which afford any support at all to the plaintiff's view, for the interpretation reported to have been given by CRESSWELL, J., in *Benett v. Peninsular Steam Boat Co.* (11), of *Sharp v. Grey* (7), was only an observation made during the argument, when it was cited as incidentally bearing on the question then before the court, and cannot be relied on as an authority. On the other hand, there is not only the plain distinction between the liabilities of the carriers of goods and of passengers constantly referred to by text writers and judges as well known and settled law, but numerous cases have been decided on grounds at variance with the supposition that there existed contemporarily with them the liability by way of warranty.

In *Aston v. Heaven* (12), which was the case of injury to a passenger, EYRE, C.J., after carefully pointing out the law as to the liability of carriers of goods

A to make good all losses (except those happening from the act of God or the king's enemies), and the reasons for it, says: "I am of opinion the cases of losses of goods by carriers, and the present are totally unlike." Again: "There is no such rule in the case of the carriage of persons; this action stands on the ground of negligence." In *Christie v. Griggs* (13), SIR JAMES MANSFIELD says:

B "There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events, but he did not warrant the safety of the passengers; his undertaking as to them went no further than this, that as far as human care and foresight could go he would provide for their safe conveyance."

C In *Crofts v. Waterhouse* (10), the observations attributed to BEST, C.J., clearly show that he did not think there was any warranty on the part of carriers of passengers, and PARK, J., in the same case says:

"A carrier of goods is liable at all events, a carrier of passengers is only liable for negligence."

D Besides the observations of individual judges to show what has hitherto been understood to be the law, there is the long series of important cases involving costly and protracted trials, in which, by common consent, the liability of carriers of passengers has been based upon the duty to take due care, and not upon a warranty. In *Grote v. Chester and Holyhead Rail. Co.* (14), where the accident arose from the breaking down of one of the bridges of the railway, E the case turned on what would or would not be negligence for which the company were answerable. PARKE, B., said (2 Exch. at p. 254):

"It seems to me the company would still be liable for the accident unless he [the engineer] also used due and reasonable care, and employed proper materials in the work."

F There is no trace in the report that it ever occurred to the court to suppose there was any warranty of the safety of the bridge. In a case tried before ERLE, C.J., *Ford v. London and South Western Rail. Co.* (15), the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tyre of one of the wheels of the G tender. ERLE, C.J., in his direction, told the jury (2 F. & F. at p. 732):

"The action is grounded on negligence; negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonably to be required from the parties considering all the circumstances. The railway company is bound to take reasonable care to use the best precautions in known practical use H for securing the safety of their passengers."

There the defect was in the tyre of a wheel of the tender of the train by which the plaintiff travelled, and no suggestion that a warranty of its soundness existed was made throughout the case.

I A case still more directly bearing upon the present point was tried before COCKBURN, C.J., *Stokes v. Eastern Counties Rail. Co.* (16). There the accident happened in consequence of the breaking of the tyre of the near wheel of the engine. The tyre broke from a latent flaw in the welding. The trial lasted six days, and the questions mainly were whether the flaw was not visible, and whether by the exercise of care it might not have been detected. The Lord Chief Justice commences a full direction to the jury by saying: "The question is whether the breaking of the tyre resulted from any negligence in the defendants or their servants for which they are responsible." The latent defect in the tyre was admitted to be the cause of the accident, but, the jury having found

in answer to specific questions that there was no evidence that the tyre was negligently welded and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. The facts of the case appear to be exactly like the present, except that in this case the defective tyre was in the wheel of the carriage, and there it was in the engine; but for the reasons already given it can never be that a warranty can exist as to the carriage, but not as to the engine drawing it. Thus then it is plain a trial of six days took place on issues which were utterly immaterial if a warranty ought to have been implied; and the learned Chief Justice and the parties themselves would seem to have been utterly unconscious of the contract which was really existing, if the plaintiff in this case is right, for the warranty as an obligation implied by law must have existed at the time of these trials if it exists now, and surely it is strong to show that no such rule does form part of the common law, that it was not then recognised or declared.

Counsel for the plaintiff insisted that a carrier by sea is bound to have his ship seaworthy. Undoubtedly the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely, and is responsible for all losses however caused, whether by the unseaworthiness of the ship or otherwise, and it does not appear to be material to inquire, when he is subject to this large obligation, whether he is also subject to a less one. In *Lyon v. Mells* (17), it was no doubt stated by the court that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. It is well to observe that HOLROYD, who argued for the plaintiff, and GASELEE, for the defendant, both state the liability of the carrier in all its breadth, viz., a liability for all losses however happening, except by the act of God or the king's enemies. This case, therefore, falls within the class of decisions relating to the liability of the carriers of goods. No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen, and it affords a strong ground for presuming that no such liability exists, that no passenger in this maritime nation has ever founded an action upon it.

Burns v. Cork and Bandon Rail. Co. (18), certainly does not support the plaintiff's view of the law. The court say there that the averments in the defendant's plea are all consistent with gross and culpable negligence, and on that ground give judgment for the plaintiff. The judgment plainly shows that the court do not mean to declare there is an absolute undertaking that the vehicle shall be free from all defects. The language is "free from defects as far as human care and foresight can provide, and perfectly roadworthy." The court refers with approbation to the language of SIR JAMES MANSFIELD, and ALDERSON, J., which helps to explain that they were disposed to adopt the views of those learned judges and to place the liability, not on a warranty, but on the obligation to exercise care and foresight.

It now remains to consider the American decisions on the subject. They have not been uniform. The judgment of HUBBARD, J., in *Ingalls v. Bills* (19), cited at length by my brother MELLOR in his judgment below (L.R. 2 Q.B. at p. 430), is opposed to the notion of a warranty. Decisions, however, were cited before us from the courts of the State of New York, having a contrary tendency, and to show us that in that State the law had been declared in favour of annexing a warranty to the contract. The most important of these cases in *Alden v. New York Central Railroad Co.* (20), in the court of appeals in the State of New York. That was the case of an accident caused by a defect in an axle-tree. The reasons given by GOULD, J., are not satisfactory to our minds; the learned judge seems to assume there was no negligence shown on the part of the company. He cites *Sharp v. Grey* (7), in the Court of Common Pleas, and he interprets that case to determine that the carrier warrants the roadworthiness of his coach. But if the view of *Sharp v. Grey* (7), taken in the early part of his judgment is correct, the learned judge gave

A too great weight to it. GOULD, J., then, after having given the rule as he supposed it to be laid down in *Sharp v. Grey* (7), observes :

“And though this may seem a hard rule, it is probably the best that can be laid down, since it is plain and easy of application, and when once established is distinct notice to all parties of their duties and liabilities.”

B With deference to the learned judge, these reasons, founded on the convenience of the arrangement, are scarcely sufficient to warrant the introduction of onerous obligations into the contracts of parties; and the terms in which the judgment is given rather lead to the conclusion that the learned judge was conscious that he was annexing to the contract of the carrier of passengers what had not hitherto been understood to form part of it. The English courts are desirous to
C treat the American decisions with great respect, but as their authority here must mainly depend on the reasons on which they are founded, we have felt bound to examine them, with the result which has been stated.

Warranties implied by law are for the most part founded on the presumed intention of the parties and ought certainly to be founded on reason and with
D a just regard to the interests of the party who is supposed to give the warranty as well as of the party to whom it is supposed to be given. We have already gone fully into the reasons for holding that, in our opinion, this alleged warranty is not so founded. On the other hand, it seems to be perfectly reasonable and just to hold that the obligation well known to the law, and which, because of its reasonableness and accordance with what men perceive to be fair and right, has
E been found applicable to an infinite variety of cases in the business of life, viz., the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carrier of passengers, nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent and under what circumstances they are liable for the
F want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use: see on the point *Grote v. Chester and Holyhead Rail. Co.* (14). “Due care,” however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all diligence to see that whatever is required for the safe conveyance of their passengers is in fit and proper order.
G But the duty to take due care, however widely construed, or however vigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice, to our minds, of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery they are obliged to use, which no human skill or care could either have prevented or detected.

H In the result, we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and so far as it rests on principle, fails in reason. Consequently, the judgment of the Court of Queen’s Bench in favour of the defendants will be affirmed.

Appeal dismissed.

BOUGHTON AND ANOTHER v. KNIGHT AND OTHERS

[COURT OF PROBATE (Sir James Hannen), March 11, 31, 1873]

[Reported L.R. 3 P. & D. 64; 42 L.J.P. & M. 25; 28 L.T. 562;
37 J.P. 598]*Will—Validity—Capacity of testator—Mental illness—Highest degree of capacity required—Burden of proof.*

Mental capacity is a question of degree, but the highest degree of capacity is required to make a testamentary disposition, inasmuch as it involves a larger and wider survey of facts than is needed to enter into the ordinary contracts of life. A sound mind in contemplation of law does not necessarily mean a perfectly balanced mind, and large allowance must be made for the difference of individual character, habits, and mode of living. It must not be assumed that because a man acts in unaccustomed ways he is, therefore, of unsound mind. The burden is on those propounding a will to satisfy the court that when the will was made the testator was of sound and disposing mind.

Notes. Considered: *Birkin v. Wing* (1890), 63 L.T. 80; *Roe v. Nix* (1892), 9 T.L.R. 128. Distinguished: *In the Estate of Plant, Wild v. Plant*, [1926] P. 139. Referred to: *Jenkins v. Morris* (1880), 14 Ch.D. 674; *Re Park, Park v. Park*, [1953] 2 All E.R. 1411.

As to testamentary capacity, see 39 HALSBURY'S LAWS (3rd Edn.) 854-859; and for cases see 33 DIGEST (Repl.) 603 et seq.

Cases referred to:

- (1) *Boyse v. Rossborough, Boyse v. Colclough*, (1857), 6 H.L.Cas. 2; 29 L.T.O.S. 27; 3 Jur.N.S. 373; 5 W.R. 414; 10 E.R. 1192, H.L.; 23 Digest (Repl.) 127, 1305.
- (2) *Dew v. Clark and Clark* (1826), 3 Add. 79; 162 E.R. 410; 33 Digest (Repl.) 586, 8.
- (3) *Smith v. Tebbitt* (1867), L.R. 1 P. & D. 398; 36 L.J.P. & M. 97; 16 L.T. 841; 16 W.R. 18; 33 Digest (Repl.) 605, 212.
- (4) *M'Naghten's Case* (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 1 Town St. Tr. 314; 1 Car. & Kir. 130, n.; sub nom. *Insane Criminals*, 8 Scott, N.R. 595, H.L.; 14 Digest (Repl.) 60, 246.
- (5) *Banks v. Goodfellow* (1870), post p. 47; L.R. 5 Q.B. 549; 39 L.J.Q.B. 237; 22 L.T. 813; 33 Digest (Repl.) 604, 210.

Action in which the plaintiffs, Sir Charles Henry Rouse Boughton and Mr. Edward Marston propounded, as executors, the will, dated Jan. 27, 1869, of John Knight who died on Sept. 7, 1872. The will was opposed by the defendants, the three sons of the deceased and the children of a deceased daughter, on the ground that the deceased, at the time of the execution of the will, was not of sound mind.

The testator was married in 1827, and shortly after his marriage removed to Brussels, where he resided until 1848. His wife died in 1842, and in 1853 on the death of his father, he came into possession of considerable landed property in Shropshire. At his death his personal estate was of the value of £62,000; his realty was of the value of £1500 a year. The will was prepared by Mr. Marston, a solicitor at Ludlow who was recommended to him at his desire by Sir Charles Boughton. By the will the testator gave legacies of £8000 to his son James, £7000 to his son Charles and a life interest in £10,000 to his son John, £10,000 to his brother Humphrey, £10,000 to be divided between the daughters of his deceased brother Thomas, £1500 to his sister, Mrs.

- A** Mansfield; £1000 to each of his executors, and then smaller legacies, amounting together to £1300. He appointed Sir Charles Boughton residuary legatee and devisee. In support of the will the plaintiffs relied on the fact that the testator, who was admittedly of eccentric habits and led a retired and secluded life, had always managed his own affairs, and had been treated by those with whom he had business transactions as of sound mind. For the defence it
- B** was alleged, that besides labouring under mental perversion in some other particulars, the deceased had conceived an insane aversion from his children, and that he was actuated by it to dispose of his property in the manner in which it was purported to be conveyed by the will. Sir Charles Boughton was a neighbour of the testator, and was on friendly, but not intimate, terms with him.
- C** The case was tried before SIR JAMES HANNEN and a special jury who found that at the time the will was executed the testator was not of sound mind.

Serjt. Parry (with him *Day, Q.C., and Inderwick*), for the plaintiffs.

Sir John Karslake (with him *Lloyd, Q.C., Dr. Swabey and C. A. Middleton*), for the defendants.

D

- SIR JAMES HANNEN**, in summing-up the case to the jury, said.—“The sole question which you have to determine is, in the language of the record, whether Mr. John Knight, when he made his will, was of sound mind, memory, and understanding. In one sense, the first phrase, “sound mind,” covers the whole subject, but emphasis is laid upon two particular functions of the mind
- E** which must be sound in order to create a capacity for the making of a will, for there must be memory to recall the several persons who may be supposed to be in such a position as to become the fitting objects of the testator’s bounty. Above all, there must be understanding, to comprehend their relations to himself and their claims upon him. But, as I say, for convenience, the phrase, “sound mind,” may be adopted, and it is the one which I shall make use
- F** of throughout the rest of my observations. You will naturally expect from me, if not a definition, at least an explanation of what is the legal meaning of those words, “a sound mind;” and it will be my duty to give you such assistance as I am able, either from my own reflections upon the subject, or by the aid of what has been said by learned judges whose duty it has been to consider this important question before me. But I am afraid that, even with their aid,
- G** I can give you but little help, because, though their opinions may guide you a certain distance on the road you have to travel, yet where the real difficulty begins—if difficulty there be in this case—there you will have to find or make a way for yourselves.

- I must commence, I think, by telling you what a “sound mind” does not mean. It does not mean a perfectly balanced mind. If it did, which of us
- H** would be competent to make a will? Such a mind would be free from the influence of prejudice, passion, and pride. But the law does not say a man is incapacitated from making a will because he proposes to make a disposition of his property which may be the result of capricious, frivolous, mean, or even bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this—to take care that that, and that only, which is the true expres-
- I** sion of a man’s real mind shall have effect given to it as his will. In fact, this question of justice and fairness in the making of wills in a vast majority of cases, depends upon such nice and fine considerations that we cannot form, or even fancy that we can form, a just estimate of them. Accordingly, by the law of England, every man is left free to make choice of the persons upon whom he will bestow his property after his death, entirely unfettered as to the selection which he may think fit to make. He may wholly or partially disinherit his children and leave his property to strangers, to gratify his spite, or to charities to gratify his pride; and we must respect, or rather I should say we

must give effect to, his will, however much we may condemn the course which he has pursued. In this respect the law of England differs from the law of other countries. It is thought better to risk the chance of an abuse of the power arising than altogether to deprive men of the power of making such selection as their knowledge of the characters, of the past history and future prospects of their children or other relatives may demand; and we must remember that we are here to administer the English law, and we must not attempt to correct its application in a particular case by knowingly deviating from it. [But see now the Inheritance (Family Provision) Act, 1938: 32 HALSBURY'S STATUTES (2nd Edn.) 139.]

I have said that we have to take care that effect is given to the expression of the true mind of the testator, and that, of course, involves a consideration of what is the amount and quality of intellect which is requisite to constitute testamentary capacity. I desire particularly, now and throughout the consideration which you will have to give to this case, to impress upon your minds that, in my opinion, this is eminently a practical question—one in which the good sense of men of the world is called into action, and that it does not depend either upon scientific or legal definitions. It is a question of degree, which is to be solved in each particular case by those gentlemen who fulfil the office which you now have imposed upon you, and I should like, for accuracy's sake, to quote the very words of LORD CRANWORTH, to which I referred in the observations which I had to make on a former occasion, and from which counsel for the defendants in his opening speech, quoted a passage. In *Boysc v. Rossborough* (1), in the House of Lords, LORD CRANWORTH made use of these words (6 H.L. Cas. at p. 45):

"On the first head, the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot, in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect—every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine."

In considering the question, therefore, of degree, large allowance must be made for the difference of individual character. Eccentricities, as they are commonly called, of manner, of habits of life, of amusements, of dress, and so on, must be disregarded. If a man has not contracted the ties of domestic life, or, if unhappily, they have been severed, a wide deviation from the ordinary type may be expected, and if a man's tastes induce him to withdraw himself from intercourse with friends and neighbours, a still wider departure from the ordinary type must be expected. We must not easily assume, because a man indulges his humours in unaccustomed ways, that he is, therefore, of unsound mind. We must apply some other test than whether or not the man is very different from other men. The test which is usually applied, and which in almost every case is found sufficient, is this: Was the man labouring under delusions? If he laboured under delusions, then to some extent his mind must be unsound. But though we have thus narrowed the ground, we have not got free altogether from difficulty, because the question still arises: What is a delusion? On this subject an eminent judge, who formerly sat in the court the jurisdiction of which is now exercised here, has quoted with approbation a definition of delusion, which I will read to you. SIR JOHN NICOLL, in the famous case of *Dew v. Clark and Clark* (2) said:

"One of the counsel [Dr. Lushington] accurately expressed it; it is only the belief of facts which no rational person would have believed that is insane delusion."

A In one sense that is arguing in a circle, for, in fact, it is only to say that that man is not rational who believes what no rational man would believe; but for practical purposes it is a sufficient definition of a delusion. You must not arbitrarily take your own mind as the measure, in the sense that you should say: I do not believe such and such a thing; therefore, the man who believes it is insane. Nay, more, you must not say: I should not have believed such and such a thing; therefore, the man who did believe it is insane. But you must of necessity put to yourself this question, and answer it. Can I understand how any man in possession of his senses could have believed such and such a thing? If the answer you would have to give is: I cannot understand it; then it is of the necessity of the case that you should say that that man is not sane.

C SIR JOHN NICOLL, in a previous passage, has given what appears to me to be a more logical and precise definition of what a delusion is. He says (3 Add. at p. 90):

D "The true criterion is, where there is a delusion of mind there is insanity; that is, when persons believe things to exist which exist only, or at least in a degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind."

E I believe you will find that that test applied will solve most, if not all, the difficulties which arise in investigations of this kind. Of course there is no difficulty in dealing with cases of delusion of the grosser kind of which we have experiences in this court. Take the case, which has been referred to, of Mrs. Thwaites (*Smith v. Tebbitt* (3)). If a woman believes that she is one person of the Trinity, and that the gentleman to whom she leaves the bulk of her property is another person of the Trinity, what more need be said? But a very different question arises where the nature of the delusion which is said to exist is when it is alleged that a totally false, unfounded, unreasonable—because unreasoning—estimate of another person's character is formed. That is necessarily a more difficult question. It is unfortunately not a thing unknown, that parents—and, I should say in justice to women, it is particularly the case rather with fathers than with mothers—that they may take unduly harsh views of the characters of their children, sons especially. But there is a limit beyond which you can feel that it ceases to be a question of harsh, unreasonable judgment of character, and that the repulsion which a father exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them mischief or to deprive them of advantages which most men desire, above all things, to confer upon their children—I say there is a point at which, taken by itself, such repulsion and aversion becomes evidence of unsoundness of mind. Fortunately it is rare. It is almost unexampled that such a delusion, consisting solely of aversion to children, is manifested without other signs which may be relied on to assist you in forming an opinion on that particular point. There are usually other aberrations of the mind which afford an index as to the character of the treatment of the children.

I Perhaps the nearest approach to a case in which there was nothing but the dislike on the part of a parent to his child on which to proceed was *Dew v. Clark and Clark* (2). There were indeed some minor things which were adverted to by the judge in giving his judgment, but he passes over these, as it was natural he should do, lightly; as, for instance, there was in that case the fact that the gentleman who had practised medical electricity attached extraordinary importance to that means of cure in medical practice. He con-

ceived that it might be applied to every purpose, among the rest even to assisting women in childbirth. But those were passed over, not indeed case aside altogether, but passed over by the judge as not being the basis of his judgment. What he did rely on was, a long, persistent course of dislike of his only child, an only daughter, who, upon the testimony of everybody else who knew her, was worthy of all love and admiration, for whom indeed the father no doubt entertained, so far as his nature would allow him, the warmest affection, but it broke out into these extraordinary forms, namely, he desired that that child's mind should be subject entirely to his own; that she should make her nature known to him, and confess her faults, as, of course, a human being can only do to his Maker; and because his child did not fulfil his desires and hopes in that respect, he treated her as a reprobate, as an outcast. In her youth he treated her with great cruelty. He beat her; he used unaccustomed forms of punishment, and he continued throughout her life to treat her as though she were the worst, instead of, apparently, one of the best, of women. In the end he left her indeed a sum of money sufficient to save her from actual want, if she had needed it, for she did not need it. She was married to a person perfectly able to support her; and, therefore, the argument might have been used in that case, that he was content to leave her to the fortune which she had secured by a happy marriage. He was not content to leave her so. He did leave her, as I say, a sum of money which would have been sufficient in case of her husband falling into poverty, to save her from actual want; and, moreover, he left his property—not to strangers or to charities—but to two of his nephews. He was a man who throughout his life had presented to those who met him only in the ordinary way of business, or in the ordinary intercourse of life, the appearance of a rational man. He had worked his way up from a low beginning. He had educated himself as a medical man, going to the hospitals and learning all that could be learnt there, and he amassed a very large fortune—at least, a large fortune, considering what his commencement was—a fortune of some £25,000 or £30,000, by the practice of his profession. Yet, upon the ground which I have mentioned, that the dislike which he had conceived for this child reached such a point that it could only be ascribed to mental unsoundness, that will made in favour of the nephews was set aside, and the law was left to distribute his property without reference to his will.

I say usually you have the assistance of other things, besides the bare fact of a father conceiving a dislike for his child, by which to estimate whether that dislike was rational or irrational; and in this case it has been contended that you have other criteria by which to judge of the testator's treatment of his children in his lifetime, and his treatment of them by his will after his death. You are entitled, indeed you are bound, not to consider this case with reference to any particular act, or rather you are not to confine your attention to a particular act, namely, that of making the will. You are not to confine your attention to the particular time of making the will, but you are to consider the testator's life as a whole with the view of determining whether, in January, 1869, when he made that will, he was of sound mind.

I shall take this opportunity of correcting an error, which you indeed would not be misled by, because you heard my words, but I observe that in the shorthand report of what I said in answer to an observation made by one of you gentlemen in the course of the case, a mistake has been made, which it is right I should correct; because, of course, everything that falls from me has its weight, and I am responsible for my words to another court which can control me if I am wrong in the directions I give you. Therefore, I beg to correct the words that have been put into my mouth, when I said that if a man be mad admittedly in 1870, and his conduct is the same in 1868 as it was in 1870, when he was, as we assume, admittedly mad, you have the materials from which you may infer the condition of his mind in the interval. I have been reported to say,

A "from which you *must* infer the condition of his mind." That is of course what I did not say.

I think I can give you assistance by referring to what has been said on this subject in another department of the law. Some years ago, the question of what amount of mental soundness was necessary in order to give rise to responsibility for crime was considered in *M'Naghten's Case* (4), where M'Naghten shot Mr. Drummond under the impression that he was Sir Robert Peel. The opinion of all the judges was taken upon the subject, and, though the question is admittedly a somewhat different one in a criminal case from what it is here, yet I shall explain to you, presently, in what that difference consists; and there is, as you may easily see, an analogy which may be of use to us in considering the point now before us. There, TINDAL, C.J., in expressing the opinion of all the judges (one of them was a very eminent judge, who delivered an opinion of his own, but it did not in any way differ from the other judges), says :

"It must be proved that at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

That, in my opinion, affords as nearly as it is possible a general formula that is applicable to all cases in which this question arises, not exactly in those terms, but in the manner in which I am about to explain to you. It is essential to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall not be able to distinguish in the act he is doing right from wrong. A very little degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act he is doing when he kills another; a very little degree of intelligence is sufficient to enable a man to know whether he is doing right or wrong when he puts an end to the life of another; accordingly, he is responsible for crime committed if he possesses that amount of intelligence.

Take the question of marriage. That question is always left in precisely the same terms as I have told you it seems to me it should be left in almost every case. When the validity of the marriage is disputed on the ground that one or other of the parties was of unsound mind, the question is: Was he or she capable of understanding the nature of the contract which he or she was entering into? So it would be with regard to contracts of buying or selling, and take the case of the unhappy man who, being confined in a lunatic asylum, and with delusions in his mind, was called to give evidence. First of all the judge had to consider: Was he capable of understanding the nature and character of the act that he was called upon to do when he swore to tell the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If he was, then he was of sufficient capacity to give evidence as a witness. But, whatever degree of mental soundness is required for any one of these things, responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness, I tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition, because, you will easily see, it involves a larger and a wider survey of facts and things than any one of these matters to which I have called your attention. Every man, I suppose, must be conscious that in an inmost chamber of his mind there resides a power which makes use of the senses as its instruments, which makes use of all the other faculties. The senses minister to it in this manner. They bring, by their separate entrances, a knowledge of things and persons in the external world. The faculty of memory calls up pictures of things that are passed; the imagination composes pictures and the fancy creates them, and all pass in review before this power, I care not what you call it, that criticises them and judges them, and it has

moreover this quality which distinguishes it from every other faculty of the mind, the possession of which indeed distinguishes man from every other living thing, and makes it true in a certain sense that he is made in the image of God. It is this faculty, the faculty of judging himself; and, when that faculty is disordered, it may safely be said that his mind is unsound. A

I wish to call your attention to a case which has been frequently adverted to in the course of this case. It is *Banks v. Goodfellow* (5), a judgment of the Court of Queen's Bench, at a time when I had the honour of being a member of it. I was, therefore, a party to the judgment; but all the members of the legal profession who hear me will recognise the eloquent language of the great judge who presides over that court, COCKBURN, C.J. That was a case in which a man, who had been subject to delusions before and after he made his will, was not shown to be either under the influence of those delusions at the time, nor, on the other hand, was he shown to be so free from them that if he had been asked questions upon the subject he would not have manifested that they existed in his mind. But he made a will by which he left his property to his niece, who had lived with him for years and years, to whom he had always expressed his intention of leaving his property, and to whom, in the ordinary sense of the word, it was his duty to leave the property or take care of her after his death. It was left to the jury to say whether he made that will free from the influence of any of the delusions he was shown to have had before and after, and the jury found that the will which I have described to you was made free from the influence of the delusions under which he suffered, and it was held that, under those circumstances, the jury finding the fact in that way, that finding could not be set aside. B C D E

It is for you to say whether the accumulation of the evidence which has been called for the defendants leads you to the conclusion that, whatever fluctuations there may have been in the condition of the testator's mind, for some years before he made that will he had been subject to delusions, especially delusions with reference to the character, the intention, and the motives of his sons' acts. F If you come to the conclusion that he was subject to these delusions, I beg particularly to impress on your minds that it is the duty of the plaintiffs to satisfy you that at the time when the testator made this will he was free from those delusions, or free from their influence. The burden of proof is upon those who assert that the testator was of sound and disposing mind. In considering that question you cannot put aside the contents and the surrounding G circumstances of that will. In considering whether or not he was free from delusions as to the characters of his several sons whom he passed over in the disposition of his estate, though he left them sums of money out of his personalty, you cannot disregard the fact that he selected one having no natural claims upon him, of whom he knew little, and to whom he was under none of the obligations which are usually recognised as the foundation on which H to make a gift of this kind. That must be taken into your consideration in determining whether at the time he made his will those prevailing delusions had passed away, or were utterly inoperative.

The jury found that at the time the will was executed the testator was not of sound mind.

BANKS v. GOODFELLOW

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn, Mellor and Hannen, JJ.), January 11, May 13, July 6, 1870]

[Reported L.R. 5 Q.B. 549; 39 L.J.Q.B. 237; 22 L.T. 813]

Will—Validity—Capacity of testator—Mental illness—Partial illness—Effect on testamentary capacity—Presumption against validity.

For a testator to be capable of making a valid will he must be able to understand the nature of the act and its effects and the extent of the property of which he is disposing, and he must be able to comprehend and appreciate the claims to which he ought to give effect and the manner in which his property is to be distributed between them. The fact that the testator suffers from mental illness which does not interfere with the general powers and faculties of his mind, and, in particular, does not prevent his possessing the faculties mentioned above, so that there is no connexion between the illness and the will, will not render the will liable to be overthrown on the ground of the testator's incapacity. But when the fact that a testator has been subject to some form of mental illness is established a will executed by him must be regarded with great distrust and every presumption should in the first instance be made against it. The presumption against such a will becomes additionally strong where the will is an "inofficious" one, i.e., one in which natural affection and the ties of near relationship have been disregarded.

Notes. Explained: *Boughton v. Knight* (1873), ante p. 40. Considered: *Jenkins v. Morris* (1880), 14 Ch.D. 674. Applied: *Re Belliss*, *Polson v. Parrott* (1929), 141 L.T. 245. Considered: *In the Estate of Bohrmann*, [1938] 1 All E.R. 271; *Battan Singh v. Armichaud*, [1948] 1 All E.R. 152. Referred to: *Murphett v. Smith* (1887), 12 P.D. 116; *Birkin v. Wing* (1890), 63 L.T. 80; *Roe v. Nix* (1892), 9 T.L.R. 128.

As to testamentary capacity, see 39 HALSBURY'S LAWS (3rd Edn.) 854-859; and for cases see 33 DIGEST (Repl.) 603 et seq.

Cases referred to:

- (1) *Waring v. Waring* (1848), 6 Moo.P.C.C. 341; 6 Notes of Cases, 388; 12 Jur. 947; 13 E.R. 715, P.C.; 33 Digest (Repl.) 586, 11.
- (2) *Smith v. Tebbitt* (1867), L.R. 1 P. & D. 398; 36 L.J.P. & M. 97; 16 L.T. 841; 16 W.R. 18; 33 Digest (Repl.) 605, 212.
- (3) *Combe's Case* (1604), Moore, K.B. 759; Noy. 101; 72 E.R. 888; 33 Digest (Repl.) 603, 204.
- (4) *Marquess of Winchester's Case* (1598), 6 Co. Rep. 23a; 77 E.R. 287; 33 Digest (Repl.) 603, 194.
- (5) *Greenwood v. Greenwood* (1790), 3 Curt. App. 1; 1 Add. 283, n.; cited in 3 Bro.C.C. at p. 444; 13 Ves. at p. 89; 163 E.R. 930; 33 Digest (Repl.) 603, 206.
- (6) *Dew v. Clark and Clark* (1826), 3 Add. 79; 162 E.R. 410; 33 Digest (Repl.) 586, 8.
- (7) *A.-G. v. Parnter* (1792), 3 Bro.C.C. 441; 29 E.R. 632, L.C.; 33 Digest (Repl.) 621, 430.
- (8) *Cartwright v. Cartwright* (1793), 1 Phillim. 90; 161 E.R. 923; 33 Digest (Repl.) 620, 405.
- (9) *Van Alst v. Hunter*, 5 Johnson, N.Y. Chan. Rep. 159.
- (10) *Harrison v. Rowan*, 3 Washington, 585.
- (11) *Sloan v. Maxwell*, 2 H. W. Green (New Jersey) Ch. Rep. 570.
- (12) *Den v. Vancleve*, 2 Southard, 660.

(13) *Harwood v. Baker* (1840), 3 Moo.P.C.C. 282; 13 E.R. 117, P.C.; 33 Digest A
(Repl.) 614, 349.

Rule Nisi for a new trial of an action of ejectment to recover houses at Keswick in Cumberland brought pursuant to an order of LORD ROMILLY, M.R., in a suit to set aside a will of J. Goodfellow on the ground of the insanity of the testator. B

Holker, Q.C., and *Crompton Hutton* showed cause against the rule.

Manisty, Q.C., and *Kemplay* in support of the rule.

Cur. adv. vult.

July 6, 1870, **SIR ALEXANDER COCKBURN, C.J.**, read the following judgment of the court.—This is an action brought by the plaintiff, as heir-at-law of John Banks, to try the validity of a will made by the latter in favour of one Margaret Goodfellow, of whom, she having died since the decease of the testator, the defendant is the heir. The question in issue at the trial was the capacity of the testator to make a will. Instructions for the will taken by the attorney who prepared it were signed by the testator and attested by witnesses in his presence on Dec. 2, 1863. The will formally prepared from such instructions was duly executed on the 27th of the same month. The question is whether on both or either of those days the testator was of sound mind so as to be capable of making a will. C D

It is a fact beyond dispute that the testator John Banks had at former times been of unsound mind. He had been confined as far back as the year 1841 in the county lunatic asylum. Discharged after a time from the asylum, he remained subject to certain fixed delusions. He had conceived a violent aversion towards a man named Featherstone Alexander, and notwithstanding the death of the latter some years ago, he continued to believe that this man still pursued and molested him and the mere mention of Featherstone Alexander's name was sufficient to throw him into a state of violent excitement. He frequently believed that he was pursued and molested by devils or evil spirits, whom he believed to be visibly present. Besides these delusions, which were spoken to by two witnesses whose evidence was above suspicion, the one a medical man who attended him to the end of 1862, and the other the clergyman of the parish in which the testator resided, there was a body of evidence which, if believed, was strong to establish a case of general insanity. The jury, however, found in favour of the will, and, therefore, must have believed this evidence to be greatly exaggerated, or must have come to the conclusion that the will was made during a lucid interval. E F G

From September, 1863, the testator had a succession of epileptic fits, a blister was applied to his head, and the medical man who attended him throughout this period deposed that his mental power, such as it was, suffered from the fits, and that he considered him insane and incapable of transacting business during the whole time. On the other hand, it appeared that the testator managed his own money affairs, which, however, were on a limited scale, and was careful of his money. According to the evidence of a witness named Tolson, who had acted as his agent in receiving the rents of some cottage property at Keswick, amounting to about £80 a-year, the testator had not only always showed himself capable of transacting business with him, but had, on the last occasion of Tolson's coming to pay the rents, suggested to him to take a lease of the cottages in question so as to relieve him (the testator) from all risk or trouble in the matter. He had also desired Tolson, when he came to pay over the next half-year's rents, to bring with him a Mr. Ansdell, an attorney of Keswick, as he wanted to see him about making a will. H I

On Dec. 2, 1863, Tolson went to Arkleby, where the testator lived, taking Ansdell with him. On their arrival the testator, according to the statement of Ansdell

A and Tolson, told Ansdell he wished to make his will. He fetched from his room a will which he had made in 1838 in favour of his sister who had since died, and said he wished to give his property to his niece, Margaret Goodfellow, in the same way. On Mr. Ansdell asking who should be the executors, the testator turned to his niece, who was present, and asked who she thought should be executors, whereupon, she desired that Tolson should be one, and asked who should be the other, when the other executor, Milwall, was named by a person present, and assented to by the testator. The instructions thus received by Ansdell were put down by him on paper, and, having been read over to the testator, were, by the desire of Ansdell, signed by him, and his signature was formally attested by two witnesses, so as to make the paper a sufficient and valid will, although it was intended that a more formal document should afterwards be prepared and executed. The reason given by Ansdell for such signing and attestation of the instructions was that he always pursued that course when his clients lived at a distance from him, and time would be required between the taking the instructions and the final completion of the will. The distance between Keswick and Arkleby is about twenty miles, and the road was said to be bad.

D After the matter of the will had been disposed of, a conversation took place concerning the proposed lease to Tolson. The testator calculated the amount of the rents, and, finding that they came to £80, offered a lease of the cottages for seven years at a rent of £76 a year. This being agreed to by Tolson, Ansdell was instructed to prepare a lease on these terms, and the instructions having been reduced to writing, were signed by the testator and Tolson. After E this Tolson proceeded to settle with the testator for the rents received by him, which amounted to £40 7s. 4d. Of this Tolson produced £29 in cash, and offered his cheque for the remainder, but the testator observed that a cheque would be of no use to him as there was no bank near, and desired Tolson to pay the balance into a bank at Keswick, at which Tolson had an account. After this a conversation ensued with a Mrs. Routledge, at whose house the testator F lodged, as to the amount which he should pay her weekly for his board and lodging combined, which, if truly reported, tended strongly to show that he was certainly then capable of managing his affairs.

On Dec. 27 Tolson took over the will and lease, which had been prepared by Ansdell, to the testator, who, having read them two or three times, said they were all right, after which both instruments were executed by the testator, and the G will was duly attested. The testator lived till July, 1865. His niece, Margaret Goodfellow, survived him, but died in 1867 under age and unmarried. She was his heir-at-law. He had other nephews and nieces to whom he is said to have been much attached. The effect of the will, if valid, is that the property goes to the defendant, who is no relation in blood to the testator, as the heir-at-law of Margaret Goodfellow, instead of to any relative of the testator. H This possible consequence of Margaret Goodfellow dying without issue and intestate does not, however, appear to have presented itself to the mind of any of the parties at the time of making the will.

I Upon this evidence the learned judge left it to the jury to say "whether on Dec. 2, 1863, or on Dec. 27, 1863, or on both, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions and free from delusions as would enable him to have a will of his own in the disposition of his property, and act upon it." The learned judge told the jury that

"the mere fact of his being able to recollect things, or to converse rationally on some subjects, or to manage some business would not be sufficient to show he was sane, while, on the other hand, slowness, feebleness, and eccentricities would not be sufficient to show he was insane,"

with the further direction that "the whole burden of showing that the testator



was fit at the time was on the defendant." The jury returned a verdict for the defendant, saying that they found that the will "was a good and valid will." The present rule was applied for and obtained on two grounds—first, that the judge misdirected the jury; secondly, that the verdict was against the weight of the evidence. The alleged misdirection is that the learned judge, in leaving to the jury the question whether at the time of making he will the testator was free from delusions, did not proceed to tell them that, though the delusions under which the testator had undoubtedly before laboured might not have been present to his mind at the time of making the will, yet, if they were latent in his mind, so that, if the subject had been touched, upon the delusions would have recurred, the testator was of unsound mind, and, therefore, incapable of making a will.

We must take it for the present purpose as a fact that the testator, though generally of weak intellect, was able to manage his own affairs, and, apart from the delusions under which he laboured, was, at all events, at the time of executing one or both of the testamentary instruments in question, of sufficient testamentary capacity. We must also take it that no delusion manifested itself at the time of making the will. On the other hand, there is ample proof that the delusions existed in the interval between the making of the will and the death of the testator, as they had done before, and it is, therefore, quite possible that these delusions may have remained at the time of making the will uncured and latent in the testator's mind, and capable of being evoked and reproduced at any moment if anything had occurred to lead his thoughts to the subject. The inquiry not having been directed to this point, it is quite possible that all that the jury meant in finding in the affirmative of the question whether the testator was "free from delusion" at the time of making his will, was that the delusions were not present to his consciousness, not that they were eradicated from his mind; and that if the question had been specifically put to them whether the delusions still remained latent in the testator's mind, and his mind was to the extent of these delusions unsound, they would have found in the affirmative.

It, therefore, becomes necessary to consider how far such a degree of unsoundness of mind as is involved in the delusions under which this testator laboured, would be fatal to the testamentary capacity; in other words, whether delusions arising from mental disease, but not calculated to prevent the exercise of the faculties essential to the making of a will, or to interfere with the consideration of the matters which should be weighed and taken into account on such an occasion, which delusions had in point of fact no influence whatever on the testamentary disposition in question, are sufficient to deprive a testator of testamentary capacity and invalidate a will. We must assume for the present purpose that the testator laboured under the insane delusions ascribed to him, but, on the other hand, that these delusions had not, nor were calculated to have, any influence on him in the disposal of his property, and that irrespective of these delusions the state of his mental faculties was such as to render him capable of making a will. Whatever may have been the evidence as to general insanity, the verdict of the jury, which there is ample evidence to support, and in which the learned judge who presided at the trial states that he concurs, establishes that at the time of making the will, irrespective of the delusions referred to, the testator was sufficiently in possession of his faculties.

The question whether partial unsoundness not affecting the general faculties, and not operating on the mind of a testator in regard to the particular testamentary disposition will be sufficient to deprive a person of the power of disposing of his property, presents itself in the present case for judicial decision, so far as we are aware, for the first time. It is true that in *Waring v. Waring* (1), the Judicial Committee of the Privy Council, and in the more recent case of *Smith v. Tebbitt* (2), LORD PENZANCE, in the Court of Probate, have laid down a doctrine according to which any degree of mental unsoundness, however slight,

A and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator. But in both those cases, as we shall presently show, the wide doctrine embraced in the judgments was wholly unnecessary to the decision, and we, therefore, feel ourselves warranted, and, indeed, bound, to consider the question as one not concluded by authority on which we are called upon to form our own judgment. The question is one of equal importance and difficulty, and we have given it our best attention. The text writers throw no light upon the point. They content themselves with stating in general terms that to be capable of making a will a man must be of sound disposing mind and memory, and that persons non compotes, cannot make a will; but they are silent as to the degree of mental disturbance which will amount to a want of disposing mind and memory.

C The cases prior to *Waring v. Waring* (1), in which the law on the subject of mental unsoundness as affecting the capacity to make a will is considered, are by no means numerous. It may be as well to pass them in review. In *Combe's Case* (3), it is said to have been agreed by the judges

D "that sane memory for the making a will is not at all times, when the party can answer to anything with sense, but he ought to have judgment to discern, and to be of perfect memory, otherwise the will is void."

So, again, in the *Marquis of Winchester's Case* (4) (6 Co. Rep. at p. 23a) :

E "By the law it is not sufficient that the testator be of memory when he makes the will, to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason."

F In *Greenwood v. Greenwood* (5), an action brought to recover estates under a will the validity of which was disputed, the principal indication of insanity relied on being a strange aversion on the part of the testator towards his only brother, his heir-at-law, and a groundless suspicion of the latter having attempted to poison him, LORD KENYON, in charging the jury, said (3 Curt. App. at p. 30) :

G "I take it a mind and memory competent to dispose of his property, when it is a little explained perhaps may stand thus: having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will."

H In other cases, such as the well known case of *Dew v. Clark and Clark* (6), the insane delusion had a direct bearing on the provision of the will. In such cases, the delusion being once proved, and its connection with the will being manifest there could be no difficulty in setting aside the will. Cases of this description afford little or no assistance towards the solution of the question before us.

I Again, other cases occurring prior to *Waring v. Waring* (1), such as *A.-G. v. Parnter* (7), and *Cartwright v. Cartwright* (8), had reference to the effect to be given to a lucid interval at the time of making the will rather than to the degree of mental unsoundness, which would constitute testamentary incapacity. The judgment in the latter case is, however, not unworthy of attention. The case was a remarkable one from the fact that the will had been made by a person actually confined in a lunatic asylum who was undoubtedly insane both before and after the making of the will; nevertheless it was upheld. SIR WILLIAM WYNNE, then judge of the Prerogative Court of Canterbury, in giving judgment uses language tending strongly to show that, in his opinion, the rationality of the

act done affords an effectual test of the mental capacity of the party doing it. He says (1 Phillim. at pp. 100, 101):

"I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself. That I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from SWINBURNE states it to be so. The manner he has laid it down is (it is in the part in which he treats of what persons may make a will, SWINBURNE, part 2, s. 3), says he, the last observation is, 'If a lunatic person, or one that is beside himself at some times, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good. Yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet, nevertheless, I suppose that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' Unquestionably, there must be a complete and absolute proof that the party who had so framed it did it without any assistance. If the fact be so that he had done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentlemen could prove by any authority or law what the length of the lucid interval is to be, whether an hour, or a day, or a month. I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient."

Without going the length of adopting to its full extent what is here said as to the effect of the rational character, or at all saying that effect can be given to the rationality of the disposition beyond that which is due to it as evidence of the sanity of the testator, we advert to this case and the judgment of SIR WILLIAM WYNNE, as showing that a more indulgent view of insanity as affecting testamentary incapacity was then taken than has latterly prevailed.

We come to *Waring v. Waring* (1), since followed by that of *Smith v. Tebbitt* (2), in which the doctrine now contended for on behalf of the plaintiff was for the first time laid down. It may be shortly stated thus. To constitute testamentary capacity, soundness of mind is indispensably necessary; but the mind, though it has various faculties, is one and indivisible; if it is disordered in any one of these faculties, if it labours under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound; such a mind is unsound, and testamentary incapacity is the necessary consequence. As has already been observed, neither in *Waring v. Waring* (1), nor in *Smith v. Tebbitt* (2) was the doctrine thus laid down in any degree necessary to the decision. Both these were cases of general, not of partial, insanity; in both the delusions were multifarious and of the widest and most irrational character, abundantly indicating that the mind was diseased throughout. In both there was an insane suspicion or dislike of persons who should have been objects of affection, and, what is still more

A important, in both it was palpable that the delusions must have influenced the testamentary disposition impugned. In both these cases, therefore, there existed ample grounds for setting aside the will without resorting to the doctrine in question.

Unable to concur in it, we have felt ourselves at liberty to consider for ourselves the principle properly applicable to such a case as the present. We do not think it necessary to consider the position assumed in *Waring v. Waring* (1), that the mind is one and indivisible. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of man's sentient and intellectual being. But whatever may be its essence, everyone must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organisation. The instincts, the affections, the passions, the moral sense, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; that while the mind may be overpowered by delusions which utterly demoralise and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which—though the offspring of mental disease, and so far constituting insanity—leave the individual in all other respects rational and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt, when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound, just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though all its other members may be healthy, and their powers or functions unimpaired.

But the question still remains, whether such partial unsoundness, if it leaves the affections, the moral sense, and general power of the understanding unaffected, and is wholly unconnected with the testamentary disposition, must have the effect of taking away the testamentary capacity. We readily concede that where a delusion has had, as in the well-known case of *Dew v. Clark and Clark* (6), or is calculated to have, an influence on the testamentary disposition, it must be held fatal to its validity. Thus if, as occurs in a common form of monomania, a man is under a delusion that he is the object of persecution or attack, and makes a will in which he excludes a child for whom he ought to have provided, though he may not have adverted to that child as one of his supposed enemies, it would be but reasonable to infer that the unsound condition had influenced him in the disposal of his property. But in the case we are dealing with the delusions must be taken neither to have had any influence on the provisions of the will, nor to have been capable of having any; and the question is whether a delusion thus wholly innocuous in its results, as regards the dispositions of the will, is to be held to have had the effect of destroying the capacity to make one.

The state of our own authorities being such as we have shown, we have turned to the jurisprudence of other countries, as on a matter of common judicial interest, to see whether we could there find any assistance towards the solution of the question. We have, however, derived but little advantage from the inquiry. The Roman law, the great storehouse of juridical science, is as vague and general on the subject as our own. The madman (*furiosus*) and the person of deficient intelligence (*mente captus*) are declared incapable of making a testament; but as to what shall constitute madness or defectiveness of intelligence sufficient

to prevent the exercise of the testamentary right the authorities are silent. The continental codes are equally general in their terms, providing simply either that persons must be of sound mind to make a will, or that persons of unsound mind shall be disabled from doing so. A

The older writers appear not to have been alive to the distinction between total and partial unsoundness as affecting testamentary capacity. In recent times, however, the question has been mooted by eminent and distinguished jurists, but, unfortunately with a marked discordance of opinion. M. TROPLONG, in his great work, *LE DROIT CIVIL EXPLIQUE* (*Commentaire sur les donations entre-vifs et testaments*), vol. 2, ss. 451-7, and M. SACAZE, in a remarkable treatise, entitled *LA FOLIE CONSIDEREE SANS DES RAPPORTS AVEC LA CAPACITE CIVILE* (p. 16), have adopted the doctrine of the unity and indivisibility of the mind, and the consequent unsoundness of the whole if insane delusion anywhere exists, while writers equally entitled to respect have maintained the contrary view. C
LEGRAND DU SAULLE, in a remarkable work entitled *LA FOLIE DEVANT LES TRIBUNAUX* (p. 146), contends that

“hallucinations are not a sufficient obstacle to the power of making a will if they have exercised no influence on the conduct of the testator, have not altered his natural affections, or prevented the fulfilment of his social and domestic duties; while, on the other hand, the will of a person affected by insane delusion ought not to be admitted if he has disinherited his family without cause, or looked on his relations as enemies, has accused them of seeking to poison him, or the like; in all such cases where the delusion exercises a fatal influence on the acts of the person affected, the condition of the testamentary power fails, the will of the party is no longer under the guidance of the reason, it becomes the creature of the insane delusion.” D E

M. DEMOLOMBE, in his admirable work, the *COURS DE CODE NAPOLEON* (*Traité des donations entre-vifs et testaments*), liv. 3, tit. 2, s. 339, M. CASTLENAU, in his treatise, *SUR L'INTERDICTION DES ALIENES*, and HOFFBAUER, in his celebrated work on medical jurisprudence, relating to insanity, have maintained the doctrine that monomaniac, or partial, insanity, not affecting the testamentary disposition, does not take away the testamentary capacity. MAZZONI, in his recent work entitled *ISTITUZIONI DI DIRITTO CIVILE ITALIANO* (lib. 3, tit. 2, s. 3), lays it down that F G

“monomania is not an unsoundness of mind which absolutely and necessarily takes away testamentary capacity as the monomaniac may have the perfect exercise of his faculties in respect of all subjects beyond the sphere of his partial derangement.”

None of these writers, however, has gone very deeply into the subject, or considered it with reference to the principle on which mental alienation should be held to form a ground for taking away the capacity of testamentary disposition. The older jurists were content to say that an insane person was incapable of making a will because he had no mind “*quia mente caret*,” as it is said in the *INSTITUTES*, lib. 2, tit. 12, s. 1, or because he could not have a will, and, therefore, was incapable of declaring his ultimate will as to the disposal of his property, positions obviously unsatisfactory when the fact becomes recognised that a man may labour under harmless delusions which leave the other faculties of his mind unaffected, and leave him free to make a disposition of his property uninfluenced by their existence. In our day the doctrine has sprung up of the unity and indivisibility of the mind; but the ground on which insanity should cause incapacity appears to have become overlooked in the reasoning on which it is founded. It may be important to recall it. H I

The law of every civilised people concedes to the owner of property the right

A of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposition of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind in the vast majority of instances will lead men to

B make provision for those who are the nearest to them in kindred, and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right which the law secures to him. Hence

C arises a reasonable and well warranted expectation on the part of a man's kindred surviving him that on his death his effects shall become theirs, instead of being given to strangers. To disappoint the expectation thus created, and to disregard the claims of kindred to the inheritance, is to shock the common sentiment of mankind, and to violate what all men concur in deeming an obligation of the moral law. It cannot be supposed that in giving the power of

D testamentary disposition the law has been framed in disregard of these considerations. On the contrary, had they stood alone it is probable that the power of testamentary disposition would have been withheld, and that the disposition of property after the owner's death would have been uniformly regulated by the law itself. [But see now the Inheritance (Family Provision) Act, 1938: 32 HALSBURY'S STATUTES (2nd Edn.) 139.]

E There are other considerations which turn the scale in favour of the testamentary power. Among those who, as a man's nearest relatives, would be entitled to share the fortune he leaves behind, some may be better provided for than others; some may be more deserving than others; some from age, sex, or physical infirmity may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal

F authority finds a useful auxiliary; age secures the respect and attention which are one of its chief consolations. As was truly said by KENT, C., in *Van Alst v. Hunter* (9):

G "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due to his infirmities."

For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, and there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it. The law of every country has, therefore, conceded to the owner of property the right of disposing by will either of the whole, or at all events of a portion of that which he possesses. The Roman law, and that of the

I continental nations which have followed it, have secured to the relations of a deceased person, in the ascending and descending line, a fixed portion of the inheritance. The English law leaves everything to the unfettered discretion of the testator, on the principle that though in some instances caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence may lead to the neglect of claims that ought to be attended to, yet the instincts, affections, and common sentiments of mankind may be safely trusted to secure on the whole a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a

general law. [But see now Inheritance (Family Provision) Act, 1938: 32 A
HALSBURY'S STATUTES (2nd Edn.) 139].

It is unnecessary to consider whether the principle of the foreign law or that of
our own is the wiser. It is obvious in either case that to the due exercise
of a power involving a moral responsibility thus grave the possession of the
intellectual and moral faculties common to our nature should be insisted on as an
indispensable condition. It is essential to the exercise of such a power that a
testator shall understand the nature of the act and its effects; shall understand
the extent of the property of which he is disposing; shall be able to comprehend
and appreciate the claims to which he ought to give effect; and with a view to
the latter object that no disorder of the mind shall poison his affections, pervert
his sense of right, or prevent the exercise of his natural faculties; that no insane
delusion shall influence his will on disposing of his property, and bring about
a disposal of it which would not have been made otherwise. C

But we have here the measure of the degree of mental power which should
be insisted on. If the human instincts and affections or the moral sense be
perverted by mental disease, if insane suspicion or aversion take the place
of natural affection, if reason and judgment are lost and the mind becomes a prey
to insane delusions calculated to interfere with and disturb its functions and to
lead to a testamentary disposition due only to its baneful influence, in such a
case it is obvious that the condition of testamentary power fails, and that a will
made under such circumstances ought not to stand. But what if the mind,
though possessing sufficient power undisturbed by frenzy or delusion to take
into account all the considerations necessary to the proper making of a will
and producing a rational and proper will, should be subject to some delusions,
but a delusion which neither exercises nor is calculated to exercise any influence
on the particular disposition? Ought we in such case to deny to the testator
the capacity to dispose of his property by will? It must be borne in mind that
the absolute and uncontrolled power of testamentary disposition conceded by the
law is founded on the assumption that a rational will is a better disposition than
any that can be made by the law itself. If, therefore, though mental disease
may exist, it presents itself in such a degree and form as not to interfere with
the capacity to make a rational disposition of property, why, it may well be asked,
should it be held to take away the right? It cannot be the object of the
legislator to aggravate an affection in itself so great by the deprivation of a
right, the value of which is universally felt and acknowledged. If it be con-
ceded, as we think it must be, that the only legitimate or rational ground
for denying testamentary capacity to persons of unsound mind, is the inability
to take into account and give due effect to the considerations which ought to be
present to the mind of a testator in making his will and influence his decision as
to the disposal of his property, it follows that a degree or form of unsoundness
which neither disturbs the exercise of the faculties necessary for such an act,
nor is capable of influencing the result, ought not to take away the power of
making a will or place a person so circumstanced in a less advantageous
position than others with regard to his rights. H

It may be here not unimportant to advert to the law relating to unsoundness of
mind arising from another cause, namely, from want of intelligence arising
from defective organisation, or from supervening physical infirmity or the decay
of advancing age, as distinguished from mental derangement, such defect of
intelligence being equally a cause of incapacity. In these cases it is admitted on
all hands that, though the mental power may be reduced below the ordinary
standard, yet, if there be sufficient intelligence to understand and appreciate the
testamentary act in its different bearings, the power to make a will remains.
It is enough if, to use the words of SIR EDWARD WILLIAMS in his work on
EXECUTORS, if "the mental faculties retain sufficient strength fully to comprehend
the testamentary act about to be done." In his COMMENTARY ON THE PANDECTS, I

A lib. 28, tit. 1, s. 36, founding himself on CODE, book 6, tit. 23, l. 15, VOET says :

“Non sani tantum, sed et in agone mortis positi, seminece ac balbutiente lingua voluntatem promentes, recte testamenta condant si modo mente adhuc valeant.”

B in the American courts. In *Harrison v. Rowan* (10), referred to in *Sloan v. Maxwell* (11), the law was thus laid down by the presiding judge :

C “As to the testator’s capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men at different periods of their lives have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new.”

F In a subsequent case of *Den v. Vancleve* (12), the law was thus stated :

G “By the terms ‘a sound and disposing mind and memory,’ it has not been understood that a testator must possess these qualities of the mind in the highest degree, otherwise very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done, for even this would disable most men in the decline of life. The mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things, and all those circumstances which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory.”

H In the same case it is said :

I “The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect: it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the faculties of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength

of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

This view of the law is fully adopted by the court in *Sloan v. Maxwell* (11), and is there stated to have been approved by VROOM, C., in a case as to the will of Tace Wallace which, however, is not reported. It appears to have had the sanction of KENT, C., in *Van Alst v. Hunter* (9), already referred to. In *Harwood v. Baker* (13), in which a will had been executed by a testator on his deathbed in favour of a second wife to the exclusion of the other members of his family he being in a state of weakness and impaired capacity from disease, producing torpor of the brain and rendering his mind incapable of exertion unless roused, ERSKINE, J., delivered the judgment of the Judicial Committee of the Privy Council in these terms (3 Moo. P.C.C. at p. 291):

"Their Lordships are of opinion that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property and the nature of the claims of others, whom by his will he is excluding from all participation in that property, and that the protection of the law is in no cases more needed than it is in those cases where the mind has been too much enfeebled to comprehend more objects than one; and more especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration. And therefore the question which their Lordships propose to decide in this case is not whether Mr. Baker knew when he executed his will that he was giving all his property to his wife and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice of the disposition might cast some light upon the question as to his capacity."

From this language it is to be inferred that the standard of capacity in cases of impaired mental power is, to use the words of the judgment, the capacity to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding. Why should not this standard also be applicable to cases of mental unsoundness produced by mental disease? It may be said that the analogy between the two cases is imperfect; that there is an essential difference between unsoundness of mind arising from congenital defect or supervening infirmity, and the perversion of thought and feeling produced by disease of the mind itself, the latter being far more likely to give rise to an inofficious will than the mere deficiency of mental power. This is no doubt true; but it becomes immaterial on the hypothesis that the disorder of the mind has left the faculties

A on which the proper exercise of the testamentary power depends unaffected, and that a rational will, uninfluenced by the mental disorder, has been the result.

No doubt, when the fact that a testator has been subject to any insane delusion is established, a will must be regarded with great distrust, and every presumption should in the first instance be made against it. In the case at Bar this was pointed out to the jury, and there is no objection to the summing-up on this ground.

B When insane delusion has once been shown to have existed, it is difficult to say how much further the mental disorder extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property, and the presumption against a will, made under such circumstances, becomes additionally strong where the will is, to use the term of the

C civilians, an inofficious one, that is to say, one in which natural affection and the ties of near relationship have been disregarded. But where a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect on the testator's will, we can see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty, and require much nicety of discrimination, but we see no reason to think that such a question is beyond the power of judicial inquiry and determination, or may not be disposed of by a jury, directed and guided by a judge.

E In the case before us, two delusions disturbed the mind of the testator, the one that he was pursued by spirits, the other that a man, long since dead, came personally to molest him. Neither of these delusions—the dead man not having been in any way connected with him—had, or could have, any influence upon him in disposing of his property. The will, though, in one sense, an idle one, inasmuch as the object of his bounty was his heir-at-law who would have taken the property without its being devised to her, was yet rational in this, that

F it was made in favour of his niece, who lived with him, and who was the object of his affection and regard. We must take it, on the finding of the jury, that, irrespectively of the question of these dormant delusions, the testator was in possession of his faculties when the will was executed. Under these circumstances, we see no reason for holding the will to be invalid. If, indeed, it had been possible in this case to connect the dispositions of the will with the delusions

G of the testator, the form in which the case was left to the jury might have been open to exception. It may be, as was contended on the part of the plaintiff, that in a case of unsoundness founded on delusion, but which delusion was not manifested at the time of making the will, it is a question for the jury whether the delusion was not latent in the mind of the testator. But, then, for the reasons we have given in the course of this judgment, we are of opinion that a jury should

H be told in such a case that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it. This effectually disposes of the question of misdirection.

I As, for the reasons we have given, we are of opinion that, if the testator was, at the time of making the will, of capacity to make a will, as defined by the learned judge, the existence of such a disease, if latent, so as to leave him free from the consciousness and influence of delusion, would not overthrow the will, it follows that, there having been here a total absence of all connection between the delusion and the will, there can have been, practically speaking, no misdirection. If the delusion had been of such a nature as was calculated to influence the testator in making the particular disposition, as was the case in *Waring v. Waring* (1), and in *Smith v. Tebbitt* (2), a jury would not in general be justified in coming to the conclusion that the delusion, still existing, was latent at the time, so as to leave the testator free from any influence arising

from it; but in the case at Bar, the disposition was quite unconnected with the delusions, and consequently there is no reason to suppose that the omission to call the attention of the jury to this specifically, at all affected the verdict. Looking to the evidence given on the trial, and to the verdict of the jury, it appears to us that if this case were submitted to another jury, whatever they might find on the first point, their decision must be in favour of the will on the second. It would consequently be worse than useless to put the parties to the expense of a new trial, when, in our judgment, the only proper or possible result must be a second verdict establishing the will.

Rule discharged.

HAMMERSMITH AND CITY RAIL. CO. v. BRAND AND WIFE

[House of Lords (Lord Chelmsford, Lord Colonsay and Lord Cairns), July 3, 6, 1868, July 13, 1869]

[Reported L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238;
34 J.P. 36; 18 W.R. 12]

Compulsory Purchase—Railway—Compensation—Damage to house—Vibration caused by passage of trains over lines.

A house belonging to the appellants, which was adjacent to a railway, was damaged owing to the vibration caused by the passage of trains over the lines in the ordinary use of the railway without any negligence on the part of the railway company. The house having depreciated in value, the appellants claimed compensation from the railway company.

Held (by LORD CHELMSFORD and LORD COLONSAY, LORD CAIRNS dissenting): there was nothing in the Lands Clauses Consolidation Act, 1845, nor in the Railways Clauses Consolidation Act, 1845, which entitled the appellants to compensation.

Notes. Considered: *City of Glasgow Union Rail. Co. v. Hunter* (1870), L.R. 2 Sc. & Div. 78; *Smith v. London and South Western Rail. Co.* (1870), L.R. 6 C.P. 14. Distinguished: *R. v. Combrian Rail. Co.* (1871), L.R. 6 Q.B. 422. Considered: *Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418. Distinguished: *Great Western Rail. Co. v. Smith* (1876), 2 Ch.D. 235. Applied: *Hopkins v. Great Northern Rail. Co.* (1877), 2 Q.B.D. 224. Considered: *Smith v. Midland Rail. Co. and Lancashire and Yorkshire Rail. Co.* (1877), 37 L.T. 224; *Metropolitan Asylum District Managers*, [1881-5] All E.R. Rep. 536; *Caledonian Rail. Co. v. Walker's Trustees*, [1881-5] All E.R. Rep. 592; *Lea Conservancy Board v. Hertford Corpn.* (1884), 48 J.P. 628; *London, Brighton and South Coast Rail. Co. v. Truman*, [1881-5] All E.R. Rep. 134; *Cowper Essex v. Acton Local Board*, [1886-90] All E.R. Rep. 901. Applied: *A.-G. v. Metropolitan Rail. Co.*, [1894] 1 Q.B. 394. Distinguished: *Long Eaton Recreation Grounds Co. v. Midland Rail. Co.* (1901), 71 L.J.K.B. 74. Considered: *Canadian Pacific Rail. Co. v. Roy*, [1902] A.C. 220. Distinguished: *Edinburgh Water Trustees v. Sommerville* (1906), 95 L.T. 217. Considered: *Fletcher v. Birkenhead Corpn.*, [1904-7] All E.R. Rep. 324. Applied: *Toronto Corpn. v. Toronto Rail. Co.*, *Toronto Rail. Co. v. Toronto Corpn.*, [1907] A.C. 315. Considered: *Price's Patent Candle Co. v. London County Council*, [1908] 2 Ch. 526. Distinguished: *R. v. Fulham Gardens* (1909), 7 L.G.R. 881.

- A** Considered: *Coldman v. Hill*, [1919] 1 K.B. 443; *Rockingham Sisters of Charity v. R.*, [1922] 2 A.C. 315. Referred to: *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 129, n.; *Jones v. Stanstead, Shefford and Chamblay Rail. Co.* (1872), L.R. 4 P.C. 98; *R. v. Sheward* (1882), 9 Q.B.D. 741; *R. v. Local Government Board and Taylor* (1882), 52 L.J.M.C. 4; *R. v. Esser* (1886), 17 Q.B.D. 447; *Parkdale Corpn. v. West* (1887), 12 App. Cas. 602; *North Shore Rail. Co. v. Pion* (1889), 14 App. Cas. 612; *Holliday v. Wakefield Corpn.*, [1891] A.C. 81; *Dixon v. Metropolitan Board of Works*, [1891] 7 Q.B.D. 418; *Meux's Brewery Co. v. City of London Electric Lighting Co.*, *Sheller v. Same* (1894), 72 L.T. 34; *Emsley v. North Eastern Rail. Co.*, [1896] 1 Ch. 418; *Kirby v. Harrowgate School Board*, [1896] 1 Ch. 437; *Southwark and Vaurhall Water Co. v. Wandsworth Board of Works*, [1895-90] All E.R. Rep. 422; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614; *Canadian Pacific Rail. Co. v. Parke*, [1899] A.C. 535; *Dawson v. Great Northern and City Rail. Co.*, [1904-7] All E.R. Rep. 913; *Dibden v. Skirrow*, [1907] 1 Ch. 437; *Horton v. Colwyn Bay and Colwyn Urban District Council*, [1908] 1 K.B. 327; *West v. Bristol Tramways Co.*, [1908-10] All E.R. Rep. 215; *Grand Trunk Pacific Rail. Co. v. Fort William Land Investment Co.*, [1912] A.C. 224; *Board of Agriculture for Scotland v. Plummer*, [1916] 1 A.C. 675; *Quebec Railway, Light, Heat and Power Co. v. Vandry*, [1920] A.C. 662; *Manchester Corpn. v. Farnworth*, [1929] All E.R. Rep. 90; *Re Simeon*, [1937] 3 All E.R. 149; *Re Carlton and Re the Nationalization Act, 1870*, [1945] 1 All E.R. 559; *R. v. Surrey (North Eastern Area) Assessment Committee*, [1947] 2 All E.R. 276; *Marriage v. East Norfolk Rivers Catchment Board*, [1949] 2 All E.R. 1021; *Qualter, Hall & Co. v. Board of Trade*, [1961] 3 All E.R. 389.

As to compensation on compulsory purchase of land, see 10 HALSBURY'S LAWS (3rd Edn.) 91 et seq.; and for cases see 11 DIGEST (Repl.) 124 et seq. For the Lands Clauses Consolidation Act, 1845, see 3 HALSBURY'S STATUTES (2nd Edn.) 890, and for the Railways Clauses Consolidation Act, 1845, see *ibid.*, vol. 19, p. 590.

F Cases referred to:

- (1) *Ricket v. Metropolitan Rail. Co. (Directors, etc.)* (1867), L.R. 2 H.L. 175; 36 L.J.Q.B. 205; 16 L.T. 542; 31 J.P. 484; 15 W.R. 937, H.L.; 11 Digest (Repl.) 150, 281.
- (2) *Re Penny* (1857), 7 E. & B. 660; 26 L.J.Q.B. 225; 3 Jur.N.S. 957; 5 W.R. 612; 119 E.R. 1390; sub nom. *R. v. South Eastern Rail. Co.*, 29 L.T.O.S. 124; 11 Digest (Repl.) 156, 310.
- (3) *Caledonian Rail. Co. v. Ogilvy* (1855), 25 L.T.O.S. 106; 2 Macq. 229, H.L.; 11 Digest (Repl.) 149, 276.
- (4) *R. v. Pease* (1832), 4 B. & Ad. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366; 38 Digest (Repl.) 39, 205.
- (5) *Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 38 Digest (Repl.) 13, 54.
- (6) *Broadbent v. Imperial Gas Co.* (1857), 7 De G.M. & G. 436; 26 L.J.Ch. 276; 28 L.T.O.S. 329; 21 J.P. 117; 3 Jur.N.S. 221; 5 W.R. 272; 44 E.R. 170, L.C.; on appeal sub nom. *Imperial Gas Light and Coke Co. v. Broadbent* (1859), 7 H.L.Cas. 600; 29 L.J.Ch. 377; 34 L.T.O.S. 1; 23 J.P. 675; 5 Jur.N.S. 1319; 11 E.R. 239, H.L.; 11 Digest (Repl.) 142, 221.
- (7) *Armory v. Delamirie* (1722), 1 Stra. 505; 93 E.R. 664; 3 Digest (Repl.) 67, 83.
- (8) *Caledonian Rail Co. v. Sprot* (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 11 Digest (Repl.) 175, 434.

Also referred to in argument:

- Bryan v. Child* (1850, 5 Exch. 368; 1 L.M. & P. 429; 19 L.J.Ex. 264; 15 L.T.O.S. 232; 14 Jur. 510; 42 Digest 654, 635.

- Eastern Counties and London and Blackwall Rail. Cos. v. Marriage* (1860), 9 H.L. Cas. 32; 31 L.J.Ex. 73; 3 L.T. 60; 7 Jur.N.S. 53; 8 W.R. 748; 11 E.R. 639, H.L.; 11 Digest (Repl.) 107, 30. A
- Mumford v. Worcester and Wolverhampton Rail. Co.* (1856), 1 H. & N. 34; 25 L.J.Ex. 265; 27 L.T.O.S. 58; 156 E.R. 1107; sub nom. *Mountford v. Oxford, Worcester and Wolverhampton Rail. Co.*, 4 W.R. 457; 38 Digest (Repl.) 398, 597. B
- Re Stockport, Timperley and Altrincham Rail. Co.* (1864), 33 L.J.Q.B. 251; 10 Jur.N.S. 614; sub nom. *R. v. Cheshire (Clerk of the Peace)*, 4 New Rep. 167; 12 W.R. 762; sub nom. *Leigh v. Stockport, Timperley and Altrincham Rail. Co.*, 10 L.T. 426; 11 Digest (Repl.) 143, 226.
- Jones v. Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733; 9 B. & S. 835; 37 L.J.Q.B. 214; 18 L.T. 902; 32 J.P. 693; 17 W.R. 28; 38 Digest (Repl.) 400, 613. C
- Soltau v. De Held* (1851), 2 Sim.N.S. 133; 21 L.J.Ch. 153; 16 Jur. 326; 61 E.R. 291; 36 Digest (Repl.) 256, 68.
- Walter v. Selve* (1851), 4 De G. & Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; 36 Digest (Repl.) 247, 1. D
- Bamford v. Turnley* (1862), 3 B. & S. 66; 31 L.J.Q.B. 286; 6 L.T. 721; 9 Jur.N.S. 377; 10 W.R. 803; 122 E.R. 27, Ex. Ch.; 36 Digest (Repl.) 262, 123.
- Elliotson v. Feetham* (1835), 2 Bing. N.C. 134; 1 Hodg. 259; 2 Scott, 174; 132 E.R. 53; 19 Digest (Repl.) 195, 1354.
- R. v. Moore* (1832), 3 B. & Ad. 184; 1 L.J.M.C. 30; 110 E.R. 68; 36 Digest (Repl.) 345, 856. E
- Crowder v. Tinkler* (1816), 19 Ves. 617; 34 E.R. 645, L.C.; 28 Digest (Repl.) 785, 349.
- Glover v. North Staffordshire Rail. Co.* (1851), 16 Q.B. 912; 20 L.J.Q.B. 376; 17 L.T.O.S. 73; 15 Jur. 673; 117 E.R. 1132; 11 Digest (Repl.) 154, 301.
- R. v. Eastern Counties Rail. Co.* (1841), 2 Q.B. 347; 2 Ry. & Can. Cas. 736; 1 Gal. & Dav. 589; 11 L.J.Q.B. 66; 6 Jur. 557; 114 E.R. 136; 16 Digest (Repl.) 375, 1561. F
- Lee v. Milner* (1837), 2 Y. & C. Ex. 611; 160 E.R. 540; 38 Digest (Repl.) 10, 32.
- Lawrence v. Great Northern Rail. Co.* (1851), 16 Q.B. 643; 6 Ry. & Can. Cas. 656; 20 L.J.Q.B. 293; 17 L.T.O.S. 39; 15 Jur. 652; 117 E.R. 1026; 38 Digest (Repl.) 24, 120. G
- Chamberlain v. West End of London and Crystal Palace Rail. Co.* (1863), 2 B. & S. 617; 2 New Rep. 182; 32 L.J.Q.B. 173; 8 L.T. 149; 9 Jur.N.S. 1051; 11 W.R. 472; 121 E.R. 1202, Ex. Ch.; 11 Digest (Repl.) 150, 278.
- London and North Western Rail Co. v. Bradley* (1851), 3 Mac. & G. 336; 6 Ry. & Can. Cas. 551; 15 Jur. 639; 42 E.R. 290, L.C.; 11 Digest (Repl.) 157, 326. H
- East and West India Docks and Birmingham Junction Rail. Co. v. Gatlke* (1851), 3 Mac. & G. 155; 6 Ry. & Can. Cas. 371; 20 L.J.Ch. 217; 17 L.T.O.S. 85; 15 Jur. 261; 42 E.R. 220, L.C.; 11 Digest (Repl.) 140, 215.
- Gardner v. London, Chatham and Dover Rail. Co. (No. 1); Drawbridge v. Same; Gardner v. Same (No. 2); Imperial Mercantile Credit Association v. Same* (1867), 2 Ch. App. 201; 36 L.J.Ch. 323; 15 L.T. 552; 31 J.P. 87; 15 W.R. 325, L.J.J.; 11 Digest (Repl.) 303, 2094. I
- East Anglian Railways Co. v. Eastern Counties Rail. Co.* (1851), 11 C.B. 775; 7 Ry. & Can. Cas. 150; 21 L.J.C.P. 23; 18 L.T.O.S. 138; 16 Jur. 249; 138 E.R. 680; 38 Digest (Repl.) 382, 510.
- Gage v. Newmarket Rail. Co.* (1852), 18 Q.B. 457; 7 Ry. & Can. Cas. 168; 21 L.J.Q.B. 398; 19 L.T.O.S. 155; 16 Jur. 1136; 118 E.R. 173; 11 Digest (Repl.) 181, 479.

A Appeal from a decision of the Court of Exchequer Chamber reversing the judgment of the Court of Queen's Bench in favour of the appellants.

The action was brought by the respondents against the appellants to recover £272 which had been assessed by a jury under the provisions of the Lands Clauses Consolidation Act, 1845, as compensation to the respondent, Mary Christiana Louisa, before her marriage with the other respondent, for damage occasioned **B** to a house and land, to which she was entitled, by vibration from the use of the appellants' railway, together with interest on the said sum. The claim in respect of which this sum of £272 was assessed, was one of three heads of claim made in respect of the damage mentioned. The appellants admitted the other two heads of claim, and paid the amounts awarded in respect of them, but they contended that the damage in respect of which the sum of £272 was assessed **C** could not be the subject of compensation, and that no claim was maintainable against them in respect thereof.

By consent of the parties the question was stated for the opinion of the Court of Queen's Bench in the form of a Special Case. The Court of Queen's Bench (MELLOR and LUSH, JJ.), gave judgment for the appellants (L.R. 1 Q.B. 130). The respondents then brought error in the Court of Exchequer Chamber, which gave judgment by a majority of three to one (BRAMWELL, B., KEATING and SMITH, JJ., CHANNELL, B., dissentiente), reversing the judgment of the Queen's Bench (L.R. 2 Q.B. 230). The appellants appealed to the House of Lords, and WILLES, BLACKBURN, KEATING and LUSH, JJ., BRAMWELL and PIGOTT, BB., were summoned to advise their lordships.

E Sir John Karslake, Q.C., Russell, Q.C., and Digby for the appellants.
Sir Roundell Palmer, Q.C., Mellish, Q.C., and Dixon for the respondents.

After the arguments of counsel the following question was referred to the judges: Were the respondents entitled to have compensation made to them by the appellants for the vibration in respect of which damages were assessed by the jury? There was a difference of opinion among the judges, WILLES, KEATING and LUSH, JJ., and PIGOTT, B., answering the question in the affirmative, and **F** BLACKBURN, J., and BRAMWELL, B., in the negative.

Their Lordships took time for consideration.

July 13, 1869. The following opinions were read.

G LORD CHELMSFORD.—This is a proceeding in error upon a judgment in the Court of Exchequer Chamber, reversing a judgment of the Court of Queen's Bench, in favour of the appellants upon a Special Case. The question raised for the opinion of the court below was whether the respondents, plaintiffs in the action, who are owners of the house adjacent to the Hammersmith and City Railway, were entitled to compensation from the railway company for injury to their **H** house from the vibration caused by the passage of trains over the lines in the ordinary use of the railway without negligence, whereby the house was depreciated in value to the extent, as found by a jury, of £272.

It is necessary in the outset of the consideration of this case to point out that the question is confined to the injury arising from the vibration, because **I** LUSH, J., in the Court of Queen's Bench stated that the question was whether the owners of the house were entitled to compensation "for vibration, noise, and smoke"; and SIR WILLIAM ERLE, who heard the whole of the argument in the Exchequer Chamber, but retired from the Bench before the judgment was delivered in that court, assumed that the compensation was given for noise and smoke, as well as for vibration, and stated that

"there was nothing to indicate what was the degree of noise, smoke, or vibration, or what was the amount assessed for either of these causes separately; and there was no evidence of any damage to the realty, either

in structure or otherwise, from these causes, so that the compensation must be taken to have been given for the supposed discomfort of the inmates of the house."

The Special Case, however, expressly states, with reference to this head of claim, that the jury assessed the amount of compensation, "for vibration from the use of the railway after construction," at £272.

There has been great difference of opinion among the judges of the courts below in this case and those whose assistance your Lordships had are not unanimous in their answers to the questions put to them. It must, therefore, be regarded as one of nicety and difficulty. It must be borne in mind that this is not a case in which it was possible to claim compensation before the construction of the railway, nor, indeed, till after its working had commenced, because till then it could not be known whether there would be any vibration injurious to the house occasioned by the passing of the trains. The simple question, therefore, is whether the legislature has provided compensation for any damage to land or houses not arising from negligence, but the inevitable consequence of the proper and ordinary use of the railway. As an introduction to this question, I must repeat what I said in *Ricket v. Metropolitan Rail. Co. (Directors, etc.)* (1) (L.R. 2 H.L. at p. 187):

"The criterion of a party's right to damages under the clauses of the Railway and Companies Acts . . . is correctly stated by LORD CAMPBELL in *Re Penny* (2) . . . that 'unless the particular injury would have been actionable before the company had acquired their statutory power, it is not an injury for which compensation can be claimed.'"

To which I must add, as I added there, the observation of my late noble and learned friend LORD CRANWORTH, in *Caledonian Rail. Co. v. Ogilvy* (3)

"that it does not follow that a party would have a right to compensation in some cases in which, if the Act of Parliament had not passed there might have been not only an indictment, but a right of action."

Assuming that before the passing of their Act the company would have been liable to an action for the injury caused to the plaintiff's house, it is necessary for the plaintiffs in the first place to establish that the company's Act has taken away the remedy by action in order to open the way of their claim to compensation. If *R. v. Pease* (4) and *Vaughan v. Taff Vale Rail. Co.* (5) were rightly decided, this question has been determined. It was established by those cases,

"that when the legislature has sanctioned the use of a locomotive engine there is no liability for any injury caused by using it so long as every precaution is taken consistent with its use."

BRAMWELL, B., in his answer to the question put by your Lordships to the judges, adverting to the above cases, said:

"With great respect, I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question."

He then reasoned from the Act of the company in this manner:

"The 86th section [of the Railways Clauses Consolidation Act, 1845], which gives the company the right to be carriers on their own line, is preceded by a heading, 'With respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon.' There is not a word in this heading as to the legalising or allowing of nuisances. The company wanted no power to enable them to use a locomotive. A man may

A use a locomotive on his soil and freehold, and so may a corporation. They do not possess the power to use it so as to be a nuisance to their neighbours. If this were intended to be given where are the words? The words are sufficient if meant to give vires ultra those of a company to make a railway, but insufficient if meant to authorise the doing of damage."

B With great respect to the learned baron, we do not expect to find words in an Act of Parliament expressly authorising an individual or a company to commit a nuisance or to do damage to a neighbour. Section 86 of the Act of 1845 gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses, upon the principle of law that cuicumque aliquis quid concedit concedere videtur et id, sine quo res ipsa esse non potuit, it must be taken that power is given to cause that vibration without liability to an action. The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighbourhood, actions might be brought by their owners which would soon put a stop to the use of the railway. I, therefore, think, notwithstanding the respect to which every opinion of BRAMWELL, B., is entitled, that *R. v. Pease* (4) and *Vaughan v. Taff Vale Rail. Co.* (5), were rightly decided.

D The respondents' remedy by action being taken away, the question remains whether they are entitled to receive compensation from the company for the injury done to their house, a question which must be decided entirely by the provisions of the Acts of Parliament relating to the subject. It must be taken
E as an established fact that by the use of the railway the respondents' house has been depreciated in value to the extent of £272, and, as they cannot recover in respect of the damage they have sustained by action, one naturally feels a wish to find that the legislature has not left them remediless, but has provided for them the means of redress in the shape of compensation to be paid by the company as the price of the right given to them to injure the respondents' property. It is with this disposition that I entered upon an examination of the sections of the Acts to which your Lordships' attention was called in the argument, and I may say that it was with regret I was unable to find anything in them upon which, in my opinion, the claim to compensation can be established. It is not that the legislature has excluded compensation for injury arising as the necessary consequence of using the railway, but that it has not, as far as I can discover, given any right to claim compensation for this species of injury.

G The sections of the Railways Clauses Consolidation Act, 1845, which appear to me to be alone necessary to be considered are s. 6 and s. 16. I do not think that the sections of the Lands Clauses Consolidation Act, 1845, which were referred to in the argument [ss. 22, 48, 49, 68, 69, 73], are applicable. The sections of the Railways Clauses Consolidation Act are, as your Lordships know, arranged in order under different headings, which indicate the general object of the provisions immediately following; and these may be usefully referred to to determine the sense of any doubtful expression in a section ranged under a particular heading. The heading to s. 6 and all the subsequent sections down to s. 30, including, of course, s. 16, is, "And with respect to the construction of the railway and the works connected therewith, be it enacted as follows."
I Therefore, all the sections, to which this heading applies, must be taken to have been intended by the legislature to provide for matters relating to "the construction of the railway, and the works connected therewith." Section 6 seems more closely to confine its provisions to these objects, for it begins by enacting:

"In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and

in the Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of, and all other persons interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act incorporated therewith, vested in the company . . ."

It was argued by the respondents that the injury occasioned to the house from the vibration caused by the use of the railway came within the words "injuriously affected by the construction thereof," or, at all events, that it was a damage sustained "by reason of the exercise of the powers vested in the company."

As to the words "by the construction thereof," it seems to me that it would be doing violence to language (even without the limitation which is placed upon these words by the general heading to s. 6 and the following sections, and the context of the section itself), to extend them to any damage which is not the immediate consequence of the construction of the railway. An instance of damage of this sort occurs in this very case, for the jury gave the plaintiffs compensation to the amount of £836 for obstruction of light, air, and doorway. To argue that, as the damage could not have occurred unless the railway had been previously constructed, therefore, it was caused "by the construction thereof," is certainly a strong example of the illogical reasoning of *post hoc ergo propter hoc*, and would extend to every accident or injury occurring upon the railway after its construction, which, of course, could not have happened if it had not been constructed. With respect to the subsequent words in s. 6, "damage sustained by reason of the exercise of the powers vested in the company," it was argued that they embrace the claim of the respondents because the powers vested in the company are not merely for the construction of a railway, but also for the use of it after its construction, being the end and object for which it is made. But again we must refer to the heading of this and the following sections which limits the provisions they contain, to "the construction of the railway and the works connected therewith." Reading the words of the section with reference to these objects, we find that compensation is to be made to the owners, etc., of lands taken or used for the purposes of the railways, or injuriously affected by the construction thereof for damage sustained (not as regards such lands, but) "by reason of the exercise, as regards such lands, of the powers vested in the company." The powers vested in the company "as regards such lands," are to take and use the lands for the purposes of the railway, and to say that the use of the railway after its construction is one of the powers vested in the company in regard to the lands conveys to my mind no intelligible meaning.

Section 6 of the Railways Clauses Consolidation Act being inapplicable to the plaintiff's claim, we must turn to s. 16 to see whether it affords any countenance to it. Section 16, as already observed, is one of the sections ranged under the heading which immediately precedes s. 6. As the words "using the railway" are found in it, great stress is laid upon it in favour of the plaintiffs' claim to compensation. It must be observed that this section begins with the words

"it shall be lawful for the company, for the purpose of constructing the railway, or accommodation works connected therewith hereinafter mentioned, to execute any of the following works."

Then follows a specification of different works in detail empowered to be done for the purposes mentioned, ending with a general power to do "all other acts necessary for making, maintaining, altering, or repairing, and using the railway." The section then provides:

"In the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction . . .

A to all parties interested, 'for all damage by them sustained by reason of the exercise of such powers'."

Counsel for the respondents argued that this proviso comprehended every description of damage sustained by reason of the exercise of the powers vested in the company, that power is given to them by s. 86 of the Act to use and employ locomotive engines upon the railway, and that the injury to the respondents arose from the use of such locomotive engines, and, therefore, was sustained by reason of the exercise of the company's powers. It appears to me that this argument claims for the proviso in s. 16 a wider application than is warranted by the purview of the section. The powers specifically conferred by it are expressly referred and limited to the purpose of "constructing the railway." The general power to do all other acts, etc., must be read with reference to this object. If this mode of construing the section by the context is adopted, there will be no difficulty in understanding the words, "all other acts necessary for using the railway," to mean that in constructing the railway the company may do all acts necessary to enable them to use the railway.

D This construction appears to me to be aided by the words which are found in juxtaposition with the word "using," viz., "making, maintaining, altering, and repairing," and it seems to me rather a forced interpretation of language to say that the words the company "may do all other acts necessary for using the railway," mean that they may do all necessary acts in using the railway. I think that the proviso must be limited to the powers conferred by the section, and that it is only if in the exercise of these powers damage is sustained, that satisfaction is to be made. The section itself having empowered the company to perform certain works for the purpose of constructing the railway, the proviso in the Act that "in the exercise of the powers" they shall do "as little damage as can be," clearly points to the execution of the works to which this section relates, and confines the satisfaction to be made for damage done in exercising those powers. It appears to me that in the reasonable construction of this section it is impossible to hold that it gives any remedy to the respondents for damage occasioned to their house in the course of using the railway. There being no other legislative provision upon which the respondents' claim to compensation can be founded, except ss. 6 and 16 of the Railways Clauses Consolidation Act, which I have fully considered and shown not to apply to that species of damage of which they complain, I am compelled very reluctantly, in a case where real damage has been sustained though not to a very large amount, to come to the conclusion that the legislature has not provided for their case, but has left them without remedy, and that the judgment of the Court of Exchequer Chamber ought, therefore, to be reversed.

H LORD COLONSAY.—I have, I confess, found this case to be attended with much difficulty, and I think I need not refrain from stating that fact when I find that there has been so much difference of opinion in regard to it among the judges who have decided it in the other courts, and there is even a difference of opinion among your Lordships.

I The case arises out of a claim made by a party for injury to her property, resulting from vibration caused by the use of the railway belonging to the appellants. The claim is rested on the provisions contained in certain statutes, and depends on the construction to be put on those provisions. Two general Acts have been referred to, and the special Railway Act, but I do not understand that under the special Act there is any particular clause that can affect the judgment to be pronounced in this case. The two general Acts that have been referred to are the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, both of which are held to be incorporated in the special Railway Act. It is, I think, upon the provisions of the two general

Acts that the question depends. One of those general Acts, to wit, the Lands Clauses Consolidation Act has, I humbly venture to think, only an indirect bearing on the question. No land belonging to the respondent, or in which she was interested, was taken or touched by the railway. Her case is not directly within the provisions, as I read them, of that Act. I think it is very clear that, unless it is within the provisions of s. 68 of that Act, it is not within the provisions of the Act at all. Nevertheless, in reading the Railways Clauses Consolidation Act, on which I think the claim of the respondent must be rested, it is not illegitimate to borrow such light as can be got from the language of the Lands Clauses Consolidation Act, passed at the same time as, and intended to be co-operative with, the Railways Clauses Consolidation Act, repeatedly referred to in, and intended to be incorporated in, the special Act for making the railway.

When I said that I do not think that the Lands Clauses Consolidation Act bears on this claim otherwise than indirectly, I may explain that it appears to me that the object of the Lands Clauses Consolidation Act is to give a power to parties engaged in this species of public undertakings to acquire lands. The preamble of the Act says that,

"Whereas it is expedient to comprise in one general Act sundry provisions usually introduced into the Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for ensuring uniformity in the provisions themselves . . ."

Then it goes on to enact, with regard to the purchase of lands for such undertakings. The Act is classed under various divisions, an early one of which is, "with respect to the purchase of lands by agreement." That begins with s. 6 and ends with s. 15. There is then another heading: "And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." Another heading, which precedes s. 69, is: "With respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, be it enacted as follows." Before s. 81 there is another heading: "And with respect to the conveyances of land, be it enacted as follows." Before s. 84: "And with respect to the entry upon lands by the promoters of the undertaking, be it enacted as follows." And so on with regard to various matters as to lands.

I am not speaking at present of s. 68 of the Act; but all the other sections are applicable to the promoters of the undertaking, and to the parties from whom lands are to be taken. There is no other class of persons contemplated in that statute. It is not a statute authorising the execution of any particular kind of works. It is a statute only as to the taking of land. It is intended to regulate the interests of the parties who take the lands, and of the parties to whom the lands belong, or who are interested in the lands to be taken. It provides on behalf of the parties whose lands are to be taken, not only that they are to receive the value of the lands so taken from them, but also that they are to be compensated for the injury done to any lands held along with such lands, whether by severance or any other injury done to them, but it is all with reference to the parties, whose lands are to be taken, or who are interested in lands to be taken. The sections which were specially referred to in the argument were ss. 18, 21, 38, 49, 63 and 68, and it will be seen that throughout the whole of them the matter to be dealt with is the interests of the parties from whom the lands are taken or who are interested in those lands, and the interests of the promoters of the undertaking, whatever it may be.

I come to s. 68, which is the only one of wider application. That section is one of that class of clauses which are placed under the heading, "With

A respect to the purchase and taking of lands otherwise than by agreement." That heading covers the sections beginning with s. 16 and ending with s. 68. Section 68 says that:

"If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of £50, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit."

B

C The words here certainly are: "If any party shall be entitled to compensation in respect of any lands injuriously affected by the execution of the works." But these expressions, "injuriously affected by the execution of the works," which occur repeatedly throughout the statute are limited to the persons who are to get notice, from whom lands are taken, or who have other lands which may be affected by such proceedings. I think that this section of the statute must be read as a part of that class of sections which has reference to the subject mentioned under the heading prefixed to that class of sections, and must be limited in its operation to the matters with which it is immediately connected.

D

E It should be observed that this is not a statute relative to any particular kind of works, it is a statute relative to the taking of land. Even if it were to be read otherwise, it will be observed that there is a limitation in the expression here used, "affected by the execution of the works," to which I shall afterwards refer. It appears to me that this section is one of those which have reference to the taking of lands otherwise than by agreement, it has reference to parties, who, under the other sections of the statute to which I have referred, would be entitled to compensation. It may be that parties having certain interests in lands taken, or lands severed by reason of the taking, have not been found out at the time, and may come forward afterwards and make a claim. Notice is required to be given to owners and occupiers, and to all parties known to be interested, who have not had notice, and it is right that those parties, if found, should have an opportunity of coming forward and making a claim. It seems clear that this was intended, seeing that it will not apply to claims that do not exceed £50 in value. Why should the claims of smaller amount be excluded? There are modes here given of opening up other claims by arbitration, but where they are above £50 they are to have the choice of arbitration or a jury. That also shows that this is connected with the precious sections under this head.

F

G

H It appears to me that the Railways Clauses Consolidation Act stands upon a different footing. That Act has reference to a particular species of undertaking, and I think that it is in that Act that we may expect to find the materials for dealing with claims in reference to such undertakings as this. It provides for compensation, not referring to the Lands Clauses Consolidation Act as the rule for compensation, but referring to that Act as the machinery by which compensation is to adjudged without taking the Lands Clauses Consolidation Act as giving the rule, or as regulating the parties to whom, or the matters for which, compensation is to be given. On the contrary, it contains its own provisions with regard to the matter that we are here dealing with. I think the Railways Clauses Consolidation Act is of wider application than the Lands Clauses Consolidation Act as regards the parties entitled to compensation, and also as regards the matter for which compensation may be given.

I

The important sections are s. 6 and s. 16. Section 6 appears to me to be, on the whole, the most important and the most general. It says:

"In exercising the power given to the company by the special Act to construct the railway, and to take lands for the purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act or any Act incorporated therewith, vested in the company."

Under this section the company are to make compensation to certain parties for certain things. They are to make compensation to the owners and occupiers, and other parties interested in any lands. What lands? "Lands taken or used for the purposes of the railway." So far it is clear, but it does not stop there. They are to make compensation to the owners and occupiers of lands "injuriously affected by the construction thereof." I think it is very clear that the occupiers and owners to whom compensation is to be made are to be the occupiers and owners of lands injuriously affected by the construction of the railway. The respondent in this case is the owner and occupier of land injuriously affected by the construction of the railway, and, therefore, she is a party who is comprehended in the class of persons who are entitled to claim compensation. What is the matter for which compensation is to be made? It is to be made for "the value of the lands so taken or used." That does not apply to the respondent's case. But the section goes on:

"and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act or any Act incorporated therewith, vested in the company."

The claimant of compensation here is an owner and occupier of lands injuriously affected by reason of the exercise of the powers vested in the company. It is very clear that her property has been injuriously affected by the exercise of the powers vested in the company. It has been injuriously affected by the construction of the railway, the very words of the section being "by the construction thereof." Therefore, she is a person who under this section is entitled to come forward and make a claim. Her property was in the predicament which this section contemplates, as property "injuriously affected," and, therefore, she is a person entitled to compensation.

Then the question arises: How far is that compensation to go? Is it to go beyond the measure in which she is injuriously affected by the construction of the railway? Is it to be extended to any injury which her property has sustained by the use of the railway? Compensation has been awarded to her for the injury done by the construction of the railway as affecting the access to her property, the light, and so forth. The sum of £800 odd has been assessed for that.

The question remains whether the statute by this enactment provides for compensation to be given for damage sustained, not only by reason of the construction of the railway and the works connected therewith, but by reason of the subsequent use of the railway by the running thereon of locomotives causing vibration. Before expressing any opinion on that question, I should like to refer to another section of the statute which has been founded upon in support of the claim. Section 16 provides:

"Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works con-

A nected therewith hereinafter mentioned, to execute any of the following works."

The things that are allowed to be done are specially enumerated—to construct inclined planes, to alter the course of rivers, etc., to make drains, to erect warehouses, etc., and to make alterations and repairs, and then there is this

B general clause :

"They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway."

There follows :

C "Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

D It appears to me that that clause for compensation has reference to the matters comprehended in s. 16 of the Act, and the question, therefore, comes to be whether the general expression, that they may do "all other acts necessary for making, maintaining, altering, or repairing, and using the railway," comprehends the claim now made in respect of the use of the railway. I confess it does not appear to me to comprehend this. I think this section has reference
E altogether to the construction of the railway, and of certain things being done to enable the railway to be constructed and repaired, and made ready for use. I think it has reference to all these acts here mentioned, the making of drains, and inclined planes, altering and repairing the works, and all other acts necessary for making or maintaining, altering or repairing, and using the railway—all acts necessary for placing the railway in a condition to be used. That is the
F construction I put on these words.

When I go back to s. 6, I think that section points in the same direction, that is, that the claim to compensation is limited to the injury done by the construction of the railway, and that it contains nothing whatever as to the use to be made of it. If compensation had been intended to be given for the using of the railway by locomotives or otherwise, I should have expected something
G to be said with reference to it. I should not expect to find in the Lands Clauses Consolidation Act anything specific with reference to any kind of works, because that Act has nothing to do with any particular use that may be made of the works that are to be constructed. But in the Railways Clauses Consolidation Act, in which we have statutory enactments with regard to this particular class of public works, namely, railways. I should have expected to find something
H with regard to claims for compensation, not merely for injury done in the construction, but also for injury arising from the use of such locomotives, if such compensation had been intended to be given. I think there may be reasons seen why such a wide claim should not be given. But however that may be, I can look only at the statute itself, and I have only to state the construction, which I feel myself constrained to put upon the statute, without going beyond that.
I There is no connection between this question and the limits of deviation, as regards particular lands, under the statute. The claim now made could not have been confined to lands within the limits of deviation under the statute, because injury by vibration or any other injury might be done to lands more remote, and the claim would be equally well founded.

I think that when the legislature gives special powers under any particular Act, the provision for compensation would be contained in that Act. The legislature has not made Acts in regard to all kinds of public works. It has made an Act with regard to railways, and I do not find within that Act with regard

to railways what I can consider as a right to claim compensation for vibration A
by reason of the subsequent use of the railway when made. I, therefore, feel
myself under the necessity of concurring in the judgment that has been suggested
by my noble and learned friend.

LORD CAIRNS.—In a case which certainly is not without difficulties and
has caused much difference of opinion in the courts below and among the learned B
judges who have assisted your Lordships, it is not, perhaps, surprising that
the same difference of opinion should reach your Lordships' House; and I regret
very much that I am unable to concur in the views of my noble and learned
friends who have just spoken.

In one part of their view I do entirely concur. It appears to me that
the effect of the legislation on this subject is to take away entirely any right C
of action on the part of the landowner against the railway company for damage
that the landowner has sustained. It must be taken, I think, from the state-
ments in this case, that the railway could not be used for the purpose for which
it was intended without the consequences of this vibration. It is clear to demon-
stration that the intention of Parliament was that the railway should be used. If, D
therefore, it could not be used without vibration, and if vibration necessarily
caused damage to the adjacent landowner, and if it was intended to preserve
to the adjacent landowner his right of action, the consequence would be that
action after action would be maintainable against the railway company for the
damage which the landowner sustained, and, after some actions had been brought
and had succeeded, the Court of Chancery would interfere by injunction, and E
would prevent the railway being worked. This, of course, is a *reductio ad*
absurdum, and would defeat the intention of the legislature. I have, therefore,
no hesitation in arriving at the conclusion that no action would be maintainable
against the railway company.

That alone would certainly predispose the mind to find in the enactments upon
the subject compensation in some other form for the loss which, beyond all doubt, F
the landowner in such a case sustains. I do not mean to say that it would be safe
to strain the words of an Act of Parliament on account of considerations of that
kind; but if there be any doubt or ambiguity in the words, the consideration
ought not to be overlooked that, beyond all doubt, the intention of legislation
of this kind is that, in some shape or other, compensation should be made to G
those who sustain loss or harm by the operation of the Parliamentary powers.
It appears to me that it is not necessary in any way to strain the words of the
Acts of Parliament in this case; but it is necessary in the first place to be
perfectly clear what Acts of Parliament and what sections apply.

In my opinion, there are two Acts of Parliament which must be looked at
for this purpose, the Lands Clauses Consolidation Act and the Railways Clauses
Consolidation Act. With regard to the Lands Clauses Consolidation Act, there H
is no doubt that it mainly relates to the taking and purchase of land, but it
would be a great mistake to suppose, and it would be at variance with the
well-settled practice upon the subject to hold, that the Act is confined to the
taking of lands from landowners. In fact, the frame of the Lands Clauses Con-
solidation Act shows that it is even dangerous to trust to the headings, which I
occur at the commencement of these fasciculi of sections, for the purpose of
restraining or confining the natural operation of the words which you find in
the various sections under those headings. I will illustrate what I mean by one
fasciculus of sections in the Lands Clauses Consolidation Act. Section 16 is pre-
faced by these words, "with respect to the purchase and taking of lands otherwise
than by agreement, be it enacted as follows." The bundle of sections which
occurs under that heading runs on to s. 68, and if you were to take the literal
meaning of the words of the heading, you might expect to find nothing in the
sections that follow except with regard to the purchase and taking of land, and

A you might perhaps say that you must interpret every section that follows as relating to the taking of land and not to the affecting in any way of land which is not taken. But when we turn to s. 22 we find this enactment :

B “If no agreement be come to between the promoters of the undertaking and the owners of or parties by this Act enabled to sell and convey or release any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed £50, the same shall be settled by two justices.”

C It is evident that various classes of land are there spoken of, not merely land which is taken or land which is required, but also land which is injuriously affected by the execution of the undertaking.

When we come to s. 68 the language is still more significant. The enactment is :

D “If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of £50 . . .”

E then it is to be settled by arbitration, or by a jury in the way pointed out. I need not remind your Lordships that, under this Act of Parliament, passed as it was many years ago, many hundreds of thousands of pounds, I might perhaps say millions of pounds, have been paid to persons, not one inch of whose land has been taken by the railway company, but whose land has been (in the words of the section) injuriously affected by the execution of the works (what-
F ever that may mean, that is another point), but “injuriously affected,” as a matter entirely distinct from the taking of the land. That shows, I think, that the headings of these sections are not to be relied upon, and there are many other instances of the same kind inside the sections themselves, something showing, in the same way as an Act of Parliament often goes beyond the preamble, that provisions have been introduced in the progress of the sections going some-
G what beyond the short and summary definition in the headings of the sections. In fact, it would appear that these short headings were introduced merely to earmark a set of sections, and to afford a short and summary way by which they might be introduced as enactments into other Acts of Parliament.

I have gone through the sections in the Lands Clauses Consolidation Act, which seem to me to be relevant to this matter, and all that I would say more with
H regard to them is this. As to s. 68, I agree that that section does not define the conditions under which the person whose land has been injuriously affected is to be entitled to compensation. It rather assumes that the right to compensation has been given in some other enactment, and it contents itself with pointing out the modus in which that compensation shall be obtained. I may observe that in the present case the whole of the proceedings have been taken under
I the Lands Clauses Consolidation Act, and indeed it is only under the Lands Clauses Consolidation Act that a jury can be summoned, or the aid of arbitration invoked. I, therefore, commence with the Lands Clauses Consolidation Act as the mode in which compensation is to be obtained, if the landowner is entitled to compensation under any other provision. I will only ask your Lordships to bear in mind the words which I mention again, in s. 68 of the Lands Clauses Consolidation Act: “If any party shall be entitled to any compensation in respect of any lands which shall have been injuriously affected by the execution of the works.”

Turning to the Railways Clauses Consolidation Act, in the fasciculus of clauses, which commences with these words, "And with respect to the construction of the railway and the works connected therewith, be it enacted as follows." Section 6 is in these words :

"In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

Then it proceeds to say that that compensation shall be ascertained under the Lands Clauses Consolidation Act. I desire in passing to point out to your Lordships that the words are evidently to be read *reddendo singula singulis*. If the land be taken or used, full compensation is to be made for the value of the land. If the land be not taken or used, but be injuriously affected by the construction of the railway, then compensation is to be made for the damage sustained by the owners and occupiers or other party interested by reason of the exercise as regards such lands of the powers by this or the special Act vested in the company.

Section 16 I may also refer to, and that will complete the enumeration of the enactments with which we have to deal. It is as follows :

"Subject to the provisions and restrictions in this and the special Act and any Act incorporated therewith [that is to say, subject to the provisions and restrictions in the Lands Clauses Consolidation Act] it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works."

Then come a number of what I may term, structural works, such as turning the course of rivers, making railways across streets, and so on, and then comes the final power :

"They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway."

Then comes what appears to me to be of great importance, the term and condition upon which alone they are authorised and empowered to make these structural works. The condition is, not that in the exercise of those structural powers they are to make certain compensation, but

"that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

I venture to think that it would be too narrow a construction of these words to say that the powers here mentioned are simply those powers which are immediately before enumerated. If that had been the intention of the legislature, nothing could be easier than to say, and it would have been much shorter to

A have said, "provided always that in the exercise of such powers they shall make full compensation to the persons interested." Then we should have known exactly that what was intended was that, if by reason of the exercise of those structural powers any damage was done, they should make compensation. But, on the contrary, the provision is in substance this: "We, the legislature, will authorise you to make these structural works, but the term and condition upon
B which we authorise you to make them is that, if by reason of the exercise of any of the powers by this, or the present Act, given to you, you do any damage you shall make compensation for that damage. In other words we will authorise the railway to be made with certain powers appendant and annexed to the making of the railway, one of the main and special ones of which is that the railway shall be used as a passage for locomotive engines, but if by reason of
C the exercise of any of the powers we give you, you do damage you shall make full compensation for that damage to the persons injured.

Having taken the liberty of pointing out to your Lordships the sections, with which we have to deal, I shall sum up what appears to me to be the true and proper construction (even if we were dealing with s. 6 alone of the Railways
D Clauses Consolidation Act) of those words which have been referred to already, "injuriously affected by the construction of the railway." Even if we were dealing with that section alone it would appear to me that those words, "by the construction of the railway," are just the same words, and intended to denote the same idea, as the words in s. 68 of the Lands Clauses Consolidation Act, "injuriously affected by the execution of the works," and that, dwelling upon those
E two sections, and not praying in aid at all s. 16 of the Railways Act the position of things would be this: Parliament authorises construction of the railway, but Parliament does not look upon those words, "the construction of the railway or the execution of the works authorised," as meaning the digging out so much land, the putting so much brick and mortar together, the making of a viaduct, or the making of an embankment, or the mere structural aspect of the works. It looks
F upon the railway as an undertaking, as a going concern, if I may so call it, as a thing which is to be there for a certain purpose, and so fulfil a certain end which the legislature has had in its view. When there is used the term "the execution of the works," and "the construction of the railway," it appears to me to point to a living and active thing which, placed in the spot where Parliament authorises it, may possibly have an injurious effect on some circumjacent
G land, and then, pointing to that Parliamentary power which is given to construct that railway or to execute that work, Parliament says: "If, by the construction of this railway with these incidents, if, by the execution of these works, there be a consequence in the shape of damage to those who are in the neighbourhood, that damage must be atoned for by compensation.

This case might be illustrated very easily by putting another case not the
H instance of a railway. The Lands Clauses Consolidation Act applies to works of all kinds, not merely to a railway. Suppose that, under a special Act of Parliament, a company were authorised to take land for the purpose of making in a particular locality a gasworks or on a particular spot copper-smelting works, either of which, we know, when they came to be worked would most probably produce injury to the circumjacent lands, although the lands around may not be taken
I by the company. Supposing Parliament authorised the gasworks or the copper-smelting works to be conducted by words of enactment which would make it impossible for the owner of the adjacent land to maintain an action for the injury sustained, and then Parliament said: "If, by the execution of those works, the neighbouring owners sustain any damage, you shall pay for such damage," I should understand by an enactment of that kind, not that the neighbouring owner is supposed to be likely to sustain damage by the construction of the building, by putting the bricks and the mortar together, but to sustain damage by those works as active, going works, which were there for the purpose

of manufacturing gas or smelting copper as the case may be, and that when Parliament said: "If, by the execution of these works, damage is done," Parliament meant to say, "If, by the execution of these works, qua gasworks or qua copper-smelting works, continuing to exist and actively proceeding, any damage is done, that damage shall be paid for."

I may remind your Lordships that this question was very near having to be decided once in your Lordships' House, although, from circumstances, the decision became unnecessary. In *Broadbent v. Imperial Gas Co.* (6), the company was authorised to make gas works in a particular place and the Lands Clauses Consolidation Act was incorporated to a certain extent in the provisions of the special Act, but there was a clause in the Gas Clauses Act, also incorporated, which provided that in carrying on their works and making gas no nuisance or injury should be occasioned to any of the surrounding land. It was held by this House, as might be expected, that the consequence of that section being introduced was that the right of action was not taken away, and, therefore, it was not necessary to consider the case I have suggested. But if you had a case, where the right of action was taken away, and where Parliament had provided that compensation should be made for injury done by the execution of the works, then, in my opinion at least, it would mean and imply the execution of the works of the undertaking as an active and going concern. That would be the opinion which I should entertain on s. 6 alone, even without s. 16. As it appears to me that LUSH, J., in the present case has expressed with great felicity the same idea which I have entertained, I cannot do better than remind your Lordships of what LUSH, J., says (L.R. 4 H.L. at pp. 186, 187):

"The Lands Clauses Act is designed, not for railways only, but for all undertakings for which compulsory powers of taking lands are given, and every special Act which incorporates its provisions designates and fixes the purpose for which the land is to be taken, and the use to which it is to be permanently appropriated, and the company, who are empowered to take it, are bound to apply it to that purpose, and to that purpose only. So much of the general Act as is incorporated becomes part of the special Act, and its language, as part of that Act, becomes pointed to the particular work or undertaking specified, whatever it may be, whether a railway, a dock, a canal, or any other undertaking. It there authorises the taking of the land for the purpose of and its conversion into the particular railway, dock, or canal in order that it may be used as such. The undertaking is regarded as a working concern, and the idea of its use as a railway, dock, or canal is in the mind of the legislature inseparable from that of its construction. In professing to give compensation for all damages sustained by the owners of the adjacent land by the 'execution of the works,' or 'the exercise of the powers of the Act as regards such lands,' the legislature must, as it appears to me, have had in view the ultimate object aimed at, the works when complete and in operation—the dock, railway, or canal, not abstractedly as a mere excavation, embankment or reservoir, but in connection with its appropriate traffic, and with the ordinary incidents of a business undertaking."

It appears to me that if it is necessary to go beyond that and make the case still clearer, the case is made clearer by s. 16, because as I interpret that section it seems to give a number of powers—structural powers, I agree—but to make it the term and condition of exercising those structural powers, of interfering with rivers or with roads, and those other violent powers, as they may be termed, given by that Act, or by the special Act, that the company shall make full satisfaction to every person for all damage sustained by reason of the exercise of such powers, that is, of all the powers given by the Act to the company.

A That being certainly the view which I should take of the construction of these Acts of Parliament, the only other matter to which I have to refer is what appears to have weighed in the minds of some of the learned judges, who were unable to adopt this view. I observe that some of those learned persons say that there would be very great difficulty in estimating the compensation because the damage could not be ascertained until the undertaking became, what I may call, a going concern, and until by experience you had ascertained exactly what the amount of damage or injury actually was. I do not think there is any difficulty at all on that head. In the first place, in the present case which we have here before us, no difficulty seems to have occurred. A sum has been found by the jury, not representing merely the past damage, but representing the whole damage which, in the opinion of the jury, both had been sustained and would be sustained by the exercise of the powers given to the company. In addition to that the problem which has to be solved appears to me not to be at all beyond the powers or the province of the jury. What you have to find is: What is the actual deterioration in value. You have a house and near it a vibrating railway, I mean a railway in the use of which there cannot fail to be vibration. The house was of a certain value before the railway was put there. If the railway causes vibration evidence can easily be obtained to prove what the amount of deterioration in value is and the sum can be awarded accordingly. The subject may be illustrated further by supposing a house used for a particular trade, say that of a watch or clock maker, which requires particular steadiness. Serious injury might be done there, and the house might become useless for the particular purpose for which it was used before.

E It is said that you ought to know how many trains in a day there will be running, and the weight of them, and the speed at which they will pass. There is a well-known principle which applies to such cases, which is, that if the company against which the claim is made are not willing to bind themselves as to the maximum number of trains or the weight, or the speed, then the sum must be taken most strongly against the company upon the principle enunciated in the well-known old case of *Amory v. Delamirie* (7). The largest amount of injury which can be sustained would probably be considered to be the amount to be awarded by the tribunal which has to award compensation.

F I might mention another case in which everyone would admit that compensation would have to be assessed at the commencement, and where the same difficulty might occur. Your Lordships will recollect cases which have come before this House arising upon questions of which the *Caledonian Rail. Co. v. Sprot* (8) may be taken as an instance. In those cases it was held that a landowner selling a strip of land to the railway company, is bound to give lateral support to resist the pressure which a heavy train passing over the land might occasion. In that case there cannot be compensation assessed and payable for the land taken in the first instance. Yet at the time when that compensation was so assessed, it might not be known what the number of trains passing along the railway, or the weight, or speed of them would be, and, therefore, it might not be possible to say with mathematical exactitude what would be the precise amount of support which would have to be given to the land on each side. In such a case the landowner would make his claim; he would show that the nature of the ground was such that lateral support would be particularly desirable; he would then show that he might have to support the land against the pressure that would be created by a great number of trains passing every day, and he would claim and probably would recover, compensation for the maximum amount of support which the land would require. I, therefore, cannot accept the suggested difficulty as to ascertaining the amount of compensation as any reason why the Act of Parliament should be taken as having a meaning other than what appears to me to be the plain meaning of the words. I am afraid that the result will be that, although a clear injury and damage has been sustained, and although a substantial

sum has been awarded by a jury to the landowner, that sum will not be recovered. A
But I have been unable to do otherwise than to express to your Lordships the
view which I entertain as to the construction of these statutes in a case which, as it
appears to me, may be one of great importance.

Appeal allowed.

JONES AND OTHERS *v.* MERSEY DOCKS AND HARBOUR
BOARD. MERSEY DOCKS AND HARBOUR BOARD *v.*
CAMERON AND OTHERS

[HOUSE OF LORDS (Lord Westbury, L.C., Lord Cranworth, Lord Chelmsford and
Lord Kingsdown), June 22, 1865]

[Reported 11 H.L.Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378;
35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur.N.S. 746;
13 W.R. 1069; 11 E.R. 1405]

*Rates—Rateable occupation—Beneficial occupation—Non-profit-making statutory
authority—Docks.*

A beneficial occupation sufficient to render the occupier liable to be rated
means an occupation of property that yields, or is capable of yielding, a net
annual value above the average annual cost of repairs, insurance and other
expenses necessary to maintain the property in a state to command such
rent. The property need not be beneficial to the occupier in the sense that
it brings to him a pecuniary profit. It is sufficient if the property is capable
of yielding a clear rent over and above the necessary outgoings, and, there-
fore, a statutory body which receives payment for the use of its property
(e.g. docks), but is under a duty to apply any profit in reduction of the dues it
charges is liable to be rated in respect of its property.

Per LORD CRANWORTH: I can discover nothing either in the word or in
the spirit of the [Poor Relief Act, 1601] exempting from liability to rating
the occupier of valuable property merely because the profits of the occupation
are not to be enjoyed by him or by anyone in whose behoof he is occupying,
but are to be devoted to the benefit of the public.

*Statute—Construction—Repetition in later statute of words in earlier statute con-
strued by court—Presumption that words to be given same construction
—Rebuttal.*

Where an Act of Parliament has received a judicial construction putting a
certain meaning on its words and the legislature in a subsequent Act in *pari*
materia uses the same words there is a presumption that the legislature used
those words intending to express the meaning which it knew had been put
on the same words previously, and, unless there is something to rebut that
presumption, the Act should be so construed even if the words are such
that they might originally have been construed otherwise. The presumption
will be rebutted if the court takes the view that in adopting in a later Act the
language of a previous Act which had received judicial interpretation the
legislature did not intend that the language of the later Act should be given
that interpretation if it were subsequently declared by the court to be wrong.

A *Statute—Recital—Effect—Fact or law—Freedom of court to take different view.*
 A mere recital in an Act of Parliament, either of fact or of law, is not conclusive, and the court is at liberty to consider the fact or the law to be different from the statement in the recital.

B *Judgment—Judicial decision as authority—Long established authorities—Right of appellate court to review.*

Courts rightly abstain from overruling cases which have been long established because, if they did so, they would only disturb, without finally settling, the law, but when an appeal from any judgment is made to the House of Lords, however it may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of stare decisis, refuse to examine the foundation on which they rest.

Per BLACKBURN, J.: The inconvenience caused by unsettling the law and disturbing what was quiet is so great that even an appellate court should be slow to reverse decisions which, though originally wrong, have long been uniform.

D **Notes.** Exemptions from rateability, a subject which is mentioned in the judgments in this case, are to be found, as now existing, at 32 HALSBURY'S LAWS (3rd Edn.) 39 et seq. (as brought up to date by the Cumulative Supplement and Current Service), and see the Rating and Valuation Act, 1961 (41 HALSBURY'S STATUTES (2nd Edn.) 935).

E Applied: *Severn Navigation Comrs. v. Tewkesbury* (1865), 29 J.P. 823. Considered: *Mersey Dock Trustees v. Gibbs* (1866), post; L.R. 1 H.L. 93. Applied: *Leith Harbour and Docks Comr. v. Inspector of the Poor* (1866), L.R. 1 Sc. & Div. 17; *Lancashire Justices v. Cheetham Overseers* (1867), L.R. 3 Q.B. 14. Applied: *R. v. St. Martin's, Leicester, R. v. Castle View, Leicester* (1867), L.R. 2 Q.B. 493. Considered: *R. v. Sherford* (1867), L.R. 2 Q.B. 503. Distinguished: *Lincoln Corp'n. v. Holmes Common Overseers* (1867), L.R. 2 Q.B. 482. Considered: *R. v. Metropolitan Board of Works* (1868), 9 B. & S. 937. Applied: *Greig v. Edinburgh University* (1868), L.R. 1 Sc. & Div. 348; *R. v. McCann* (1868), L.R. 3 Q.B. 677. Considered: *R. v. Oldham Corp'n.* (1868), L.R. 3 Q.B. 474; *R. v. Rhymney Rail. Co.* (1869), L.R. 4 Q.B. 276; *Morgan v. Crawshay* (1871), L.R. 5 H.L. 304. Applied: *St. Thomas's Hospital v. Stratton* (1875), L.R. 7 H.L. 477; *R. v. West Derby* (1875), L.R. 10 Q.B. 283. Considered: *Essenden Corp'n. v. Blackwood* (1877), 2 App. Cas. 574. Distinguished: *Re Leslie, R. v. Curzon* (1882), 46 L.T. 159. Considered: *Mersey Docks v. Lucas* (1883), 8 App. Cas. 891; *Coomber v. Berkshire Justices* (1883), 9 App. Cas. 61; *Martin v. West Derby Assessment Committee* (1883), 11 Q.B.D. 145. Applied: *West Bromwich School Board v. West Bromwich Overseers* (1884), 13 Q.B.D. 929. Considered: *Mersey Docks and Harbour Board v. Ilancilian Overseers* (1884), 14 Q.B.D. 770. Applied: *Tunnicliffe v. Birkdale Overseers* (1888), 20 Q.B.D. 450; *Showers v. Chelmsford Union Assessment Committee* (1891), 60 L.J.M.C. 55. Considered: *Perry v. Eames, Salaman v. Eames, Mercer's Co. v. Eames*, [1891-4] All E.R. Rep. 1100; *London County Council v. Erith Churchwardens, West Ham Churchwardens v. London County Council, St. George's Assessment Committee v. London County Council*, [1891-4] All E.R. Rep. 577; *Middlesex County Council v. St. George's Union Assessment Committee*, [1897] 1 Q.B. 64; *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*, [1900-3] All E.R. Rep. 27; *Lewis v. Durham Union* (1904), 90 L.T. 383; *Liverpool Corp'n. v. West Derby Union*, [1904-7] All E.R. Rep. 296; *Liverpool Corp'n. v. Chorley Union Assessment Committee and Withell Overseers*, [1911-13] All E.R. Rep. 194; *Port of London Authority v. Orsett Union*, [1920] All E.R. Rep. 545; *Roberts v. Poplar Metropolitan Borough Assessment Committee*, [1922] 1 K.B. 25; *London County Council v. Hackney Borough Council*, [1928] All E.R. Rep. 614; *North Riding*

of *Yorkshire County Valuation Committee v. Redcar Corpn. and Guisborough Assessment Committee*, [1942] 2 All E.R. 589; *Territorial Forces Association v. Philpott*, [1947] 2 All E.R. 376. Referred to: *Secretary of State for India v. St. Mary, Lambeth* (1865), 29 J.P.Jo. 292; *Colchester v. Kewney* (1867), 36 L.J.Ex. 172; *Magee College Trustees v. Valuation Comrs.* (1870), 19 W.R. 328; *A.-G. v. Dakin* (1870), L.R. 4 H.L. 338; *Metropolitan Board of Works v. West Ham Overseers* (1870), L.R. 6 Q.B. 193; *A.-G. v. Black* (1871), L.R. 6 Exch. 308; *R. v. Abney Park Cemetery Co.* (1873), 42 L.J.M.C. 124; *R. v. Postmaster-General* (1873), 28 L.T. 337; *Hare v. Putney Overseers* (1881), 7 Q.B. 223; *Hicks v. Dunstable Overseers* (1883), 48 J.P. 326; *Yates v. Chorlton-upon-Medlock Union, Almond v. Chorlton-upon-Medlock Union* (1883), 48 L.T. 872; *Dewsbury and Heckmondwike Waterworks Board v. Penistone Union Assessment Committee* (1885), 16 Q.B. 585; *Owens College v. Chorlton-upon-Medlock Overseers* (1887), 51 J.P. 356; *Bray v. Lancashire J.J.* (1889), 22 Q.B.D. 484; *Income Tax Special Purposes Comrs. v. Pemsel*, [1891-4] All E.R. Rep. 28; *Marylebone Vestry v. Postmaster-General* (1893), 21 W.R. 459; *Worcestershire County Council v. Worcestershire Union Assessment Committee and St. Nicholas Overseers* (1897), 66 L.J.Q.B. 323; *Lambeth Overseers v. London County Council* (1897), 66 L.J.Q.B. 806; *Farnham Flint Co. v. Farnham Union* (1900), 83 L.T. 660; *Glamorganshire Canal Co. v. Merthyr Tydfil Union* (1902), 1 L.G.R. 34; *Oxford University v. Oxford Corpn.* (No. 1) (1902), Ryde & K. Rat. App. 87; *Mary Clark Home Trustees v. Anderson* (1904), 91 L.T. 457; *Hackney Corpn. v. Lee Conservancy Board*, [1904] 2 K.B. 541; *The Bearn*, [1906] P. 48; *Davies v. Seisdon Union* (1908), 2 Konst. Rat. App. 546; *Winstanley v. North Manchester Overseers*, [1908-10] All E.R. Rep. 752; *London City Corpn. v. Associated Newspapers*, [1915] A.C. 674; *Hackney Borough Council v. Metropolitan Asylums Board* (1924), 131 L.T. 136; *Kingston Union Assessment Committee v. Metropolitan Water Board*, [1926] All E.R. Rep. 1; *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899; *Williams v. Neath Assessment Committee* (1935), 34 L.G.R. 82; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K.B. 585; *Yeovil Rural District Council v. South Somerset & District Electricity Co.*, [1947] 1 All E.R. 669; *Amalgamated Relays, Ltd. v. Burnley Rating Authority and Burnley Assessment Committee* (1949), 113 J.P. 232; *Madras Electric Supply Corpn. v. Boarland*, [1955] 1 All E.R. 753; *Sheffield Corpn. v. Tranter (Valuation Officer)*, [1957] 2 All E.R. 583; *Arbuckle Smith & Co., Ltd. v. Greenock Corpn.*, [1960] 1 All E.R. 568; *Clayton v. Kingston-upon-Hull Corpn.*, [1960] 3 All E.R. 840.

As to rateable occupation, see 32 HALSBURY'S LAWS (3rd Edn.) 16 et seq.; and for cases see 38 DIGEST (Repl.) 476 et seq. As to construction of statutes, see 36 HALSBURY'S LAWS (3rd Edn.) 402-407; and for cases see 42 DIGEST 667-671. As to judicial decisions as authorities, see 22 HALSBURY'S LAWS (3rd Edn.) 796 et seq.; and for cases see 30 DIGEST (Repl.) 211 et seq.

Cases referred to:

- (1) *R. v. Lady Ponsonby* (1842), 3 Q.B. 14; 4 State Tr.N.S. App. 1369; 1 Gal. & Dav. 713; 11 L.J.M.C. 65; 6 J.P. 266; 6 Jur. 642; 114 E.R. 412; 38 Digest (Repl.) 506, 197.
- (2) *Lord Amherst v. Lord Sommers* (1788), 2 Term Rep. 372; 1 Bott, 164; 100 E.R. 200; 38 Digest (Repl.) 545, 394.
- (3) *Smith v. Birmingham Union* (1857), 7 E. & B. 483; 3 Jur.N.S. 769; 119 E.R. 1326; sub nom. *R. v. Smith*, 26 L.J.M.C. 105; 29 L.T.O.S. 76; 21 J.P. 694; 5 W.R. 496; 38 Digest (Repl.) 546, 404.
- (4) *R. v. Stewart*, *R. v. Stainsby*, *R. v. Breton*, *R. v. Foster* (1857), 8 E. & B. 360; 120 E.R. 134; sub nom. *R. v. Stainsby*, *R. v. Breton*, *R. v. Foster*, *R. v. Stewart*, *R. v. Edwards*, *R. v. Lake*, 27 L.J.M.C. 81; 30 L.T.O.S. 114; 22 J.P. 480; 4 Jur.N.S. 187; 6 W.R. 35; 38 Digest (Repl.) 486, 77.

- A** (5) *Lancashire Justices v. Stretford Overseers* (1858), 8 E. & F. 225; 4 Jur.N.S. 1274; 120 E.R. 492; sub nom. *R. v. Lancashire JJ.*, 27 L.J.M.C. 209; 31 L.T.O.S. 116; sub nom. *Stretford Overseers v. Lancashire JJ.*, 22 J.P. 705; 38 Digest (Repl.) 563, 507.
- (6) *Hodgson v. Carlisle Local Board of Health* (1857), 8 E. & B. 116; 120 E.R. 43; sub nom. *Hodgson v. Carlisle Local Board of Health*, *Redin v. Same*, *Wilkie v. Same*, 21 J.P.Jo. 421; sub nom. *R. v. Hodgson*, 29 L.T.O.S. 246; 4 Jur.N.S. 160; 38 Digest (Repl.) 544, 387.
- B** (7) *R. v. Manchester Overseers* (1854), 3 E. & B. 336; 2 C.L.R. 974; 23 L.J.M.C. 48; 22 L.T.O.S. 241; 18 J.P. 218; 18 Jur. 267; 118 E.R. 1167; 38 Digest (Repl.) 544, 392.
- C** (8) *R. v. Shepherd* (1841), 1 Q.B. 170; Arn. & H. 141; 4 Per. & Dav. 534; 10 L.J.M.C. 44; 5 J.P. 241; 5 Jur. 432; 113 E.R. 1095; 38 Digest (Repl.) 486, 84.
- (9) *R. v. St. Luke's Hospital* (1760), 2 Burr. 1053; 1 Wm. Bl. 249; 97 E.R. 703; 38 Digest (Repl.) 540, 361.
- (10) *R. v. Salter's Load Sluice Comrs.* (1792), 4 Term Rep. 730.
- D** (11) *R. v. St. Bartholomew's the Less (Inhabitants)* (1769), 4 Burr. 2435; 98 E.R. 276; sub nom. *St. Bartholomew's Hospital (Governors) Case*, 1 Bott. 131; 38 Digest (Repl.) 469, 2.
- (12) *R. v. London Corpn.* (1790), 4 Term Rep. 21; 100 E.R. 872; 38 Digest (Repl.) 476, 10.
- E** (13) *R. v. Liverpool (Inhabitants)* (1827), 7 B. & C. 61; 9 Dow. & Ry.K.B. 780; 4 Dow. & Ry.M.C. 524; 5 L.J.O.S.M.C. 145; 108 E.R. 647; 38 Digest (Repl.) 482, 48.
- (14) *R. v. River Weaver Navigation Trustees* (1827), 7 B. & C. 70, n.; Pratt, 28; 9 Dow. & Ry.K.B. 788; 4 Dow. & Ry.M.C. 533; 5 L.J.O.S.M.C. 102; 108 E.R. 651; 44 Digest 90, 717.
- F** (15) *Bristol (Governors of the Poor) v. Wait* (1836), 5 Ad. & El. 1; 2 Har. & W. 70; 6 Nev. & M.K.B. 383; 5 L.J.M.C. 113; 111 E.R. 1067; 38 Digest (Repl.) 479, 32.
- (16) *R. v. Liverpool Corpn.* (1839), 9 Ad. & El. 435; 1 Per. & Dav. 334; 2 Will. Woll. & H. 3; 8 L.J.M.C. 41; 3 J.P. 691; 112 E.R. 1276; 38 Digest (Repl.) 563, 508.
- G** (17) *R. v. Wallingford Union* (1839), 10 Ad. & El. 259; 2 Per. & Dav. 226; 8 L.J.M.C. 89.
- (18) *Tyne Improvement Comrs. v. Chirton Overseers* (1859), 1 E. & E. 516; 23 J.P. 583; 120 E.R. 1002; sub nom. *R. v. Chirton (Churchwardens & Overseers)*, 28 L.J.M.C. 131; 5 Jur.N.S. 865; sub nom. *R. v. Tyne Improvement Comrs.*, 32 L.T.O.S. 275; 7 W.R. 242; 38 Digest (Repl.) 565, 525.
- H** (19) *R. v. Badcock* (1845), 6 Q.B. 787; 1 New Mag. Cas. 207; 4 L.T.O.S. 412; 9 Jur. 250; 115 E.R. 297; sub nom. *R. v. Taunton Market Trustees*, 1 New Sess. Cas. 543; 14 L.J.M.C. 58; 9 J.P. 245; 38 Digest (Repl.) 490, 107.
- (20) *R. v. Longwood Overseers* (1849), 13 Q.B. 116; 3 New Sess. Cas. 371; 18 L.J.M.C. 65; 12 L.T.O.S. 512; 13 J.P. 137; 13 Jur. 170; 116 E.R. 1206; 38 Digest (Repl.) 502, 175.
- I** (21) *Birkenhead Docks Trustees v. Birkenhead Overseers* (1852), 2 E. & B. 148; 118 E.R. 724; sub nom. *R. v. Birkenhead Docks Trustees*, 21 L.J.M.C. 209; 19 L.T.O.S. 215; 16 J.P. 551; 17 Jur. 162; 38 Digest (Repl.) 565, 524.
- (22) *R. v. River Lee Trustees* (1855), 24 L.T.O.S. 234; 19 J.P. 310; 3 W.R. 210; 38 Digest (Repl.) 489, 100.
- (23) *Crease v. Sawle* (1842), 2 Q.B. 862; 2 Gal. & Dav. 812; 11 L.J.M.C. 62; 114 E.R. 334, Ex. Ch.; 38 Digest (Repl.) 559, 479.
- (24) *Marshall v. Pitman* (1833), 9 Bing. 595; 2 Moo. & S. 745; 1 Nev. & M.M.C. 270; 2 L.J.M.C. 33; 131 E.R. 737; 18 Digest (Repl.) 401, 1506.
- (25) *Earby's Case* (1633), 2 Bulst. 354; 80 E.R. 1180; 38 Digest (Repl.) 469, 1.

- (26) *R. v. Erminster (Inhabitants)* (1840), 12 Ad. & El. 2; 4 Per. & Dav. 69; 9 L.J.M.C. 108; 4 J.P. 426; 113 E.R. 710; 38 Digest (Repl.) 563, 509. **A**
- (27) *R. v. St. George, Southwark, Bethlem Hospital Case* (1847), 10 Q.B. 852; 16 L.J.M.C. 129; 9 L.T.O.S. 431; 11 J.P. 615; 11 Jur. 968; 116 E.R. 323; 38 Digest (Repl.) 540, 362.
- (28) *R. v. Harrogate Comrs.* (1850), 15 Q.B. 1012; 4 New Sess. Cas. 319; 20 L.J.M.C. 25; 16 L.T.O.S. 190; 15 J.P. 38; 15 Jur. 422; 117 E.R. 741; 38 Digest (Repl.) 562, 504. **B**
- (29) *R. v. Haughton (Inhabitants)* (1853), 1 E. & B. 501; 22 L.J.M.C. 89; 17 J.P. 585; 17 Jur. 455; 118 E.R. 523; sub nom. *R. v. Houghton (Inhabitants)*, 20 L.T.O.S. 247; 6 Cox, C.C. 101; 42 Digest 611, 114.
- (30) *R. v. Sterry* (1840), 12 Ad. & El. 84; 4 Per. & Dav. 122; 9 L.J.M.C. 105; 4 J.P. 442; 4 Jur. 1158; 113 E.R. 743; 38 Digest (Repl.) 550, 424. **C**
- (31) *R. v. St. Giles, York (Inhabitants)* (1832), 3 B. & Ad. 573; 110 E.R. 208; sub nom. *York Lunatic Asylum Trustees v. St. Giles, York (Churchwardens and Overseers)*, 1 L.J.M.C. 50; 38 Digest (Repl.) 488, 98.

Also referred to in argument :

- R. v. Woodward* (1792), 5 Term Rep. 79; Nolan, 162; 101 E.R. 45; 38 Digest (Repl.) 484, 66. **D**
- R. v. Baptist Missionary Society* (1849), 10 Q.B. 884; 3 New Mag. Cas. 162; 3 New Sess. Cas. 555; 18 L.J.M.C. 194; 13 L.T.O.S. 299; 13 Jur. 748; 116 E.R. 335; 38 Digest (Repl.) 483, 58.
- R. v. Stapleton (Inhabitants)* (1863), 4 B. & S. 629; 3 New Rep. 114; 33 L.J.M.C. 17; 9 L.T. 322; 27 J.P. 772; 10 Jur.N.S. 44; 12 W.R. 49; 122 E.R. 595; 38 Digest (Repl.) 484, 64. **E**

JONES v. MERSEY DOCKS AND HARBOUR BOARD

Appeal from a decision of the Court of Exchequer Chamber in an action of replevin brought by the respondents, the Mersey Docks and Harbour Board against the appellants, William Jones, and others, churchwardens and overseers of the poor of the parish of Liverpool, for the taking and detaining of certain goods and chattels of the respondents. **F**

The Mersey Docks and Harbour Board was assessed to the poor by a rate made on June 2, 1858, in a sum of £20,580 18s. 8d. in respect of the annual value of the dock estates. There was no appeal against the rate, and the distress was levied for nonpayment of the rate. The respondents entered into the usual replevin bond, and then brought the present action. The dock estates were originally vested in Liverpool Corporation as trustees of the docks and harbour by several Acts of Parliament. The corporation had voluntarily granted part of the estates to the trustees. The private statutes from the time of Queen Anne were twenty-two in number. They describe the estate of the docks as a public trust. The board were bound by statute to apply the moneys received by them in defraying conservancy and pilotage expenditure, and, save as the statutes provided, no moneys receivable by the board were to be applied to any purpose, unless the same conduced to the safety or convenience of ships frequenting the port of Liverpool, for facilitating the shipping or unshipping of goods, or in discharging debts contracted for such purposes. The board managed the whole estates by means of its servants. The dock dues were to be applied to building and repairing and maintaining the docks and paying off debts, and when all debts were paid the rates were to be reduced as far as could then be done. The board were bound to apply their funds as the statutes directed, and no member of the board derived any private advantage or emolument from the execution of the trusts. All the dock sheds, and other buildings were used solely for the purposes of the dock business. The Court of Common Pleas held **G**
H
I

A that the board were not rateable. That decision was affirmed by the Court of Exchequer Chamber, and the churchwardens and overseers appealed.

MERSEY DOCKS AND HARBOUR BOARD v. CAMERON.

B In this case the action was also replevin, by the respondents Cameron and others, overseers of the township of Birkenhead. The Mersey Docks and Harbour Board now represented the original Birkenhead Dock Commissioners and the Birkenhead Dock Co. which two bodies had transferred their powers and estate to the Liverpool Corporation; but in 1857 a private Act consolidated the dock estates on both sides of the Mersey in one body, called the Mersey Docks and Harbour Board. Previously to the consolidation the docks on the Birkenhead side of the river were rated to the poor. The Court of Common Pleas gave judgment for the respondents, holding the Mersey Board rateable in respect of the Birkenhead Docks. The Court of Exchequer Chamber affirmed this decision, and the board appealed.

The following learned judges attended the argument to assist the House: POLLOCK, C.B., WILLIAMS, BYLES, BLACKBURN and MELLOR, JJ., and PIGOTT, B.

D Sir Fitzroy Kelly, Q.C., and Quain (with them Parker), for the Mersey Docks and Harbour Board.

Bovill, Q.C., Mellish, Q.C., and Hutton for the overseers.

E At the conclusion of the arguments the House put the following questions to the learned judges: (i) Are the Mersey Docks and Harbour Board "occupiers" of the docks vested in them within the true meaning of the word "occupier", in s. 1 of the Poor Relief Act, 1601? (ii) If they are occupiers within the statute are they exempted from liability to be rated for relief of the poor by the operation or effect of [certain private Acts]? (iii) Does the private Act 20 & 21 Vict., c. clxii (1857) impose on the board a liability to poor rate in respect of the docks, estate, and property vested in the board, or any and what part thereof, by virtue of ss. 26 & 27 of the Act?

F After time taken to consider, the learned judges differed in opinion, BYLES, J., dissenting from the rest. The opinion of the majority was delivered as follows by

G **BLACKBURN, J.**—The opinion which, with your Lordships' permission, I am about to read, contains the joint answers to your Lordships' questions of POLLOCK, C.B., WILLIAMS and MELLOR, JJ., PIGOTT, B., and myself.

To the first question put to us by your Lordships in these causes we answer, that, in our opinion, the Mersey Docks and Harbour Board are "occupiers" of the docks in question within the true meaning of that word as used in the Poor Relief Act, 1601. Our reasons for that opinion are as follows. Section 1 of the H Act requires the overseers of every parish to raise by "taxation of every inhabitant, parson, vicar and other, and of every occupier of" various kinds of real property, and inter alia of "lands in the parish, in such competent sum as they shall think fit," a stock for setting the poor of the parish to work, and for the relief of the poor of the parish. Though the words of this enactment might seem to give the overseers a discretion to tax each inhabitant in such arbitrary I sum as they might think fit, it has long been settled that the taxation of the different persons must be equal and in proportion to the value of their respective means. It would appear from the passages cited at your Lordships' Bar from DALTON'S COUNTRY JUSTICE that this was determined very shortly after the statute was passed. It has always been so held, and the legislature, by the Parochial Assessment Act, 1836, s. 1 [repealed by Local Government Act, 1948], has affirmed this principle by enacting that no rate shall be valid unless made

"upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably

be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

In order, therefore, that a valid rate may be imposed, it is essential that the occupation be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the average annual expense of the maintenance, would leave no overplus, there is nothing to rate. It is clear that there can be no valid rate unless the occupation be such as to be of value, and if the words "beneficial occupation" are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the Bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that, if the phrase be understood in this limited sense, the Mersey Docks and Harbour Board have a beneficial occupation, for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks which are at present greatly in excess of what is necessary to maintain the docks. Hereafter the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation—possibly at some future time to render it no greater than the sum requisite to maintain the docks—but while the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks as at present enjoyed by the Mersey Docks and Harbour Board a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent.

Where there is an actual demise of property to an occupier who pays rent to the owners of the property, the tenant, if a subject, is rateable, without any regard to the purpose to which the rent is applied. It is immaterial whether the landlord enjoys the rent himself, or is obliged to pay it away as interest to mortgagees, or even (as is the case with tenants of Crown property) pays it into the Consolidated Fund, or the privy purse of the Sovereign. The occupier in each case is rateable, and if the matter were now for the first time to be determined without reference to the decisions, it would seem that where the owners of the property are themselves in occupation and receive the value, the amount of which is measured by the rent which the hypothetical tenant would give, the purposes to which that amount is applied ought to be as immaterial as if there had been a real demise at that rent, and the occupiers, if subjects, ought to be rated, whatever be the object for which the property is occupied, unless some special enactment exempted them.

But the decisions have now settled that there is an exemption, and the important question in the present case is: What is the nature of the occupation and of the purposes which bring the occupiers' case within that exemption? On this question the decisions are to some extent inconsistent, and it is necessary to examine them. The Crown, not being named in the statute of Elizabeth, is not bound by it; and, consequently, the overseers cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by her servants for Her Majesty. The exemption depends entirely on the occupier and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable like all other occupiers; and it has even been determined that where apartments in Hampton Court, a Royal palace, were gratuitously assigned to a subject, who occupied them by the permission of the Sovereign but for the subject's benefit, the subject was rateable in respect of her occupation of this royal property: *R. v. Lady Ponsonby* (1). On the other hand,

A where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or her servants on her behalf, the occupation being that of Her Majesty, no rate can be imposed: *Lord Amherst v. Lord Sommers* (2).

B So far the ground of exemption is perfectly intelligible, but it has been carried a good deal further and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. A long series of cases have established that where property is occupied for the purpose of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. This applies not only to property occupied for such purposes by the servants of the great departments of state, such as the Post Office (*Smith v. Birmingham Union* C (3)), the Horse Guards (*Lord Amherst v. Lord Sommers* (2)), or the Admiralty (*R. v. Stewart* (4)), in all which cases the occupiers might strictly be called the servants of the Crown, but also to property occupied by local police (*Lancashire Justices v. Stretford Overseers* (5)), to county buildings occupied for the assizes, and for the judges' lodgings (*Hodgson v. Carlisle Local Board of Health* (6)), or occupied as a county court (*R. v. Manchester Overseers* (7)), or for a gaol (*R. v. Shepherd* (8)). In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in consimili casu.

F The decisions are uniform, and were not disputed at the Bar, that the exemption applies so far; but there is a conflict between the decisions whether the exemption goes further. There are several cases relating to charities which were mentioned at your Lordships' Bar, but were not much pressed, nor, as it seems to us, need they be considered now; for, whatever may be the law as to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption. There is, however, one case on this subject, *R. v. St. Luke's Hospital* (9), which it is necessary to notice on account of the effect which in *R. v. Salter's Load Shuice Comrs.* (10), was attributed by LORD KENYON to part of what fell from LORD MANSFIELD in that case. In *R. v. St. Luke's Hospital* (9) the question before the court was whether G Joseph Mansfield was rateable as occupier of St. Luke's Hospital, but the court entered into the larger question, whether there was any one who could be charged as occupier, saying very truly that unless there was some one who could be so charged no rate could be imposed. LORD MANSFIELD, as to that, is reported to have said: "As to the lessees, mere nominal trustees cannot be H esteemed occupiers or rated as such."

In the subsequent case of *R. v. St. Bartholomew's the Less (Inhabitants)* (11), LORD MANSFIELD says that the corporation of London

"are not de facto the occupiers of St. Bartholomew's Hospital; the poor are the occupiers, but they are not rateable."

I This may, perhaps, show that LORD MANSFIELD only meant to lay down the position that those in whom the legal estate is vested are not necessarily the occupiers, which is no doubt true. No one could contend that the person in whom a term assigned to attend the inheritance had vested could be rated as occupier, in point of law, of the estates de facto occupied by his cestui que trust. But if LORD MANSFIELD meant (as it rather seems that LORD KENYON thought he did), that the persons in actual valuable occupation of property are not rateable if they occupy in a merely fiduciary character, it is a position which cannot be maintained. Counsel for the Mersey Docks and

Harbour Board at your Lordships' Bar did not attempt to maintain any such A
general position. They limited themselves to contending that such was the law
where it was a public trust; for which they cited authorities which, they said,
must be overruled unless that position was maintained. We think they were
justified in so saying; but we also think that there are conflicting decisions which
must be overruled if it is maintained.

The first case in which the position was advanced that trustees occupying B
valuable property, but prohibited from taking any individual benefit from it, were
not rateable, seems to have been *R. v. London Corpn.* (12). There BULLER, J.,
in his judgment says (4 Term Rep. at p. 27) :

"Now it has been objected that they are not liable to this rate, because C
they hold it on a public trust; but, in the first place, it does not appear
to be the case of a trust at all; and if it did, perhaps the consequence
contended for would not necessarily follow."

It certainly seems that the doctrine contended for was not at that time, 1790,
considered as established.

R. v. Salter's Load Sluice Comrs. (10), was decided in 1792. In the D
argument the clauses of the Act under which the commissioners held were
referred to and argued on; but LORD KENYON's judgment does not appear to have
proceeded on the ground that their effect was to prohibit the payment of
poor rate. He says (4 Term Rep. at p. 732) :

"The trustees have a bare naked trust, not coupled with any interest. E
If any interest resulted either to the commissioners or to the owners of the
adjoining land after the public purposes of the Act were answered, these
tolls might have been rated. But it is admitted that all the money which
is collected under this Act of Parliament must be expended for the purposes
of the Act, and, therefore, upon the ground upon which the court proceeded
in *R. v. St. Luke's Hospital* (9), namely, that there was no occupier, F
these commissioners are not liable to be rated."

Counsel for the parish and township in the cases now at your Lordships' Bar G
did not attempt to deny that this decision was in favour of their opponents;
they admitted (and we think quite properly admitted) that the decision was
against them, but they denied that it was law. Counsel for the Mersey Board
were fully justified in relying on this case as entitling them to the benefit of
LORD KENYON's judgment; but we think that when they proceeded to argue
that the decision acquired additional authority because it was acquiesced in, H
they fell into a fallacy. When the Court of Queen's Bench has decided in favour
of a rate, those who are rated may, if they are so advised, bring replevin,
and (subject to the question whether replevin lies in such case) may carry the
case up to the House of Lords, and, therefore, where a decision in favour
of a rate is not disputed further, it may properly be said to be acquiesced in.
But when the Court of Queen's Bench has decided against a rate and quashed
it, there is no way whatever in which the parish officers can raise the question
again; and acquiescence in a decision cannot add any weight to it when there
is no possible way of disputing it.

The next cases to be found in the reports in which any similar point arose I
were those of *R. v. Liverpool (Inhabitants)* (13), and *R. v. River Weaver
Navigation Trustees* (14), in 1827. It appears that in 1806 the Liverpool
sessions made an order excluding the Liverpool docks from a rate for the relief
of the poor of the parish of Liverpool, subject to a case intended to obtain
the opinion of the King's Bench on the question whether the corporation of
Liverpool were rateable as occupiers of the docks, and that in 1808 the order of
sessions was confirmed, but under what circumstances does not appear. LORD
ABINGER was counsel for the parish, both in that case and in the case of 1827, and

A the attorneys of the corporation of Liverpool in 1827 could not be ignorant of the circumstances attending the confirmation of the order of sessions in 1806. Yet on the argument in the case reported in 7 B. & C. neither side alludes to what, if a decision at all, must have been precisely in point. It seems, therefore, probable that, though the rule confirming the order in 1808 is not drawn up as by consent, the former case was compromised and there was no decision of the court in 1808. However this may be, there can be no doubt that the Court of King's Bench in 1827 acted upon the authority of *R. v. Salter's Load Sluice Comrs.* (10), LORD TENTERDEN saying, in *R. v. Liverpool (Inhabitants)* (13):

"Here the trustees were not occupiers in the ordinary sense of the word, and no profit was received for the use of any person";

C and BAYLEY, J., saying:

"The principle of this decision is applicable to the case of *R. v. River Weaver Navigation Trustees* (14). There the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes; and as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees."

There is no dispute that those two decisions, if they are to be followed, are decisive in favour of the Mersey Docks and Harbour Board, at least in the first of the cases at your Lordships' Bar, and reduce the case of the overseers of Birkenhead to that point mentioned in your Lordships' third question.

E The next case to which it is necessary to call attention is that of *Bristol (Governors of the Poor) v. Wait* (15), decided in 1836. In that case the governors of the Bristol poor had taken property for the purpose of putting out their poor there. A rate had been imposed on them in respect of this occupation and was levied by distress. The governors of the Bristol poor brought replevin for the purpose of questioning the validity of this rate. In the judgment of the court the point raised is said to be "whether the plaintiffs were such occupiers of the property as to be rateable to the poor." The decision was that they were. The judges who decided this case probably did not suppose that they were deciding anything inconsistent with the decisions in *R. v. Salter's Load Sluice Comrs.* (10) and *R. v. Liverpool (Inhabitants)* (13), and *R. v. River Weaver Navigation Trustees* (14), which appear not to have been brought to their notice. But we do not see how the cases can stand together. The governors of the poor of Bristol were as much bare naked trustees having no personal interest in the occupation of this property as the commissioners of Salter's Load Sluice, and if the one set of trustees were on that ground not occupiers, we do not see how the others could be occupiers; and if the application of the surplus funds of the Weaver navigation to the bridges and highways of Cheshire, so as to be in relief of the county rate, was a public purpose rendering the trustees of that navigation not rateable, it is difficult to see why the application of whatever value was derived from the lands occupied by the governors of the Bristol poor to the maintenance of the poor of Bristol, and so in relief of the poor rate of the city of Bristol, was not a public purpose also.

I We think that in this case the Court of King's Bench, probably without being aware of it, came to a decision inconsistent with, and, therefore, shaking the authority of, *R. v. Salter's Load Sluice Comrs.* (10), *R. v. Liverpool (Inhabitants)* (13), and *R. v. River Weaver Navigation Trustees* (14). The decision in *Bristol (Governors of the Poor) v. Wait* (15) has been repeatedly acted upon, and never questioned that we know of. As the decisions in this case and those which followed it were decisions in favour of the rate, and consequently might have been questioned in replevin, the acquiescence in them does add something

to their authority. The Municipal Corporations Act 1835 [repealed by Municipal Corporations Act, 1882] restricted the power of the municipal corporations named in Schedules A. and B. to that Act over what had been their private estates, and compelled them to pay the net proceeds into the borough fund, which was applicable first to the payment of the existing debts of the corporation, and then to the corporation expenses, and the surplus (if any) for the public benefit of the inhabitants and the improvement of the borough. The Court of Queen's Bench in *R. v. Liverpool Corpn.* (16), decided in 1839 that the effect of this enactment was to render the corporations no longer liable to be rated in respect of any property occupied by them. The reason given by the court for this decision was that they found

"the principle settled by the decisions already made, and felt it to be their duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority."

They proceed to mention *R. v. Liverpool (Inhabitants)* (13), and *R. v. River Weaver Navigation Trustees* (14), and say (9 Ad. & El. at p. 442) that:

"We feel it to be impossible substantially to distinguish these cases, and especially the latter from the present. The extent and approximation to something like national benefit are in kind, and almost in degree, the same. The public in the one case is the same town of Liverpool, in the other, the county of Chester."

The court do not explain why the same argument did not avail in *Bristol (Governors of the Poor) v. Wait* (15), where the city of Bristol was held not to be the public, but they did not intend to depart from that decision, and in the same year acted upon it in *R. v. Wallingford Union* (17), in which latter case an attempt, but, as it seems to us, not a successful one, is made to reconcile the decision with that in *R. v. Liverpool Corpn.* (16). CROMPTON, J., in *Tyne Improvement Comrs. v. Chilton Overseers* (18), stated that the decision in *R. v. Liverpool Corpn.* (16) created at the time great surprise. We think, however, that the conclusion came to by the court in that case does logically follow from the decisions in *R. v. Liverpool (Inhabitants)* (13) and *R. v. River Weaver Navigation Trustees* (14), and that the court in that case had to choose whether they would consider it a reductio ad absurdum, and say that decisions leading to such a conclusion must be wrong in principle, or to say that the decisions being binding on them, they must hold that the conclusion was not wrong. They adopted the latter course, apparently not at that time perceiving that it was inconsistent with the principle of their own decision in *Bristol (Governors of the Poor) v. Wait* (15).

A few years later the Court of Queen's Bench in several cases to be presently cited, adopted the former course, and the question now pending in your Lordships' House seems to us to be in substance which set of decisions are to be followed in future? The effect of the decision in *R. v. Liverpool Corpn.* (16) was immediately nullified by the Municipal Corporations Act, 1841, but that enactment did not declare the decision erroneous. On the contrary, the Act was couched in language which, though not declaring the decision to be law, indicates that the framers of the Act thought that it was law; and the fact that an Act couched in such terms was passed by the legislature affords an argument of more or less weight, that the error of the court, if it was one, was acquiesced in and had become communis error. This is, we think, the latest authority in point of date relied on by the counsel for the Mersey Docks and Harbour Board.

The next case in order of date was *R. v. Badcock* (19), in 1845. In the judgment of the court, the conflicting cases are cited. The court does not attempt to reconcile them, but observes that in all the cases where the occupation was held to be of such a public nature as to exempt the property from rateability,

A "the public, as such, unlimited by the bounds of county, borough, or parish, had a direct interest in the benefit which the application of the funds produced,"

and that the case then before them did not come within that principle. The passage here cited has been repeatedly quoted with approval as giving the true principle of exemption. It does include all the cases already cited, in which the occupation was for the purposes of government. But the principle thus laid down cannot be made to embrace either *R. v. River Weaver Navigation Trustees* (14), where the funds were applicable to the relief of the county rate of Cheshire, or *R. v. Liverpool Corpn.* (16), where the funds were brought into the borough fund in relief of the borough rate in that particular borough. In *R. v. Longwood Overseers* (20), in 1849, the Court of Queen's Bench, acting upon the principle laid down in *R. v. Badcock* (19), held that the commissioners of the Huddersfield Waterworks were rateable to the relief of the poor.

All the cases which we have hitherto cited were decided before LORD CAMPBELL took his seat upon the Bench. It is right to notice this, for it has often been supposed, and indeed was said in the argument at your Lordships' Bar, that the decisions in his time, on the subject of the exemption from rates, were innovations introduced in consequence of his strong individual opinion that the exemptions from rateability had been carried further than was warranted by law or reason; but we think that the cases which we have cited show that before he came upon the Bench that opinion had been entertained and acted upon, and that in consequence the decisions had got into such a state as to be inconsistent with each other, so that it had become necessary to overrule one set of the inconsistent decisions unless the law was to be administered without any reference to principle, deciding each case as it arose, according as the facts might be supposed to approximate more nearly to those in the one set of decisions or the other. Several cases were decided in LORD CAMPBELL's time which closely resembled that of the Huddersfield commissioners (*R. v. Longwood Overseers* (20)), and were decided in the same way without rendering it necessary to go further than had been done in that case, until, in 1852, *Birkenhead Docks Trustees v. Birkenhead Overseers* (21) arose. CROMPTON, J., was a party to that decision, and in *Tyne Improvement Comrs. v. Chirton Overseers* (18), he has given some account of the deliberations on that case (though his observations were misunderstood by the reporter), and he repeated it during the argument in the Exchequer Chamber of the case at Bar.

It appears that this learned judge was at first startled at being called upon to act on a principle in direct opposition to the considered decision of the Court of Queen's Bench in *R. v. Liverpool Corpn.* (16), though he had always thought that decision wrong, and that he was the more unwilling to act in direct contradiction to that case because the legislature in the Municipal Corporations Act, 1841, when enacting that the decision should no longer be practically operative, did not express any disapprobation of the principle of the decision, but rather used language seeming to assume that it was good law; and he doubted whether the case should not be followed though not approved of, leaving it to the legislature to correct it. The rest of the court thought that the time had come when the court could no longer halt between two sets of decisions, but must follow that which was law, and CROMPTON, J., ultimately agreed with them. LORD CAMPBELL in his judgment (perhaps out of deference to the doubts which CROMPTON, J., had at first entertained), seeks to avoid expressly overruling the previous decisions, and suggests that, perhaps, *R. v. Salter's Load Stuiice Comrs.* (10), and *R. v. Liverpool (Inhabitants)* (13), may be distinguishable on the ground that the private Acts in those cases were construed by the courts as amounting to a prohibition to pay poor rate. But the counsel on both sides at your Lordships' Bar agreed that no such distinction could be maintained,

and we think that neither LORD KENYON nor the Court of King's Bench in LORD TENTERDEN'S time proceeded on any such ground. A

In the subsequent cases of *R. v. River Lee Trustees* (22) and *Tyne Improvement Comrs. v. Chirton Overseers* (18), in 1859, no such distinction was made. The Court of Queen's Bench in that last case acted upon the broad principle that though, where the property was occupied for public purposes, such as, says LORD CAMPBELL: "a post office or a military store depot, where the purposes for which the property is occupied are purposes created by the government of the country," there was no rateable occupier, the occupation of a public dock was not an occupation for such public purposes, and that the commissioners occupying such a dock were rateable in respect of the value of that occupation, estimated according to the rule laid down in the Parochial Assessments Act, 1836, unless an exemption was conferred by some subsequent statute, and that the enactments in the Tyne Improvement Acts as to the applications of the rates received (which are in substance the same as those in the Liverpool Acts), did not amount to such an exemption. CROMPTON, J., after stating his former doubts when *Birkenhead Docks Trustees v. Birkenhead Overseers* (21) was argued, said that he now thought that case laid down the proper rule. This, we think, must be considered as the rule now acted upon in practice in the Court of Queen's Bench. B C D

Such being the state of the authorities, it seems to us no longer possible to support the decisions relied on by counsel for the Mersey Docks and Harbour Board. We quite agree that it is very desirable to adhere to decided cases, though this principle may be carried too far. It has been forcibly remarked by an American author of repute (1 PHILLIPS ON INSURANCE, 393, note g), that where the objection to the decisions E

"is inconsistency with admitted fundamental principles, it is an adhering to an inconsistency and contradiction, and tends to reduce jurisprudence from a science to an aggregation of dogmas."

Still the inconvenience caused by unsettling the law and disturbing what was quiet is so great that we agree that even a court of error should be slow to reverse decisions which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error and leave the remedy to the legislature. It may be that, if the attention of the Court of King's Bench had in 1836 been called to *R. v. Liverpool (Inhabitants)* (13) and *R. v. River Weaver Navigation Trustees* (14) before they decided *Bristol (Governors of the Poor) v. Wait* (15), this principle, which is strongly laid down in *Crease v. Sawle* (23), would have led them to decide *Bristol (Governors of the Poor) v. Wait* (15) otherwise than they did. But all this inconvenience has been already incurred, the recent decisions have been such as to disturb the quiet state of things, and a decision of your Lordships' House affirming *R. v. Liverpool (Inhabitants)* (13) and the non-rateability of the Liverpool docks must reverse the decision in *Tyne Improvement Comrs. v. Chirton Overseers* (18), and render the docks in the Tyne rateable. Such a decision, though not necessarily reversing the numerous decisions based on *Bristol (Governors of the Poor) v. Wait* (15), by which poor houses and gas-works and waterworks in the hands of public trustees have been held rateable, must greatly shake their authority and disturb a principle of rating now generally adopted throughout the country. The balance of convenience, if that be a legitimate consideration, is now in favour of adhering to the more recent decisions, and if we view the case on principle, without regard to the decisions either way, it seems to us clear that the Mersey Docks and Harbour Board ought to be rated. F G H I

Counsel referred to many expressions in the local Acts showing that the Mersey docks were thought likely to confer great public benefit and to be very

A advantageous to the commerce of this country; and there is no doubt that that expectation has been realised, and that these docks are of great public benefit, but not more so than the docks in the river Thames, all of which are in the hands of private companies, and are undoubtedly rateable. The rate is imposed, not in respect of the value of the benefit conferred on the public, or that portion of it which uses the dock, but is on the occupiers of the docks in respect
B of the value to them derived from the payments taken for that use. We think it impossible to point out any real distinction in this respect between the occupation of a dock formed by a company under an Act of Parliament incorporating the Companies Clauses Act and the Harbours, Docks and Piers Clauses Act, 1847, and the occupation of the Mersey Docks by the Mersey Docks and Harbour Board. A company forming a dock under an Act of
C Parliament incorporating these Acts is bound to maintain the docks, and to keep harbour masters and other officers there, and to allow the public to use the dock on payment of the rates, and to allow Her Majesty's vessels to use it without making any payment; and by these means they confer a benefit on the public. The company, by virtue of its occupation, receives the rates on shipping
D using the docks, and the amount thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then in paying dividends on the share capital, and it is common to have a maximum limit put on the rate of the dividend; when that maximum dividend is reached the rates must be lowered. It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. If, without in any way
E altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour masters and others who manage it, we change the name of the body who occupy it from that of "the company" to that of "the board;" and if, instead of "the company" paying to the shareholders a maximum dividend on their capital, the "board" pay to the same individuals the same identical sums, but call them "interest on bonds" instead of "maximum dividend on share capital," what difference does this make? If *R. v. Liverpool (Inhabitants)* (13), is to be supported, it makes this difference, that what was formerly an occupation in respect of which the company was rateable has by this change of name, without any change in the thing, become an occupation for public purposes, for which the board is not rateable. If the decision in
F *Tyne Improvement Comrs. v. Chirton Overseers* (18), is to be supported, the change in name makes no difference in the rateability. We think the latter
G the correct view of the law, and, therefore, we answer your Lordships' first question in the affirmative.

We now proceed to answer the second question put by your Lordships. We are of opinion that there is nothing in the matters referred to in your Lordships' question to exempt the board from being rated in respect of their
H occupation. We have already, in answering your Lordships' first question, given our reasons for thinking that the purposes to which the rates are applicable are not such as to exempt them from rateability, and we are further of opinion that the effect of the statutes applicable to the Liverpool docks is not such as to exempt them from the payment of poor rate. There are no negative words
I prohibiting the application of the rates to payment of the poor rate. We think, in conformity with the decision in *Tyne Improvement Comrs. v. Chirton Overseers* (18), that enactments directing that the revenue shall be applied to certain purposes and no others are directory only, and mean that, after all charges imposed by law on the revenue have been discharged, the surplus or free revenue, which otherwise might have been disposed of at the pleasure of the recipients, shall be applied to these purposes.

We have only, therefore, to consider the reasons on which the Court of Exchequer Chamber based their decision in the second of the present cases; and, with very great respect for those who concurred in that judgment, we think

that they acted on a principle sound in itself, but not applicable to the case before them. Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the legislature in a subsequent Act in pari materia use the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before; and, unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise. If the decision in *R. v. Liverpool (Inhabitants)* (13), had been that certain words used in the former Acts had amounted to an exemption from poor rate, and those same words had been repeated in the subsequent Acts, it would, on this principle, have been a fair inference that the legislature intended by using the same words to give the exemption. But this is not the case here. The legislature had by former Acts conveyed to the trustees the docks to be held for certain purposes. The Court of Queen's Bench had decided that, as an incident of law, those who held land for such purposes were not rateable to the relief of the poor. When the legislature again in fresh Acts used the same language, it showed that they intended to convey the land to be occupied for the same purposes, and that if the law did annex non-rateability as an incident to such an occupation the legislature had no objection. But it did not afford any argument that the legislature intended to annex that incident in case it should be discovered that it was not annexed by law. The clauses enacting that the warehouses should be rated carry this argument no further. During the course of the argument at your Lordships' Bar the Lord Chancellor put the case of an express recital in the Act, to the effect that it had been decided in *R. v. Liverpool (Inhabitants)* (13), that the dock trustees were not liable to poor rate in respect of land occupied by them, and that it was expedient that no such exemption should be given to them in respect of the occupation of new warehouses acquired under the new Act, and then after that recital an enactment in the terms in which it is now expressed. He asked counsel at your Lordships' Bar two questions. First, whether such a recital could be construed to amount to a declaratory enactment that the decision in *R. v. Liverpool (Inhabitants)* (13) was good law? Secondly, whether the Acts framed as they were could have a greater effect than they would have had if framed with such an express recital? Counsel for the Mersey Docks and Harbour Board were not able to give any answer to those questions that would support the decision of the Court of Exchequer Chamber. BLACKBURN, J., (the only judge who, being a party to the decision in the Exchequer Chamber, was also present at the argument at your Lordships' Bar) admits that he cannot answer them, and his inability to do so has led him to change the opinion which he entertained when in the Exchequer Chamber. We have no reason to believe that the other judges who joined in that judgment have changed their opinion. We have most sincere deference for their judgment, and, as we have had no opportunity of hearing what answer they would have made to the way the case has been put in your Lordships' House, it is with diffidence that we have formed our opinion that they have misapplied the ground of their decision, but, entertaining that opinion, we are bound to express it. We therefore answer your Lordships' second question in the negative.

The answers which we give to the first and second questions put by your Lordships in effect answer the third question. In our opinion the liability to poor rate is imposed on the board by the general law, and not by virtue of the sections of the Act referred to. We therefore answer your Lordships' last question in the negative.

Their Lordships took time for consideration.

June 22, 1865. The following opinions were read.

A LORD WESTBURY, L.C.—The questions raised in this appeal depend in a great measure on the inquiry: What is the occupation of real property which is liable to be rated under s. 1 of the Act of 43 Eliz. c. 2 [Poor Relief Act, 1601], independently of the decided cases, several of which are irreconcilable with each other. It would seem to be easy to answer this inquiry, and having regard to the Parochial Assessments Act, 1836 [repealed by Local Government Act, 1948] it may be said in answer that occupations to be rateable must be of property yielding, or capable of yielding, a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent. It is in this sense that I understand the words beneficial occupation, wherever it is said that to support a rate the occupation must be a beneficial one. For on principle it is by no means necessary that the occupation should be beneficial to the occupier. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings. The only occupier exempt from the operation of the Act is the King, because he is not named in the statute, and the direct and immediate servants of the Crown whose occupation is the occupation of the Crown itself also come within the exemption.

D This ground of exemption does not warrant many decisions which have held that property used for public purposes is not rateable. So also trustees who are in law the tenants or occupiers of valuable property upon trusts for charitable purposes such as hospitals or lunatic asylums are in principle rateable notwithstanding that the buildings are actually occupied by paupers who are sick or insane. If the matter were res integra I could not concur in the decision of LORD MANSFIELD in *R. v. St. Luke's Hospital* (9) in which he is reported to have said that mere trustees cannot be esteemed occupiers, or rated as lessees, or with his conclusion in *R. v. St. Bartholomew's the Less (Inhabitants)* (11). But with a slight verbal alteration, I entirely agree with the remark of the learned judges in the present case, that if LORD MANSFIELD meant that the persons in the legal occupation of valuable property are not rateable if they occupy it in a merely fiduciary character, it is a position which cannot be maintained. To these observations and decisions of LORD MANSFIELD, that which appears to me to be the erroneous doctrine of several subsequent decisions is to be attributed. This is plain on an examination of LORD KENYON's judgment in *R. v. Salter's Load Sluice Comrs.* (10) as reported in 4 Term Rep. 730. LORD KENYON refers to the decision in *R. v. St. Luke's Hospital* (9), and adopts the position that trustees who have a bare naked trust not coupled with any interest are not liable to be rated, and he uses language which, with the decisions of LORD MANSFIELD, has introduced the notion that if valuable property be in the possession of trustees who are bound to apply the whole of the proceeds to public but not government purposes, that is, in works or purposes for the better accommodation or use of the public, they are not liable to be rated.

H There is nothing in the Poor Relief Act, 1601 or in the reason of the thing to warrant this conclusion. No exemption is thereby given to charity or to public purposes, beyond that which is strictly involved in the position that the Crown is not bound by the Act. It is a remarkable fact that whenever these opinions of LORD MANSFIELD and LORD KENYON have not been presented to the Court of Queen's Bench the judges have adopted the correct view of the statute. Thus, in *R. v. Liverpool (Inhabitants)* (13) and *R. v. River Weaver Navigation Trustees* (14), decided in 1827, *R. v. Salter's Load Sluice Comrs.* (10) was cited and relied on, and the Court of Queen's Bench adopted the language of LORD KENYON and followed his decision, but in *Bristol (Governors of the Poor) v. Wait* (15), decided in 1836, *R. v. Salter's Load Sluice Comrs.* (10) does not appear to have been referred to, and the court recurred to the correct view of the statute of Elizabeth, and held that the governors of the Bristol poor who had taken some buildings and land on lease for the occupation of their poor, although they were

bare trustees and held for a public purpose only, were such occupiers of property as to be liable to be rated to the poor. This case in its turn has been followed in other decisions as an authority, and it might have been supposed that the authority of *R. v. Salter's Load Sluice Comrs.* (10) and its two satellites *R. v. Liverpool (Inhabitants)* (13) and *R. v. River Weaver Navigation Trustees* (14), had come to an end. But in the year 1839 the Court of Queen's Bench, in *R. v. Liverpool Corpn.* (16) returned to its old allegiance, and again set up the authority of *R. v. Liverpool (Inhabitants)* (13) and *R. v. River Weaver Navigation Trustees* (14). This last case of *R. v. Liverpool Corpn.* (16) was decided on the principle, that since the Municipal Corporation Act the property of a municipal corporation is held upon trust for the purposes of the borough fund, and therefore, that the corporation of Liverpool were bare trustees for the property in question for public purposes. The mischief of this decision was remedied by the Act of 4 & 5 Vict., c. 48 [Municipal Corporations (Poor Rates) Act, 1841], but unfortunately that Act did not declare the law.

Some subsequent decisions of the Court of Queen's Bench have been marked with much timidity. They have in effect departed from the grounds of the decisions in *R. v. Salter's Load Sluice Comrs.* (10), and its attendant cases, but have at the same time attempted by very questionable distinctions to save whole the authority of those cases. Thus in *R. v. Badcock* (19) and *R. v. Longwood Overseers* (20) there is an attempt to distinguish between the interest of the unlimited public and the interest of the public limited by the bounds of a county, borough, or parish. At last, in *Tyne Improvement Comrs. v. Chirton Overseers* (18), the Court of Queen's Bench recurred to that which is, in my opinion, the true principle, namely, that the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule that the Sovereign is not bound by that statute, and that consequently when valuable property capable of yielding a net rent above what is required for its maintenance is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are, therefore, to be deemed part of the use and service of the Crown.

If this be the true criterion of exemption from rateability where the property is valuable, it is clear that the Mersey docks are liable to be rated. In this country many works tending greatly to the convenience and benefit of the public—and, in that sense, public works—are the result and creation of private enterprise, being made or performed by money subscribed by the public on the terms or in the hope of receiving such interest out of the proceeds of the works as will in the judgment of the subscribers make the investment a profitable one. Such is the condition of the Mersey docks, which are, in truth, property used and occupied for the profit and benefit of a number of persons, and it is the same thing in substance as if the docks had been demised by the subscribers to the trustees on the terms of maintaining the docks and paying to the subscribers a rent equivalent to the interest on their bonds. I am, therefore, clearly of the same opinion with the majority of the learned judges, that the Mersey Docks and Harbour Board are occupiers of the docks and harbour within the true meaning of the word "occupier" in the statute of Elizabeth. The answer to the second question put to the learned judges is in effect a mere consequence of the answer to the first question, for it cannot be pretended that the statute of Elizabeth has been repealed, either expressly or impliedly, by any of the statutes which apply to the Liverpool docks, or that the liability of the trustees or occupiers, which is the result of the true interpretation of the Act of Elizabeth, has been discharged or altered by anything contained in the local statutes. On this head it is unnecessary to say more than that I concur with the observations of the majority of the judges in their elaborate opinion delivered by BLACKBURN, J. The result is, that I humbly move your Lordships to reverse the order of

A the Court of Exchequer Chamber in *Jones v. Mersey Docks and Harbour Board*, but to affirm it in *Mersey Docks and Harbour Board v. Cameron*.

B **LORD CRANWORTH.**—I concur with my noble and learned friend in thinking that judgment ought to be given for the appellants in *Jones v. Mersey Docks and Harbour Board*. I have given full attention to the opinions of the learned judges who assisted us at the hearing, and concurring as I do in that delivered by BLACKBURN, J., on behalf of himself and four of the other five judges, I do not feel it necessary to go into the question at length. That very able opinion seems to me to exhaust the subject.

C By the statute of Elizabeth the overseers are directed to raise the money necessary for the relief of impotent poor by taxation of (inter alios) every occupier of lands in the parish. That the respondent board are occupiers of land in the parish of Liverpool cannot be doubted, and so, unless there be something to exempt them, they are rateable. The argument on their behalf has been that, though they are occupiers, their occupation is not a beneficial occupation, and the statute, it was contended, contemplated only such an occupation as is beneficial to the occupier, or to some other person or persons for whose behoof the occupier is occupying. If by beneficial occupation is meant any occupation of something valuable—something in its own nature beneficial to some one—I think it is fair to consider that that word is impliedly included in the statute. It was not meant to impose the duty of contributing to the relief of the poor on any one merely because he might be the occupier of a barren rock neither yielding nor capable of yielding any profit from its occupation. But I can discover nothing either in the word or in the spirit of the Act exempting from liability the occupier of valuable property merely because the profits of the occupation are not to be enjoyed by him or by any one in whose behoof he is occupying, but are to be devoted to the benefit of the public.

F In the opinion of the five judges delivered by BLACKBURN, J., that learned judge has traced with great care and accuracy the progress of the decisions on this subject, and I should be merely wasting the time of the House if I were to proceed to go over again what has been so well done by him. The court seems to me to have fallen into error in the time of LORD KENYON, if not in that of LORD MANSFIELD, in proceedings which unfortunately were incapable of being questioned in a court of error. The decisions so made were followed in similar proceedings in the time of LORD ELLENBOROUGH and LORD TENTERDEN. The doctrine on which they rested was shaken in some cases which occurred when LORD DENMAN was Chief Justice, and eventually were in substance overruled when LORD CAMPBELL presided in the Court of Queen's Bench. In these circumstances, thinking as I do that there is nothing in the statute of Elizabeth expressly or impliedly exempting from rateability the occupiers of valuable property merely because the benefit of the occupation is to go to the public, I think your Lordships ought not to consider yourselves fettered by any decisions of the court below, but that you ought to lay down the law as you think it ought to have been laid down if this question had arisen before any of those decisions had been pronounced. I, therefore, concur in the motion of my noble and learned friend on the Woolsack.

I To avoid all misconception I wish to add that there are certain cases to which the observations I have made do not apply. The Crown, not being named, is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown, are not liable to be rated, and I conceive that it is from confusion between property occupied for public purposes and property occupied by the Crown or servants of the Crown that the mistake has arisen. This principle exempts from rates not only Royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. On the same ground,

police-courts, county courts, and even county buildings occupied as lodgings at the assizes for the judges, have been held exempt. These decisions, however, have all gone on the ground, more or less sound, that these might all be treated as buildings occupied by servants of the Crown, and for the Crown, extending in some instances the shield of the Crown to what might fitly be described as the public government of the country. In none of these cases was exemption conceded on the ground contended for in the present case. I cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown or its servants were concerned.

LORD CHELMSFORD.—It is impossible, in entering upon the consideration of these appeals, to refrain from an expression of surprise that there should arise at the present day, after more than two centuries and a half from the time of the passing of the Act, a necessity for interpreting any part of the Poor Relief Act, 1601, and yet, from the numerous cases which have been cited in argument at your Lordships' Bar, it is evident that the exact meaning of the important word "occupier" in the rating clause of that Act must be regarded as hitherto an unsettled question.

Those who have to establish the liability of the docks to be rated to the poor rate have, with respect to the Liverpool docks, to contend against the authority of a decision probably in 1808, but certainly one in 1827, upon the very subject in question. In one of the appeals the latter decision was expressly founded upon a case determined more than thirty years before, which has since been regarded and acted upon as an unquestionable authority. Under these circumstances counsel for the parishes might expect that the House would feel the same reluctance to disturb these decisions as was expressed by TINDAL, C.J., in *Crease v. Sawle* (23), and would say with him (2 Q.B. at pp. 885, 886) :

"It would be extremely inconvenient, and, indeed, mischievous, to overrule a class of cases which have been much discussed and sanctioned by many eminent judges, and which are now constantly acted upon, because we might not feel perfectly satisfied with the reason assigned for their decision. And, if we could permit ourselves to disregard these authorities on that account, we might feel disposed on the same ground to reject others which have put a construction on the 43 Eliz. c. 2, which we were by no means sure it ought to bear if we were now for the first time called upon to explain the meaning of its language."

CROMPTON, J., in delivering the judgment of the Court of Exchequer Chamber in *Mersey Docks and Harbour Board v. Jones*, said, with reference to the former decisions :

"I think that neither a court of co-ordinate jurisdiction nor a court of error ought to interfere in such a case. If there is any hardship it must be left to the legislature."

By this last observation the learned judge seems to have considered that this House, as well as the courts of original and appellate jurisdiction, ought to yield implicitly to the authority of long-established decisions. But the same reasons for acquiescence did not apply to the different tribunals. The courts rightly abstain from overruling cases which have been long established, because, if they did so, they would only disturb, without finally settling, the law, but, when an appeal from any judgment is made to this House, however it may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis*, refuse to examine the foundation upon which they rest. It would, in my opinion, have been the duty of your Lordships, even if the

A current of the decisions had been uniform; but as various cases have been decided, which, with all the endeavours to reconcile them, must still be regarded as conflicting and contradictory, it is absolutely necessary to determine what for the future shall be considered to be the law with reference to rating docks and works of a similar character.

B The Act of 1601 enacts that the overseers are to raise by taxation of every inhabitant, etc., and of every occupier of lands, houses, etc., in such competent sums as they shall think fit, according to the ability of the parish, the requisite fund for the purposes of the Act. The words "taxation in such sum as they shall think fit," do not mean, as TINDAL, C.J., says in *Marshall v. Pitman* (24), that they are to have a power to rate arbitrarily; they are to rate the occupier according to the value of his occupation, the inhabitant according to his visible personal property, or, as was said in *Earby's Case* (25), the overseers are to make their taxations and assessments well and truly, and in an equal manner, according to the visible estates, real and personal, of the inhabitants within their town. Prima facie, therefore, a liability to the rate would seem to attach upon every occupation from which benefit is derived, and no occupier can claim an exemption unless he can find it in the Act itself, or it arises from some principle of law applicable to all cases.

D With respect to exemption arising from the Act itself, it is obvious that, as the occupier is to be assessed according to his ability, if he derives no benefit of any kind from his occupation, he has no ability in respect of it, and consequently cannot be rateable. The other exemption, which does not arise from the Act itself, but which is found on a general principle of law, applies only to the Crown, which, not being named in the Act, is not bound by it. I am unable to find any ground of exemption from liability to the poor rate either in the Act itself, or in any principle of law apart from the Act, except the two which I have mentioned; and there is nothing to indicate the intention of the legislature that lands and houses occupied for what in some of the cases is rather loosely called public purposes, as contradistinguished from private benefit, should not be liable to the rate.

F LORD CAMPBELL, in *Birkenhead Docks Trustees v. Birkenhead Overseers* (21), says that the exemption on the ground of public purposes takes its origin from the marginal note of the report of *R. v. Salter's Load Sluice Comrs.* (10). If this is so, it is a remarkable fact that in following that case as an authority the courts should have been misled, by confining their attention to the marginal abstract which certainly conveys a very imperfect if not inaccurate idea of the grounds of the decision. The term "public purposes" is only employed by LORD KENYON in *R. v. Salter's Load Sluice Comrs.* (10) incidentally. The reason given for the judgment is the absence of beneficial occupation. His Lordship says, "the commissioners have a bare naked trust not coupled with any interest." Again, upon the ground upon which the court proceeded in *R. v. St. Luke's Hospital* (9), there was no occupier, by which he must have meant no beneficial occupier, for he adds: "the commissioners were mere trustees to superintend the execution of the Act without any personal advantage." This reference to the case of *St. Luke's Hospital* shows that the leading idea in the mind of the court was the want of a beneficial occupier, although there does not seem to be a very close analogy between the case of a hospital supported by voluntary subscriptions from which no person who could be regarded as an occupier derived any pecuniary benefit, and the receipt of tolls as a compulsory incident to the occupation by the commissioners of the *Salter's Load Sluice*.

I The first case in which an occupation for public purposes was expressly stated as the ground of exemption from liability to poor rate is *R. v. River Weaver Navigation Trustees* (14), to which the principle of the decision in *R. v. Liverpool (Inhabitants)* (13) (the judgment brought into question by this appeal) was held to be applicable. In *R. v. Liverpool (Inhabitants)* (13) LORD TENTERDEN pro-

ceeded upon the ground of there being no beneficial occupation with respect to which he said *R. v. Salter's Load Sluice Comrs.* (10) is decisive. But in *R. v. River Weaver Navigation Trustees* (14) BAYLEY, J., said (7 B. & C. at p. 78):

"The surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes, and as no part of the moneys received could be applied to private purposes, these moneys were not rateable in the hands of trustees."

In *R. v. Liverpool Corpn.* (16), the court followed *R. v. Liverpool (Inhabitants)* (13) and *R. v. River Weaver Navigation Trustees* (14), without expressing any opinion as to the grounds of these decisions, observing that they felt it to be impossible substantially to distinguish the case before them from those cases, and especially from the latter, and that if they found the principle settled by decisions already made, they felt it to be their duty to act upon them, and not, upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority. In *R. v. Exminster (Inhabitants)* (26), the court adhered to the decision in *R. v. Liverpool Corpn.* (16) without any further explanation of the grounds of their judgment. But in a more recent case, *R. v. St. George's, Southwark* (27), LORD DENMAN said (10 Q.B. at pp. 864, 865):

"Whether a person is rated as occupier, holder, or possessor of the premises, or as using them, the occupation, holding, possessing, or using them must be beneficial to the parties so rated. It has been settled by several cases that the possessors or occupiers, as trustees of property otherwise rateable, the profits of which they were bound by Act of Parliament to apply to public or charitable purposes, were not rateable to the poor in respect of such property."

Although LORD DENMAN, in *R. v. Liverpool Corpn.* (16) seems to hint at some distinction between *R. v. Liverpool (Inhabitants)* (13) and *R. v. River Weaver Navigation Trustees* (14), yet it would appear (especially from his last-mentioned observations) that he considered them to rest upon the same foundation, and that the counsel on both sides at your Lordships' Bar were correct in saying that there was no case decided upon the ground of public purposes which was not resolvable into beneficial occupation. But, if this is so, it will be impossible to accept the explanation by which decisions apparently inconsistent with the judgment in *R. v. Salter's Load Sluice Comrs.* (10) and the cases which followed it have been attempted to be reconciled with them. To these cases it is necessary now to turn.

The first of them which broke in upon the series of decisions hitherto considered is *Bristol (Governors of the Poor) v. Wait* (15). In deciding the case as they did the judges were probably not aware that they were disregarding the authority of previous decisions, as *R. v. Salter's Load Sluice Comrs.* (10) and the other cases founded upon it are not noticed in the argument or in the judgment. But in *R. v. Wallingford Union* (17), where those cases were cited, the court followed *Bristol (Governors of the Poor) v. Wait* (15) without any attempt to reconcile it with what had been previously decided. In *R. v. Badcock* (19), however, LORD DENMAN in giving judgment reviewed the authorities which appeared to be conflicting—on the one side, the series which followed *R. v. Liverpool (Inhabitants)* (13) and, on the other, that which commenced with *Bristol (Governors of the Poor) v. Wait* (15), and observed that in all the first class the public as such, unlimited by the bounds of county, borough, or parish, had substantial and direct interest in the benefit which the application of the funds produced; in the latter the ratepayers, or at most the inhabitants of certain parishes, were alone concerned in the benefit direct or indirect. The

A distinction was afterwards approved of and adopted by COLERIDGE, J., in *R. v. Harrogate Comrs.* (28). The attempt thus to reconcile the discordant decisions will be regarded as having been completely unsuccessful when it appears that in the first class, instead of all the cases being instances in which the public at large unlimited by the bounds of county, borough, or parish, had an interest, there are found *R. v. River Weaver Navigation Trustees* (14), in which the surplus funds were applied for the general purposes of the county of Chester, and of *R. v. Liverpool Corpn.* (16), and *R. v. Exminster (Inhabitants)* (26) in which the public beyond the bounds of the boroughs had no interest in the benefit produced by the application of the funds. The distinction fails altogether if the term "public purposes" as distinguished from private purposes is to be resolved into the question of beneficial occupation, because it would then appear to be immaterial whether the public purposes which exclude the idea of private benefit were of a local or of a general character.

The desire of the court, however, not to be bound by the former decisions and yet not to be compelled expressly to overrule them is exhibited in a very striking manner in *R. v. Harrogate Comrs.* (28), where it was held that in order to exempt property from liability to poor rate on the ground of its occupation for public purposes, the benefit must be exclusively public, and that if the occupation was in some degree beneficial to the whole public, yielding additional benefit also to a limited district or community, the property was rateable, as if it could make any difference in point of principle, when the occupation is for public purposes, that one portion of the public derived a greater benefit from the application of the funds produced than the rest.

After these fruitless endeavours to reconcile the decisions a case arose in which it seemed absolutely necessary to determine whether *R. v. Liverpool (Inhabitants)* (13) and the cases which followed it were to be submitted to as authorities for the future, or were to be set aside and disregarded. In *Birkenhead Docks Trustees v. Birkenhead Overseers* (21), the question to be decided was whether the commissioners of the Birkenhead docks were liable in respect of their occupation to be rated to the poor rate. It certainly requires some ingenuity to discover any difference between the Birkenhead docks and the Liverpool docks, the latter of which had been decided, in *R. v. Liverpool (Inhabitants)* (13) not to be rateable. But LORD CAMPBELL held that the cases were distinguishable. He said that the decision in *R. v. Salter's Load Sluice Comrs.* (10) could be rested only on the clause in the local Act, which directed the tolls to be applied and disposed of for the several uses and purposes of the said Act, and to no other use and purpose whatsoever. The question was whether this amounted to a prohibition to apply the tolls to the payment of the poor rate, and, adopting this construction, he added: "We think that the decision in the Liverpool case can only be supported by similar reasoning."

It is clear, however, that the cases in question were not decided on any such ground, and it could have been assumed by LORD CAMPBELL only from his desire to escape from the necessity of submitting to them by suggesting a distinction without denying their authority. That distinction was that in the *Birkenhead* case (21) the obligation to lower the tolls, which was much relied upon in the *Liverpool* case (13), was entirely wanting. It might have been supposed that, the decision of the *Birkenhead* case (21) having proceeded upon this ground, when the subsequent case of *Tyne Improvement Comrs. v. Chirton Overseers* (18), was brought before LORD CAMPBELL and the Court of Queen's Bench, in which case the local Act for making a dock expressly required the commissioners in the event of any surplus remaining after the appropriation of the rates to the purposes of the Act to lower the rates to the extent of such surplus, he would have adhered to the distinction and have held the case to be governed by the authority of *R. v. Liverpool (Inhabitants)* (13). But instead of taking this course, he said that, to hold the dock exempt from rateability, they would have

to overrule *Birkenhead Docks Trustees v. Birkenhead Overseers* (21), and that the only distinction between the cases was that in the *Birkenhead* case (21) the commissioners had power to raise the rates again after having reduced them.

In this unsatisfactory state of the authorities, it is evident that the two classes of decisions which have been subjected to this examination cannot stand together, and that it is necessary for your Lordships to determine which of them is agreeable to law. It must not be overlooked that in favour of the exemption of the docks from liability to poor rate, there is the recital in the Municipal Corporations (Poor Rates) Act, 1841, which strongly indicates the opinion of the legislature that the cases which had held the property of municipal corporations not to be liable to poor rate had been rightly decided. But, as LORD CAMPBELL said in *R. v. Houghton (Inhabitants)* (29), a mere recital in an Act of Parliament either of fact or of law is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital. The question, of course, depends upon the true meaning of the word "occupier" in the Act of 1601. The words of the Act are as general as possible, "every occupier according to his ability." LORD DENMAN, in *Bristol (Governors of the Poor) v. Wait* (15), seems to give a correct description of the effect of those words when, after adverting to the meaning of the term "beneficial occupation," he says, without affecting the precision of an exact definition, it would probably be nearer the truth to say that a presumptive liability arising from occupation is to be explained away in each case.

It is impossible not to agree with the observations made by his Lordship in *R. v. Sterry* (30), that no one can review the numerous decisions (which cases somewhat like the one then before him had occasioned) without regretting that the court was ever induced to depart from the simple test which the subject-matter of occupation would in every case have afforded. Whether the occupation was in respect of private or public, or charitable purposes, it would have been wiser to have disregarded, and whenever the subject-matter was found productive to any one to have rated the actual occupant in respect of that produce, I cannot help thinking that the test here suggested was the one intended by the legislature. By the Act the taxation is to be on every occupier "according to the ability of the parish." The productive occupation of the several occupiers within the parish make up its aggregate ability. If an occupier derives no benefit of any description from his occupation, it forms no part of the general ability of the parish; but if it is productive (although not profitable), there is nothing in the Act which requires the overseers to follow the produce in its subsequent application. The receipt of it constitutes the visible ability of the occupier. As was said by LORD TENTERDEN in *R. v. St. Giles, York (Inhabitants)* (31), if any profit be made the application of it when made is immaterial as to the question of rateability.

This seems to be the true distinction which ought to have guided the decisions, and not that between private benefit and public purposes, from the adoption of which all the contrariety in the cases on the subject of beneficial occupation has arisen. It is to be observed that the term beneficial occupation is nowhere to be found in the Act of 1601, and it must have been used in the different cases as synonymous with ability. In this sense, the decisions with regard to St. Luke's and St. Bartholomew's Hospitals, and to chapels and rectory houses, where no pew rents are received, are perfectly intelligible. In none of them could any person in the character of occupier be said to derive any benefit from the occupation. That the absence of private benefit is no ground of exemption appears from the cases in which trustees of chapels, who received profit from letting the pews, although they applied it entirely to the purposes of the chapel, were held rateable. In *R. v. Sterry* (30), the trustees of a school, purchased from funds raised by charitable subscriptions and bequests, were held rateable in respect of the school, because no child was admitted to the

A school without an annual payment of £12, although the average annual expense with respect to each child was £20.

B *R. v. Salter's Load Sluice Comrs.* (10) gave the key-note to all the subsequent decisions, which held that the prima facie liability of an occupier no longer existed when it was shown that the profits connected with his occupation were applicable to public purposes. LORD KENYON, in founding his judgment upon *R. v. St. Luke's Hospital* (9), must have intended to decide that in the case before him there was no beneficial occupier, although he did not advert to the distinction that in the case of *St. Luke's* there was nothing received by any one by reason of the occupation, while the commissioners of the *Salter's Load Sluice* were empowered to take tolls for the navigation, which was vested in them. The exemption of an occupier, whose occupation is applicable to public purposes, was C thus almost identically introduced, and having been so, it was accepted without much consideration in the subsequent cases.

At last, some decisions having taken place which were hard to be reconciled with each other, it became necessary to define with some precision the true principle which ought to govern cases of this description. The distinction was then proposed between general and local public purposes. The difficulty, not to D say the impossibility, of reconciling the cases by a distinction of this sort has been already shown. If, as before observed, the ability of the occupier means the personal benefit derived from his occupation, it is as much excluded where the profits of his occupation are applicable to limited public purposes as where they are to be applied to the benefit of the public at large. I am of opinion that, under the words of the Act of 1601, every occupier of a tenement yielding E profit is within the rating clause of the statute, although the tenement be a public work for the general good of the realm, and the profit be directed to be applied exclusively to its maintenance.

Having thus expressed my opinion that the Mersey Docks and Harbour Board are liable to be rated for the Liverpool as well as for the Birkenhead docks, F it is unnecessary to consider the effect of the different Acts of Parliament by which the trustees were expressly made liable to parochial rates in respect of warehouses to be built, in like manner as the same are or would be payable in respect of warehouses the occupancy of which is beneficial. The provisions of these Acts certainly appear to indicate the opinion of the legislature that, without them the warehouses would have been exempt from liability to poor G rate as part of the docks enjoying that exemption. But if this liability existed before, the Acts cannot have the effect of taking it away by mere implication. It is quite true, as BYLES, J., has said, that the Act of 20 & 21 Vict., c. clxii, having consolidated the docks at Liverpool and Birkenhead into one estate, and vested the control of them in one public trust, it would be singular if one portion of the property should be rateable and one not rateable under precisely H similar circumstances. This undoubtedly would be the result if the decisions of the two cases appealed against were to stand. The remark exhibits in a striking manner the impossibility of reconciling the decisions which, on the one hand, have exempted the Liverpool docks from liability to poor rate, and, on the other, have rendered the Birkenhead docks liable to it. By reversing the judgment in the case of the Liverpool docks, and by affirming the judgment in that of the I Birkenhead docks, the decisions will at last be brought into uniformity, and the Act of 1601 will, in my opinion, receive its proper construction and have its consistent effect and operation.

LORD KINGSDOWN.—I concur with my noble and learned friends in the opinions they have expressed.

Orders accordingly.

PEARCE AND ANOTHER v. BROOKS

[COURT OF EXCHEQUER (Pollock, C.B., Martin, Pigott and Bramwell, BB.), April 17, 1866]

[Reported L. R. 1 Exch. 213; 4 H. & C. 358; 35 L.J. Ex. 134;
14 L.T. 288; 30 J.P. 295; 12 Jur.N.S. 342; 14 W.R. 614]

Contract—Immoral purpose—Unenforceable contract—Supply of goods to facilitate immoral acts—Evidence.

A contract for the supply of goods to be used for an immoral purpose is unenforceable. It is not necessary that the immoral acts contemplated should be proved with absolute strictness; or that it was part of the bargain that the goods should be used for an immoral purpose; it is sufficient if there is such evidence that the jury can properly infer that the suppliers knew that the goods supplied were intended to facilitate the commission of such acts. Nor is it necessary that it should be proved that the price of the goods was to be paid out of the proceeds of the immoral acts.

Notes. Approved: *Waugh v. Morris* (1873), L.R. 8 Q.B. 202. Applied: *Upfill v. Wright*, [1911] 1 K.B. 506. Considered: *Foster v. Driscoll*, [1928] All E.R. Rep. 130; *Alexander v. Rayson*, [1936] 1 K.B. 169. Referred to: *Cowan v. Milbourn* (1867), L.R. 2 Exch. 230; *Taylor v. Chester* (1869), post; L.R. 4 Q.B. 309; *Seymour v. London and Provincial Marine Insurance* (1872), 41 L.J.C.P. 193; *Hegarty v. Shine* (1878), 14 Cox, C.C. 124; *Scott v. Brown, Doering, McNab & Co.*, *Slaughter and May v. Brown, Doering, McNab & Co.*, [1891-4] All E.R. Rep. 654; *Brightman v. Tate*, [1919] 1 K.B. 463; *Berg v. Sadler and Moore*, [1937] 1 All E.R. 637; *Hindley & Co. v. General Fibre Co.*, [1940] 2 K.B. 517; *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*, [1944] 2 All E.R. 579; *Brown, Jenkinson & Co. v. Percy Dalton (London), Ltd.*, [1957] 2 All E.R. 844; *Regazzoni v. K. C. Sethia* (1944), Ltd., [1957] 3 All E.R. 236; *Archbolds, Ltd. v. S. Spanglett, Ltd.*, [1961] 1 All E.R. 417; *Shaw v. D.P.P.*, [1961] 2 All E.R. 446.

As to immoral contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 138, 139; and for cases see 12 DIGEST (Repl.) 294-299.

Cases referred to:

- (1) *Cannan v. Bryce* (1819), 3 B. & Ald. 179; 106 E.R. 628; 12 Digest (Repl.) 319, 2459.
- (2) *M'Kinnell v. Robinson* (1838), 3 M. & W. 434; 1 Horn. & H. 146; 7 L.J. Ex. 149; 2 Jur. 595; 25 Digest (Repl.) 438, 202.
- (3) *Bowry v. Bennett* (1808), 1 Camp. 348, N.P.; 12 Digest (Repl.) 308, 2370.

Also referred to in argument:

- Appleton v. Campbell* (1826), 2 C. & P. 347, N.P.; 12 Digest (Repl.) 308, 2375.
Lloyd v. Johnson (1798), 1 Bos. & P. 340; 126 E.R. 939; 12 Digest (Repl.) 310, 2385.
Crisp v. Churchill (1794), cited in 1 Bos. & P. at p. 340; 126 E.R. 939; 12 Digest (Repl.) 308, 2374.

Rule Nisi obtained by the plaintiffs to set aside a verdict for the defendant and enter one for the plaintiffs in an action for money due under an agreement dated May 4, 1864, for hire of a brougham.

The declaration stated that it was agreed between the defendant, Mrs. Brooks, of 14 Westmoreland Place, Pimlico, and the plaintiffs, Pearce and Countze, coach-builders, that the plaintiffs should supply Mrs. Brooks with a new miniature brougham on hire, until the whole of the purchase price, 135 guineas, was paid, and that the defendant should hire the brougham with the option to purchase as aforesaid, and should pay down £50 and the balance, with 5 per cent. interest

A thereon, by instalments periodically, so as to complete the purchase within twelve months. Averments followed that the brougham had been duly supplied and before payment of a second instalment had been returned in a damaged state, yet the defendant did not pay a forfeiture of 15 guineas provided for in the agreement or the amount of the said damage. It was alleged on behalf of the defendant at the time of making the agreement the defendant was to the know-
 B ledge of the plaintiffs a prostitute, and that the supposed agreement was made for the supply of a brougham to be used by her as such prostitute, and to assist her in carrying on her immoral vocation, as the plaintiffs when they made the agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the moneys to be paid by the said agreement out of her receipts as such prostitute. At the trial before BRAMWELL, B., the learned
 C judge left these questions to the jury: (i) Did the defendant hire the carriage for the purpose of her prostitution? (ii) If she did, did the plaintiffs know the purpose for which it was hired? The jury found that the carriage was used by the defendant as part of her display to attract men, and that the plaintiffs knew it was to be supplied to be used for that purpose. The learned judge directed
 D the verdict to be entered for the defendant, reserving leave to move to enter it for the plaintiffs for £15 15s., being the amount found to be due by the jury supposing the plaintiffs to be entitled to the verdict. A rule nisi was obtained on behalf of the plaintiffs to set aside the verdict, and enter it for the plaintiffs for the sum of £15 15s., pursuant to leave reserved, on the ground that the defendant did not prove such allegations as were essentially necessary to be proved
 E to constitute a good defence to the action; that the defendant did not prove that to the knowledge of the plaintiffs she was a prostitute, or that the brougham sold to her by the plaintiffs was to be used by her as such prostitute, and to assist her in carrying on her said immoral vocation, or that the plaintiffs made the agreement sued upon with such knowledge or in the expectation that defendant would pay the plaintiffs out of her receipts as such prostitute.

F *Digby Seymour, Q.C.*, and *Beresford*, for the defendant, showed cause.
Montague Chambers, Q.C., and *J. O. Griffiths* supported the rule.

POLLOCK, C.B.—We are all of opinion that the rule must be discharged. I shall not enter more fully into the reasons of our decision beyond what has fallen from the court in the course of the argument, than to say that since
 G *Cannan v. Bryce* (1), cited by LORD ABINGER in *M'Kinnell v. Robinson* (2), I take the rule to be that any person who contributes to the performance of an illegal act, knowing that the subject-matter is to be so applied, cannot recover the price of such subject-matter, and that the old notion, if any such ever existed, which I do not wish to affirm, that the price must be intended to be paid out of the profits of the illegality, has ceased to be part of the law, if
 H ever it was so. I do not think that for this purpose we should make any distinction between an illegal and an immoral act. The rule now is, *ex turpi causa non oritur actio*, and whether such turpitude be an immorality or an illegality, the effect is the same; no cause of action can arise out of one or the other. I think that rule is at last well settled by *Cannan v. Bryce* (1), at which I own
 I I was at first surprised, in company with many others of the profession; but there have been few members of the profession who have adorned the Bench with clearer views, more accurate minds, and more beneficial results than LORD TENTERDEN, and that was emphatically his judgment. If, therefore, this article was furnished for the purpose of a display favourable to the defendant's immoral vocation, it seems to me no cause of action can arise. I cannot agree in thinking it necessary that these matters should be proved with an accuracy repugnant to decency. In certain criminal matters there is a necessity for absolute proof, but there is no such necessity for the purposes of civil actions. If there was enough evidence of the defendant's profession and of the plaintiffs' knowledge

of its nature from which the jury could infer that the article was to the plaintiffs' knowledge intended to facilitate the exercise of her vocation, that is enough. A

MARTIN, B.—I agree that this rule must be discharged. The real question is whether enough of the plea was proved for the purposes of the defence. In my opinion, the plea would have been good, striking out the last averment, and the rest was sufficiently proved. That is a very simple ground. At first I did not sufficiently apprehend what the verdict of the jury was; but understanding that I have no doubt: the word "display" was a very appropriate one. As to *Cannan v. Bryce* (1) I wish to say nothing, because I have an impression that it has been somewhere disapproved of. I should doubt, if it was not the purpose of the contract that the subject-matter should be applied to an illegal purpose, but it was merely known to the contracting party that it was intended to be so applied, whether that would render the contract unlawful. But I base my decision on the simple ground that the plea was proved. B C

PIGOTT, B.—I am of the same opinion. I agreed in granting the rule from doubt whether there was evidence. The principle of law is clear from the legal maxim, *ex turpi causa non oritur actio*. Where people choose to enter into immoral contracts they must take the consequences, and cannot apply to the court for assistance in enforcing such contracts. As to evidence, the jury are entitled to call in aid their knowledge of the world and of the usages of the society in which they live. Here there can be very little doubt, looking to the character and position of the woman and the nature of the article. The law would be blind indeed if it supported such contracts because nothing was said as to the means of payment where it is quite clear what such means will be. A man who does these things does not generally express in words the object with which he does them. I do not think LORD ELLENBOROUGH, in *Bowry v. Bennett* (3), intended what he said as a general rule, but merely as an illustration of a case within the rule. The contract need only be in furtherance of an immoral trade. D E F

BRAMWELL, B.—I am of the same opinion. There is no doubt the woman was a prostitute, and no doubt to my mind that the plaintiffs knew it, for there was cogent evidence to show they did, and the jury found it. At the time of the trial it certainly struck me there was no evidence as to the purpose with which the brougham was hired, but for the reason given, viz., that the jury might apply their knowledge of life, it seems to me they might infer that it was hired for the purpose alleged in the plea. Was enough of the plea made out? As to that my difficulty was this—though it was clear for what purpose the defendant hired the carriage, could the plaintiffs be said to have let it for that purpose? In one sense not; they only wanted the hire of it. As in the case of a man who goes to a gunmaker and says: "Give me a pair of pistols. I think I shall want them to fight a duel tomorrow," could it be said that the pistols were sold for the purpose of being put to an illegal use? It does seem to me a matter of some difficulty, looking at things on principle. I should continue to doubt, as a matter of reasoning, but for *Cannan v. Bryce* (1) and *M'Kinnell v. Robinson* (2); but there the plea does not say that it was part of the bargain that the money should be put to the illegal purpose, and LORD ABINGER says that, as the money was lent for the purpose of illegally gaming, it could not be recovered back. These cases, therefore, decide that it is not necessary that it should be part of the bargain that the subject-matter should be unlawfully used, but that it is enough that it should be provided with the intention that it should be applied to an unlawful purpose. So we are concluded by authority. It must not be supposed that we are overruling the decision of LORD ELLENBOROUGH in *Bowry v. Bennett* (3). It is manifest to me that he never intended to lay it down that there could be no illegality unless the price was to be paid G H I

A out of the proceeds, for the plea in the case in question contained no such allegation. It is also quite clear from the case I put of the man hiring the carriage instead of the woman to proceed to some place where prostitution is carried on; it can never be that the price might be recovered from the man but not from the woman. Therefore, I think that allegation quite immaterial.

B POLLOCK, C.B.—I wish to add a few words. I agree with what my brother **MARTIN** has said that if money were lent with a doubt as to the purpose with which it was lent, that must be left to the jury, but if it were lent generally so as possibly to be put to one purpose or the other, that would not be so. *Cannan v. Bryce* (1) does not go to that extent. The ground of that decision was that the money was expressly borrowed for the purpose of satisfying an illegal debt.

Rule discharged.

D

WASON v. WALTER AND OTHERS

E [COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Lush, Hannen and Hayes, JJ.), November 19, 25, 1868]

[Reported L.R. 4 Q.B. 73; 8 B. & S. 671; 38 L.J.Q.B. 34;
19 L.T. 409; 33 J.P. 149; 17 W.R. 169]

F *Libel—Privilege—Qualified privilege—Report of Parliamentary debate—Report of judicial proceedings.*

The publication of a fair and faithful report of a debate in either House of Parliament is privileged, and an action for libel cannot be maintained against the publisher, although the speeches contain matter defamatory of an individual. The grounds on which this privilege rests is (i) that the prima facie presumption of malice in proceedings for libel is rebutted because the object of the publication is to afford information to the public, for the benefit of society, with no particular reference to the person or persons referred to, and (ii) that the advantage to the general public resulting from publication is so great that it outweighs the injury which may be sustained by an individual.

G Per Curiam: On the same grounds the publication of a fair and accurate report of judicial proceedings is privileged (see note p. 115, post).

H Notes. Explained: *Henwood v. Harrison* (1872), L.R. 7 C.P. 606. Considered: *Davis v. Duncan* (1874), L.R. 9 C.P. 396; *Perera v. Peiris*, [1949] A.C. 1; *Webb v. Times Publishing Co., Ltd.*, [1960] 2 All E.R. 789. Referred to: *Re Belfast Election Petition* (1868), 17 W.R. 333; *Purcell v. Sowler* (1877), 2 C.P.D. 215; *Macdougall v. Knight* (1886), 17 Q.B.D. 636; *Allbutt v. General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400; *Hunt v. Star Newspaper Co., Ltd.*, [1908-10] All E.R. Rep. 513.

I As to privileged reports, see 24 HALSBURY'S LAWS (3rd Edn.) 63-70; and for cases see 32 DIGEST (Repl.) 159 et seq.

Cases referred to:

(1) *R. v. Wright* (1799), 8 Term Rep. 293; 101 E.R. 1396; 32 Digest (Repl.) 127, 1491.

(2) *Davison v. Duncan* (1851), 7 E. & B. 229; 26 L.J.Q.B. 104.

- (3) *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; 3 State Tr.N.S. 723; 9 Per. & Dav. 1; 8 L.J.Q.B. 294; 3 Jur. 905; 112 E.R. 1112; 32 Digest (Repl.) 127, 1493.
- (4) *R. v. Lord Abingdon* (1794), 1 Esp. 226, N.P.; 32 Digest (Repl.) 126, 1483.
- (5) *R. v. Creevey* (1813), 1 M. & S. 273; 105 E.R. 102; 32 Digest (Repl.) 126, 1484.
- (6) *Lake v. King* (1670), 1 Mod. Rep. 58; 1 Lev. 240; 1 Saund. 131; 86 E.R. 729; sub nom. *King v. Lake*, Hard. 470; 32 Digest (Repl.) 127, 1489.
- (7) *Bromage v. Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry.K.B. 296; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 32 Digest (Repl.) 185, 1974.
- (8) *Taylor v. Hawkins* (1851), 16 Q.B. 308; 20 L.J.Q.B. 313; 16 L.T.O.S. 409; 15 Jur. 746; 117 E.R. 897; 32 Digest (Repl.) 192, 2054.

Also referred to in argument :

- R. v. Williams* (1686), 2 Show. 471; Comb. 18; 13 State Tr. 1370; 89 E.R. 1048; subsequent proceedings *Earl of Peterborough v. Williams*, Comb. 43; 2 Show. 505; 32 Digest (Repl.) 127, 1490.
- Waterfield v. Bishop of Chichester* (1676), 1 Freem.K.B. 288; 2 Mod. Rep. 118; 89 E.R. 208; 19 Digest (Repl.) 303, 727.
- Curry v. Walter* (1796), 1 Bos. & P. 525; 1 Esp. 456; 126 E.R. 1046; 32 Digest (Repl.) 159, 1750.
- Lewis v. Levy* (1858), E.B. & E. 537; 27 L.J.Q.B. 282; 31 L.T.O.S. 194; 4 Jur.N.S. 970; 6 W.R. 629; 120 E.R. 610; 32 Digest (Repl.) 161, 1762.
- Campbell v. Spottiswoode* (1863), 3 B. & S. 769; 3 F. & F. 421; 2 New Rep. 20; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 9 Jur.N.S. 1069; 11 W.R. 569; 122 E.R. 288; 32 Digest (Repl.) 178, 1911.
- Paris v. Levy* (1860), 9 C.B.N.S. 342; 30 L.J.C.P. 11; 3 L.T. 323; 7 Jur.N.S. 289; 9 W.R. 71; 142 E.R. 135; 32 Digest (Repl.) 177, 1898.
- Turnbull v. Bird* (1861), 2 F. & F. 508, N.P.; 32 Digest (Repl.) 173, 1867.
- Lewis v. Clement* (1820), 3 B. & Ald. 702; 106 E.R. 817; on appeal sub nom. *Clement v. Lewis* (1822), 3 Brod. & Bing. 297, Ex. Ch.; 32 Digest (Repl.) 166, 1805.

Rule Nisi obtained by the plaintiff for the new trial of an action brought by him against the proprietors of "The Times" newspaper for alleged libels on him contained in a report which appeared in that paper, of certain speeches delivered in the House of Lords, and in leading articles commenting on those speeches and on the conduct of the plaintiff. The defendants denied liability.

On Feb. 12, 1867, Earl Russell presented to the House of Lords a petition from the plaintiff, a member of the Bar, praying the House to appoint a committee to inquire into the conduct of Sir Fitzroy Kelly who had recently been appointed Lord Chief Baron of the Exchequer. The plaintiff alleged that in 1835 the Chief Baron, then Mr. Kelly, had made a false statement before an election committee of the House of Commons as to the mode in which his canvass of the borough of Ipswich had been made, and he prayed that Sir Fitzroy might be removed from his judicial position. Speeches made in the House of Lords and published in "The Times," and also a leading article in "The Times," were highly critical of the plaintiff, and they formed the basis of the present action.

The case was tried before Cockburn, C.J., at the sittings at Guildhall on Dec. 19, 20, and 21, 1867. It was not disputed that the report of the debate published in "The Times" was a full and accurate one, and his Lordship directed the jury that, in point of law, a faithful and bona fide report of a debate in Parliament was a privileged communication, and one which could not be made the subject of an action for libel on account of statements contained in the speeches therein reported; that the principle of public utility which had been applied to reports of proceedings in courts of justice applied with equal force to reports of proceedings in Parliament; and, with reference to the articles in question, that criticisms on matters of public interest, if written honestly,

A and with a desire to vindicate truth and justice, could not be made the foundation of an action; and that the privilege extended not only to the data or grounds upon which the criticisms proceed, but also to the opinions expressed upon those data. As to the first count, his Lordship left it to the jury, as the only question of fact for them, "whether they were satisfied of the fairness of the report of the debate; if so, it was their duty to find for the defendants upon that count." As to the other counts, his Lordship left it to the jury "whether they were satisfied that the articles were written honestly, and with the desire to vindicate truth and justice; if so, they were to find for the defendants on those counts also." The jury returned a verdict for the defendants on all the counts. Counsel for the plaintiff obtained a rule nisi for a new trial on the ground of misdirection, both as to the privileged character of the report of the debate, and as to the articles in question.

Sir John Karlake, Q.C., Coleridge, Q.C., and Wood showed cause against the rule.

Jones, Q.C., and R. E. Turner supported the rule.

Cur. adv. vult.

D Nov. 25, 1868. **SIR ALEXANDER COCKBURN, C.J.**, read the following judgment of the court.—The main question for our decision is whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.
E Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in Parliament during the many years that Parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a
F Parliamentary debate has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, dicta of learned judges having reference to the point in question, but they are conflicting and inconclusive, and having been unnecessary to the decision of the cases in which they were pronounced may be said to be extra-judicial.

In *R. v. Wright* (1), **LAWRENCE, J.**, placed the reports of Parliamentary
G debates on the same footing with respect to privilege as is accorded to reports of proceedings in courts of justice, and expressed an opinion that the former were as much entitled to protection as the latter. But it is to be observed that in that case the question related to the publication by the defendant of a copy of a report of a committee of the House of Commons, which report the House had ordered to be printed, not to the publication of a debate un-
H authorised by the House. Again, in *Davison v. Duncan* (2), **WIGHTMAN, J.**, seems disposed to treat the reports of proceedings in Parliament as entitled to the same privilege as reports of proceedings in courts of justice. But here, again, the question before the court had reference to a report, not of a proceeding in Parliament, but of proceedings at a public meeting of improvement commissioners of a particular locality, in which the conduct of an individual
I had been assailed, which report the court held not to be privileged without being in any way called upon to determine how far the privilege would have extended to a report of proceedings in Parliament. On the other hand, in *Stockdale v. Hansard* (3), **LITTLEDALE** and **PATTESON, JJ.**, use language from which it may be safely inferred that they would have deemed the report of a Parliamentary debate, if containing an attack on character, as not entitled to be held privileged in an action for libel. But here again the question was not how far the publication of Parliamentary debates was privileged, but solely whether an order of the House of Commons directing a paper forming no part of the

proceedings of the House and containing libellous matter to be printed and sold to the public, and a resolution of the House that such an order was within its privileges, protected the publisher of the paper from an action of libel. Any opinion expressed on the subject of the report of Parliamentary debates was, therefore, beyond the scope of the inquiry, and must be considered as more or less extra-judicial. Several cases were cited in the course of the argument before us, but they turned for the most part on the question of Parliamentary privilege, and, therefore, appear to us very wide of the present question.

R. v. Wright (1) approaches nearest to the one before us. In that case a committee of the House of Commons having made a report imputing to Horne Tooke seditious and revolutionary designs after his acquittal on a trial for high treason, and the House having ordered the report to be printed for the use of its members, the defendant, a bookseller and publisher, printed and published copies of the report. On an application for a criminal information, the court refused the rule, apparently on the ground that the report of a committee of the House of Commons, approved of by the House, being part of the proceedings of Parliament, could not possibly be libellous. LORD KENYON, C.J., says (8 Term Rep. at p. 296):

"This report was first made by a committee of the House of Commons, then approved by the House at large, and, then communicated to the other House, and is now sub judice; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the Houses of Parliament is a libel, and yet that is to be taken as the foundation of this application."

LORD KENYON and his colleagues appear to have thought that a paper containing matter reflecting on the character of an individual, if it formed part of the proceedings of the House of Commons, could be so divested of all libellous character that a party publishing it even without the authority of the House would not be responsible at law for the defamatory matter it contained.

If this doctrine could be upheld, it would have a manifold bearing on the present occasion, for, as no speech made by a member of either house, however strongly it may assail the conduct or character of others can be held to be libellous, it would follow, such a speech being a Parliamentary proceeding, that the publication of it would not be actionable. But this is directly contrary to the decision in *R. v. Lord Abingdon* (4), and *R. v. Creevey* (5), in which the publication of speeches made in Parliament reflecting on the character of individuals was held to be actionable; and it must be admitted that the authority of *R. v. Wright* (1) is much shaken, not only by the decision in *R. v. Creevey* (5), but also by the observations made by LORD ELLENBOROUGH in his judgment in the latter case. Beyond, however, impugning the authority of *R. v. Wright* (1), the two last mentioned cases afford little assistance towards the solution of the present question. There is obviously a very material difference between the publication of a speech made in Parliament, for the express purpose of attacking the conduct or character of a person and afterwards published with a like purpose or effect, and the faithful publication of Parliamentary debates in their entirety with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards anyone.

Lake v. King (6) has no application to the present case. There, a petition having been presented to the House of Commons by the defendant impugning the conduct of the plaintiff, copies of the petition had been printed and circulated among the members of the House, and it was held that the printing and circulating of the petitions, being according to the course and usage of Parliament, no action would lie. *Stockdale v. Hansard* (3), which was much pressed upon us by the counsel for the defendant, is in like manner altogether beside the question. In that case a report from the inspectors of prisons relative to

A the gaol of Newgate, in which a work published by the plaintiff, a bookseller, which had been permitted to be introduced into the prison, had been described as "one of a most disgusting nature," and as containing "plates obscene and indecent in the extreme," had been presented to the House in conformity with the Prisons Act, 1835 [repealed]. In another report, being a reply to a report of the Court of Aldermen on the same subject, the inspectors had reiterated their charges as to the character of the book, adding that it had been described by medical booksellers to whom they (the inspectors) had applied for information as to its character, as "one of Stockdale's obscene books." These papers the House had ordered to be printed, not only for the use of the members, but also, in conformity with a modern practice, for public sale, the proceeds to be applied to the general expenses of printing by the House. An action of libel having been brought by Stockdale against the defendants, the printers of the House of Commons, for publishing these papers, the defence as raised by the plea which this court had to consider was, first, that the papers in question had been published by order of the House of Commons, and, secondly, that the House having resolved (as it had done) with a view to such an action that the power of publishing such of its reports, votes, and proceedings as it should deem necessary was an essential incident to the functions of Parliament, the question became one of privilege as to which the decision of the House was conclusive, and could not be questioned in a court of law.

From the doctrines involved in this defence, namely, that the House of Commons could by their order authorise the violation of private rights, and by declaring the power thus exercised to be matter of privilege, preclude a court of law from inquiring into the existence of the privilege, doctrines which would have placed the rights and privileges of the subject at the mercy of a single branch of the legislature, LORD DENMAN and his colleagues, in a series of masterly judgments, which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law, and the rights which it is the purpose of the law to uphold. To the decision of this court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The position that an order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is not whether the act complained of, being unlawful at law, is rendered lawful by the assertion of its privilege, but is independently of such order or assertion of privilege in itself privileged and lawful.

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us. Fortunately we have not far to seek before we find principles, in our opinion, applicable to the case, which will afford a safe and sure foundation for our judgment. It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible (a). The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel malice is said to be the gist of an action for defamation, and though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal and not actual malice is meant, while by legal malice, as is explained by BAYLEY, J., in *Bromage v. Prosser* (7), is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act, without

(a) See note, p. 115, post.

any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published; and if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. LORD CAMPBELL, in *Taylor v. Hawkins* (8), says (16 Q.B. at p. 321):

"The rule is that if the occasion be such as repels the presumption of malice the communication is privileged, and the plaintiff must then, if he can, give evidence of actual malice."

It is thus that in the case of reports of the proceedings of courts of justice, though individuals may occasionally suffer from them, yet as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The other and the broader principle on which this exception to the general law of libel is founded is that the advantage to the community from publicity being given to the proceedings of courts of justice is so great that the occasional inconvenience to individuals arising from it must yield to the general good.

It is true that with a view to distinguish the publication of proceedings in Parliament from that of those of courts of justice it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the Houses of Parliament are not, as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But, in our opinion, the true ground is that given by LAWRENCE, J., in *R. v. Wright* (1), namely, that though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast advantage to the public that the proceedings of courts of justice should be universally known, and the general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings (a). In *Davison v. Duncan* (2), LORD CAMPBELL says (7 E. & B. at p. 231):

"A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from the publicity is great. It is of great consequence that the public should know what takes place in court, and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity."

WIGHTMAN, J., says (*ibid.* at p. 232):

"The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great."

Both the principles on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is in the one case, as in the other, a preponderance of general good over partial and occasional evil. We entirely concur with LAWRENCE, J., in *R. v. Wright* (1), that the same reasons which apply to the reports of the proceedings in courts of justice apply also to proceedings in Parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communi-

(a) See note, p. 115, post.

A cated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done the welfare of the community depends. Where would be our confidence in the government of the country, or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed—where would be our attachment to the constitution under which we live, if the proceedings of the great council of the realm were shrouded in secrecy, and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in Parliament—the undoubted right of the subject—if the people are to be kept in ignorance of what is passing in either House. Can any man bring himself to doubt that the publicity given in modern times to what passes in Parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large?

D It may, no doubt, be said that while it may be necessary as a matter of national interest that the proceedings in Parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing Parliamentary reports would be placed, if this distinction was to be enforced, and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is, perhaps, no subject in which the public have a deeper interest than in all that relates to the conduct of the public servants of the state—no subject of Parliamentary discussion which more requires to be made known than an inquiry relating to it. Of this no better illustration could possibly be given than is afforded by the case before us. A distinguished counsel, whose qualifications for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honour is an essential qualification. Can it be said that such a subject is not one in which the public has a deep interest, and as to which it ought not to be informed of what passes in debate?

H Lastly, what greater anomaly, or more flagrant injustice, could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the Houses of Parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community, from the highest to the lowest, looks with eager interest to the debates of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that the party publishing a Parliamentary debate is to be held liable to legal proceedings because the conduct of a particular individual may happen to be called in question? The learned counsel for the plaintiff scarcely ventured, as of his own assertion, to deny that the benefit to the public from having the debates in Parliament published was as great as that which arose from the publishing of the proceedings of the courts of justice; but he relied on the dicta of LITLEDALE and PATTESON, JJ., in *Stockdale v. Hansard* (3), and on the opinions of certain noble and learned Lords in the course of debates in the House of Lords on Bills introduced by LORD

CAMPBELL for the purpose of amending the law of libel. There is no doubt that in delivering their opinions in *Stockdale v. Hansard* (3), the two learned judges referred to denied the necessity, and, in effect, the public advantage of proceedings in Parliament being made public. Counsel for the defendant in that case having insisted, as a reason why the power to order papers to be printed and published should be considered within the privilege of the House of Commons, on the advantage which resulted from the proceedings of Parliament being made known, the two learned judges, not satisfied with demonstrating by conclusive arguments, as they did, that the House had not the power to order papers of a libellous character, and forming no part of the proceedings of the House, to be published, still less to conclude the legality of such a proceeding by the assertion of privilege, thought it necessary to follow the counsel into the question of policy and convenience, and in so doing took what we cannot but think a very short-sighted view of the subject. This is the more to be regretted, as their observations apply not only to the printing of papers by order of the House, the only question before them, but also to the publication of Parliamentary proceedings in general, the consideration of which was not before them, and therefore was unnecessary.

LORD DENMAN, in his admirable judgment—than which a finer never was delivered within these walls, and in which the spirit of HOLT is combined with the luminous reasoning of MANSFIELD—while overthrowing by irresistible arguments the position of the Attorney-General, was content to answer the argument as to the policy of allowing papers to be published by order of either of the Houses of Parliament, not by denying the policy of giving the House power to order the printing and publishing of papers, but by saying that such power must be provided for by legislation. On the subject of the publication of Parliamentary debates he said nothing, nor was he called upon to say anything. That the legislature did not concur with the two judges in their view of the policy is manifest from the Parliamentary Papers Act, 1840, passed in consequence of the decision in *Stockdale v. Hansard* (3), the preamble [repealed Statute Law Revision (No. 2) Act, 1890] of which statute recites that

“it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published.”

After that the Act proceeds to provide for the prevention of actions being in future brought in respect of papers published by order of either House of Parliament. As regards the attempt of LORD CAMPBELL to fix the legality of the publication of Parliamentary debates on the sure foundation of statutory enactment, we think it may be as well accounted for by the apprehension as to the result of any proceeding at law in which the legality of such publication should come in question produced, in his mind by the language of the judges in *Stockdale v. Hansard* (3), as by any conviction of the defectiveness of the law. As regards the opinions of the noble and learned persons in the debates of the House of Lords, we must observe that the discussion proceeded on the assumption that the publishing of Parliamentary debates, if involving defamatory matter, was contrary to law and actionable, although no decision to that effect had ever been pronounced, and no argument or discussion on the point had ever taken place.

We, before whom this case is now presented for judicial decision for the first time, and who have had the advantage of able and learned arguments at the Bar to assist us, must endeavour to ascertain the law as applicable to the case, and, if our minds are satisfied as to what the law is, must decide according to our convictions, undeterred by the authority of great names or the opinions of those who, although our superiors in all other respects, had not the advantage of

A forensic discussion, or the opportunity of a judicial consideration of the subject. This is the more necessary as we observe that one of the main grounds insisted on for resisting LORD CAMPBELL's Bill was that there was no necessity for legislation, inasmuch as no action had ever been brought in respect of the publication of a Parliamentary debate. We cannot but think that had the noble and learned persons referred to foreseen that such an action as the present would be
B brought, in which a party, having by his own attack upon a public man given rise to a debate in one of the Houses of Parliament which he knew would in the ordinary course of things be reported, brings an action for the publication of the discussion which he himself has provoked, which publication he would have hailed with satisfaction if the result of it had been favourable to himself and
C damaging to the object of his attack, they would have paused before they assumed that by the law such an action could be maintained, or at all events would have seen the necessity for an immediate amendment of a law so defective.

We, however, are glad to think that, on closer inquiry, the law turns out not to be as on some occasions it has been assumed to be. To us it seems clear that the principle on which the publication of the reports of the proceedings of courts of justice have been held to be privileged apply to the reports of Parliamentary proceedings. The analogy between the two cases is in every respect
D complete. If the rule had never been applied to the reports of Parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply
E them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law—and of these we are fully sensible—it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise
F when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. Comments on government, on Ministers and officers of State, on members of both Houses
G of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or of ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism,
H the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?

Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary, even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges in holding
I the publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what we call ex parte proceedings as a probable exception from the operation of the rule. Yet ex parte proceedings before magistrates, and even before this court, as for instance on applications for criminal informations, are published every day; but such a thing as an action or indictment founded on a report of such an ex parte proceeding is unheard of, and if any such action or indictment should be brought it would probably be held that the true criterion of the privilege is not whether the report was, or was not, ex parte, but whether it was a fair and honest report of what had taken place, published simply

with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected. It is to be observed that the analogy between the case of reports of proceedings in courts of justice and those of proceedings in Parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach to the other. A garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in *R. v. Lord Abingdon* (4) and *R. v. Creevey* (5). At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison v. Duncan* (2) as to such a speech being privileged if bona fide published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in Parliament.

It only remains to advert to an argument urged against the legality of the publication of Parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both Houses of Parliament. The fact, no doubt, is that each House of Parliament does by its standing orders prohibit the publication of its debates, but practically each House not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in HANSARD or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively as well as individually, the members of both Houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of Parliamentary proceedings is prohibited by Parliament. The standing orders which prohibit it are obviously maintained only to give to each House the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the Houses, there is nothing unlawful in publishing reports of the Parliamentary proceedings. Practically such publication is sanctioned by Parliament. It is essential to the working of our Parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either House of Parliament ever be so ill advised as to prevent its proceedings from being made known to the country—which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the Houses and the publisher. For the present purpose we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected. So much for the great question involved in this case.

We pass on to the second branch of this rule, which has reference to alleged misdirection in respect of the second count of the declaration, which is founded on the article in "The Times" commenting on the debate in the House of Lords, and the conduct of the plaintiff in preferring the petition which gave rise to it. We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told that the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made; and that consequently the occasion was privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts—in other words, that in the first place they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not

A enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticise and condemn the conduct or motives of another must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem under the circumstances of the case a fair and legitimate criticism on the conduct and motives of the party who is the object of censure. Considering the direction thus given to have been perfectly correct, we are of opinion that in respect of this alleged misdirection, as also on the former point, the ruling at nisi prius was right, and that consequently this rule must be discharged.

Rule discharged.

[NOTE]

KIMBER v. PRESS ASSOCIATION

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.JJ.), October 25, 26, 1892]

[Reported [1893] 1 Q.B. 65; 62 L.J.Q.B. 152; 67 L.T. 515; 57 J.P. 247; 41 W.R. 17; 9 T.L.R. 6; 37 Sol. Jo. 8; 4 R. 95]

E *Libel—Privilege—Qualified privilege—Report of judicial proceedings—Fair and accurate report—Proceedings held in open court—Ex parte application—Adjournment of hearing.*

Where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court a fair and accurate account of what then took place is privileged if published without malice. And that is so even though on that hearing the court does not arrive at a final conclusion, as in the case of an ex parte application for a summons or where the hearing is adjourned to a later day.

F **Notes.** Considered: *Hearts of Oak Assurance Society v. A.-G.*, [1932] All E.R. Rep. 732. As to privileged reports, see 24 HALSBURY'S LAWS (3rd Edn.) 63–70; and for cases see 32 DIGEST (Repl.) 159–169.

Cases referred to in argument:

Lewis v. Levy (1858), E.B. & E. 537; 27 L.J.Q.B. 282; 31 L.T.O.S. 194; 4 Jur. N.S. 970; 6 W.R. 629; 120 E.R. 610; 32 Digest (Repl.) 161, 1762.

G *Curry v. Walter* (1796), 1 Bos. & P. 525; 1 Esp. 456; 126 E.R. 1046; 32 Digest (Repl.) 159, 1750.

Usill v. Hales (1878), 3 C.P.D. 319; 47 L.J.Q.B. 323; 38 L.T. 65; 26 W.R. 371; 14 Cox, C.C. 61; 32 Digest (Repl.) 160, 1760.

Stevens v. Sampson (1879), 5 Ex.D. 53; 49 L.J.Q.B. 120; 41 L.T. 782; 44 J.P. 217; 28 W.R. 87, C.A.; 32 Digest (Repl.) 186, 1991.

Milissich v. Lloyds (1877), 46 L.J.Q.B. 404; 36 L.T. 423; 13 Cox C.C. 575; sub nom. *Melissich v. Lloyds*, 25 W.R. 353, C.A.; 32 Digest (Repl.) 166, 1818.

H *Capital and Counties Bank v. Henty*, [1881–5] All E.R. Rep. 86; 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest (Repl.) 23, 135.

Saunders v. Mills (1829), 6 Bing. 213; 3 Moo. & P. 520; 8 L.J.O.S.C.P. 24; 130 E.R. 1262; 32 Digest (Repl.) 164, 1795.

I **Application** by the plaintiff for judgment or a new trial, on appeal from the verdict and judgment, at the trial before HAWKINS, J., and a jury, in an action by the plaintiff to recover damages for an alleged libel published by the defendants concerning him. The libel complained of was a short report, sent by the defendants to several newspapers, as follows:

“ALLEGED PERJURY BY A SOLICITOR.—Mr. W. H. Thompson, barrister, applied at the Guildhall, Canterbury, today, for a summons against Edward Kimber, solicitor, of Alpine Villas, Shooter's Hill, and 15, Walbrook, for perjury alleged to have been committed in the Canterbury Bankruptcy Court, in connection with some bankruptcy proceedings.”

Candy, Q.C., J. E. Fox and Alan Macpherson for the plaintiff.

Murphy, Q.C., and Blake Odgers for the defendants.

LORD ESHER, M.R.—The rule is that where there are judicial proceedings before a properly constituted judicial tribunal which is exercising its jurisdiction in open court, a

fair and accurate account published by anyone of what then took place is privileged if published without malice. Such publication may be hard upon a person who is named in the report, but considerations of public policy require that hardship should be endured rather than that judicial proceedings should be conducted in secret. If judicial proceedings were conducted in secret it might be productive of greater mischief than if the character of an individual should be for a time injured by an unfounded charge. A

It was argued that a report of the proceedings in this case [an ex parte application for a summons for perjury against the plaintiff] must not be published because the magistrates gave no final determination. If there are judicial proceedings which, in the result, lead to a final determination, although that stage is not arrived at, yet a fair and accurate account of the proceedings may be published before the final determination. B

LOPES, L.J.—I am of the same opinion. The rule of law, founded upon principles of public policy and convenience, is that no action for libel can be maintained in respect of a report of judicial proceedings taken before persons acting judicially in open court, where the report is a fair and accurate report of those proceedings, and is published without malice. C

It is said that the determination must be a final determination, and that, if it is not, there is no privilege. My opinion, however, is that a fair and accurate report may be published of any preliminary proceedings before a judicial tribunal, if those proceedings must ultimately lead to a final determination. Can it be said that the proceedings in a coroner's court cannot be published because they are not final, or that a report of one day's proceedings cannot be published because the whole proceedings last more than one day? I am clearly of opinion that an account of preliminary judicial proceedings, if they are leading to a final determination, may be published. D

KAY, L.J.—Proceedings like those in the present case, though preliminary, before justices in open court, may properly be the subject of a fair and accurate report in the Press, and such a report, if it is fair and accurate, is a privileged publication when those circumstances have been made out. E

PEEK v. GURNEY AND OTHERS

[HOUSE OF LORDS (Lord Chelmsford, Lord Colonsay and Lord Cairns), June 19, 20, 24, 26, 27, July 10, 31, 1873] F

[Reported L.R. 6 H.L. 377; 43 L.J.Ch. 19; 22 W.R. 29] G

Company—Prospectus—Object—Invitation to persons to become original shareholders—Untrue statement of fact—Loss by shareholder—Right of action against directors—Need to prove active misstatement, not merely concealment—Right of action not enuring for benefit of purchaser from original shareholder. H

Where the prospectus of a company contains misstatements of fact and a person buys shares in the belief that those statements are true he may recover in respect of his loss from those who have published the prospectus with knowledge of the misstatements therein. Such proceedings cannot be based on the concealment of a material fact which those responsible for the prospectus were morally, but not legally, bound to disclose. There must have been some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact that the withholding of that which is not stated makes that which is stated absolutely false. I

To entitle a purchaser of shares to succeed in the proceedings he must be an original allottee of the shares, being thus in direct communication with those who are answerable for the prospectus. The proper office of a prospectus is to invite persons to become original shareholders in a company, and the respon-

A sibility to those shareholders which attaches to those issuing the prospectus does not follow the shares when they have been transferred to other persons by purchase in the market. The office of the prospectus is fulfilled when the original allottee has got his shares.

B *Misrepresentation—Defence to action—Delay.*

Per LORD CAIRNS : An action for damages for misrepresentation is in the nature of a proceeding ex delicto, and delay is no bar to such an action unless it be such as would bring into operation the Statute of Limitations applicable to the case.

Notes. Distinguished : *Twycross v. Grant* (1878), 4 C.P.D. 40. Explained : *Cargill v. Bower* (1878), 10 Ch.D. 502. Distinguished : *Smith v. Chadwick* (1882), 20 Ch.D. 27. Followed : *Young v. Wallingford* (1883), 52 L.J.Ch. 590. Considered : *Phillips v. Homfray* (1883), 24 Ch.D. 590. Distinguished : *Andrews v. Mockford*, [1896] 1 Q.B. 372. Followed : *Geipel v. Peach*, [1917] 2 Ch. 108. Considered : *Collins v. Associated Greyhound Racecourses* (1929), 141 L.T. 529. Applied : *R. v. Kyslant*, [1931] All E.R. Rep. 179. Considered : *Rayfield v. Hands*, [1958] 2 All E.R. 480. Referred to : *Eaglesfield v. Londonderry* (1876), 4 Ch.D. 693; *Davies v. London and Provincial Marine Insurance* (1878), 38 L.T. 478; *Weir v. Bill* (1878), 3 Ex.D. 238; *Arkwright v. Newbold* (1881), 17 Ch.D. 301; *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459; *Re Southport and West Lancashire Banking Co.*, *Fisher and Sherrington's Case* (1885), 53 L.T. 832; *Hatchard v. Mège* (1887), 18 Q.B.D. 771; *Derry v. Peek*, [1886-90] All E.R. Rep. 1; *Glasier v. Rolls* (1889), 42 L.J.Ch.D. 436; *Salaman v. Warner* (1891), 65 L.T. 132; *Aaron's Reefs v. Twiss*, [1896] A.C. 273; *Chapman v. Great Central Freehold Mines* (1905), 22 T.L.R. 90; *Quirk v. Thomas*, [1915] 1 K.B. 798; *Jewson & Sons, Ltd. v. Arcos, Ltd.* (1933), 39 Com. Cas. 59; *R. v. Bishirgian*, *R. v. Howson*, *R. v. Hardy* (1936), 154 L.T. 499; *Bradford Third Equitable Benefit Building Society v. Borders*, [1941] 2 All E.R. 205.

As to a company's prospectus, see 6 HALSBURY'S LAWS (3rd Edn.) 171 et seq.; and for cases see 9 DIGEST (Repl.) 102 et seq. As to misrepresentation, see 26 HALSBURY'S LAWS (3rd Edn.) 844 et seq.; and for cases see 35 DIGEST (Repl.) 17 et seq.

Cases referred to :

- (1) *Burrowes v. Lock* (1805), 10 Ves. 470; 32 E.R. 927; 35 Digest (Repl.) 34, 265.
- (2) *Slim v. Croucher* (1860), 1 De G.F. & J. 518; 29 L.J.Ch. 273; 2 L.T. 103; 6 Jur.N.S. 437; 8 W.R. 347; 45 E.R. 462, L.C. & L.J.J.; 35 Digest (Repl.) 35, 266.
- (3) *Keates v. Earl Cadogan* (1851), 10 C.B. 591; 20 L.J.C.P. 76; 16 L.T.O.S. 367; 15 Jur. 428; 138 E.R. 234; 31 Digest (Repl.) 191, 3220.
- (4) *Hill v. Gray* (1816), 1 Stark. 434, N.P.; 35 Digest (Repl.) 50, 448.
- (5) *Bedford v. Bagshaw* (1859), 4 H. & N. 538; 29 L.J.Ex. 59; 33 L.T.O.S. 137; 157 E.R. 951; 9 Digest (Repl.) 510, 3362.
- (6) *Seymour v. Bagshaw* (1859), 18 C.B.N.S. 903; 29 L.J.Ex. 62, n.
- (7) *Scott v. Dixon* (1859), 29 L.J.Ex. 62, n.
- (8) *Gerhard v. Bates* (1853), 2 E. & B. 476; 22 L.J.Q.B. 364; 22 L.T.O.S. 64; 17 Jur. 1097; 1 W.R. 383; 1 C.L.R. 868; 118 E.R. 845; 9 Digest (Repl.) 125, 673.
- (9) *Cullen v. Thomson* (1862), 6 L.T. 870; 26 J.P. 611; 9 Jur.N.S. 85; 4 Macq. 424, H.L.; 9 Digest (Repl.) 564, 3726.
- (10) *Barry v. Croskey* (1861), 2 John. & H. 1; 70 E.R. 945; 9 Digest (Repl.) 368, 2352.
- (11) *Levy v. Langridge*, *Langridge v. Levy* (1837), 2 M. & W. 519; 6 L.J.Ex. 137; affirmed sub nom. (1838), 4 M. & W. 337; 150 E.R. 1458; sub nom. *Levi v. Langridge*, 1 Horn. & H. 325; 7 L.J.Ex. 387, Ex. Ch.; 35 Digest (Repl.) 53, 472.

Also referred to in argument :

New Brunswick and Canada Rail. Co. v. Muggeridge (1860), 1 Drew. & Sm. 363; 30 L.J.Ch. 242; 3 L.T. 651; 7 Jur.N.S. 132; 9 W.R. 193; 62 E.R. 418; 9 Digest (Repl.) 117, 607.

Henderson v. Lacon (1867), L.R. 5 Eq. 249; 17 L.T. 527; 32 J.P. 326; 16 W.R. 328; 9 Digest (Repl.) 124, 672.

Central Rail. Co. of Venezuela (Directors, etc.) v. Kisch (1867), L.R. 2 H.L. 99; 36 L.J.Ch. 849; 16 L.T. 500; 15 W.R. 821, H.L.; 35 Digest (Repl.) 63, 578.

Oakes v. Turquand and Harding, Peek v. Turquand and Harding, Re Overend, Gurney & Co. (1867), L.R. 2 H.L. 325; 36 L.J.Ch. 949; 16 L.T. 808; 15 W.R. 1201, H.L.; 9 Digest (Repl.) 28, 1.

Pasley v. Freeman (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest (Repl.) 25, 165.

Burns v. Pennell (1849), 2 H.L.Cas. 497; 14 L.T.O.S. 245; 9 E.R. 1181; sub nom. *Burnes v. Pennell, Forth Marine Insurance Case*, 13 Jur. 897, H.L.; 9 Digest (Repl.) 367, 2348.

Evans v. Bicknell (1801), 6 Ves. 174; 31 E.R. 998, L.C.; 35 Digest (Repl.) 34, 253.

Rawlins v. Wickham (1858), 3 De G. & J. 304; 28 L.J.Ch. 188; 5 Jur.N.S. 278; 44 E.R. 1285; sub nom. *Rawlins v. Wickham, Wickham v. Rawlins*, 1 Giff. 355; sub nom. *Rawlins v. Wickham, Wickham v. Bailey*, 32 L.T.O.S. 231; 7 W.R. 145, L.J.J.; 35 Digest (Repl.) 35, 275.

Colt v. Woollaston (1723), 2 P. Wms. 154; 24 E.R. 679; 35 Digest (Repl.) 60, 529.

Ramshire v. Bolton (1869), L.R. 8 Eq. 294; 38 L.J.Ch. 594; 21 L.T. 50; 17 W.R. 986; 35 Digest (Repl.) 60, 533.

Ogilvie v. Currie (1868), 37 L.J.Ch. 541; 18 L.T. 593; 16 W.R. 769, L.C.; 9 Digest (Repl.) 132, 738.

Clarke v. Dickson (1858), E.B. & E. 148; 27 L.J.Q.B. 223; 31 L.T.O.S. 97; 4 Jur.N.S. 832; 120 E.R. 463; 35 Digest (Repl.) 82, 756.

Clarke v. Dickson (1859), 6 C.B.N.S. 453; 28 L.J.C.P. 225; 33 L.T.O.S. 136; 23 J.P. 326; 5 Jur.N.S. 1029; 7 W.R. 443; 141 E.R. 533; 35 Digest (Repl.) 18, 101.

Tapp v. Lee (1803), 3 Bos. & P. 367; 127 E.R. 200; 35 Digest (Repl.) 21, 126.

Foster v. Charles (1830), 6 Bing. 396; 4 Moo. & P. 61; subsequent proceedings, 7 Bing. 105; 4 Moo. & P. 741; 9 L.J.O.S.C.P. 32; 131 E.R. 40; 35 Digest (Repl.) 37, 294.

Chandelor v. Lopus (1603), Cro. Jac. 4; 79 E.R. 3; sub nom. *Lopus v. Chandler*, 1 Dyer, 75, n., Ex. Ch.; 35 Digest (Repl.) 29, 203.

Ingram v. Thorp (1848), 7 Hare, 67; 11 L.T.O.S. 171; 68 E.R. 27; 26 Digest (Repl.) 101, 689.

Barwick v. English Joint Stock Bank (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 26 Digest (Repl.) 101, 690.

Re Liverpool Bank, Duranty's Case (1858), 26 Beav. 268; 28 L.J.Ch. 37; 32 L.T.O.S. 114; 4 Jur.N.S. 1068; 7 W.R. 70; 53 E.R. 901; 9 Digest (Repl.) 261, 1650.

Blain v. Agar (1828), 2 Sim. 289; 57 E.R. 797; 9 Digest (Repl.) 199, 1277.

Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland (1867), L.R. 1 Sc. & Div. 145, H.L.; 9 Digest (Repl.) 119, 617.

Walsham v. Stainton (1863), 1 De G.J. & Sm. 678; 3 New Rep. 56; 33 L.J.Ch. 68; 9 L.T. 357; 9 Jur.N.S. 1261; 12 W.R. 63; 46 E.R. 268, L.J.J.; 10 Digest (Repl.) 1290, 9130.

Davidson v. Tulloch (1860), 2 L.T. 97; 6 Jur.N.S. 543; 8 W.R. 309; 3 Macq. 783, H.L.; 9 Digest (Repl.) 511, 3366.

Ship v. Crosskill (1870), L.R. 10 Eq. 73; 39 L.J.Ch. 550; 22 L.T. 365; 18 W.R. 618; 9 Digest (Repl.) 126, 680.

Land Credit Co. of Ireland v. Lord Fermoy (1870), 5 Ch.App. 763; 23 L.T. 489; 18 W.R. 1089, L.C. & L.J.J.; 9 Digest (Repl.) 528, 3460.

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- A** *Devaynes v. Noble, Houlton's Case* (1816), 1 Mer. 529, 616; 35 E.R. 767, 796; 36 Digest (Repl.) 494, 621.
Powell v. Aitken (1858), 4 K.J. 343; 70 E.R. 144; 35 Digest (Repl.) 478, 1658.
Marquis of Lansdowne v. Dowager Marchioness of Lansdowne (1815), 1 Madd. 116; 56 E.R. 44; 2 Digest (Repl.) 135, 1035.
B *Moore v. Burke* (1865), 4 F. & F. 258; 15 L.T. 118, N.P.; 35 Digest (Repl.) 46, 409.
Hambly v. Trott (1776), 1 Cowp. 371; 98 E.R. 1136; 24 Digest (Repl.) 669, 6576.
Bishop of Winchester v. Knight (1717), 1 P. Wms. 406; 2 Eq. Cas. Abr. 226, pl. 7; 24 E.R. 447, L.C.; 24 Digest (Repl.) 772, 7617.
Joint Stock Discount Co. v. Brown (1869), L.R. 8 Eq. 381; 9 Digest (Repl.) 707, 4695.

C **Appeal** against a decree of SIR JOHN ROMILLY, M.R., dismissing the plaintiff's bill in an action in which he claimed against the defendants, directors of the Overend and Gurney Co. Ltd., an order that he be indemnified by them in respect of payments made by him as a contributory, holding 2000 shares in the company, when the company was ordered to be wound-up.

The company was formed in July, 1865, and a prospectus was then issued.
D Business was begun on Aug. 1, 1865. The appellant was not an original allottee, but he purchased his shares in October and December of that year. On May 10, 1866, the company stopped payment. On June 11 a resolution was passed to have a voluntary winding-up, and on June 22 an order for winding-up under supervision of the court, was made. The appellant, who had been, by this House, in July, 1867, declared to be liable as a contributory, and had paid nearly £100,000 on his shares under this winding-up, filed a bill in March, 1868, against the then directors and the executors of Thomas Augustus Gibb, who had been a director at the time of issuing the prospectus, but had died in November, 1866. The bill alleged misrepresentation of facts and concealment of facts on the part of the directors in the prospectus by which the appellant had been induced to purchase shares and had been damnified, and he sought indemnity from the estates of the directors. The Master of the Rolls held that if the appellant had been an original allottee, and had come in due time, he would have been entitled to such indemnity, but that he was debarred of his remedy on the grounds, first, that he was in no better position than the allottee from whom he had bought, and, secondly, that he had come too late for relief. His bill was, therefore, dismissed, and against that dismissal this appeal was brought.

G *Kay, Q.C., and Swanston, Q.C. (Jolliffe with them), for the appellant.*
Roxburgh, Q.C., Lindley, Q.C., and Graham Hastings for the respondents
J. H. Gurney, H. E. Gurney and R. Birkbeck.
Fry, Q.C., Jackson, Q.C., and Sayer for the respondent Barclay.
H *Fooks, Q.C., and W. Fooks for the respondent Gordon.*
Sir George Jessel, Q.C., Macnaghten and Medd for the respondent Rennie.
Sir Richard Baggallay, Q.C., and Macnaghten for the executors of the respondent Gibb.

Their Lordships took time for consideration.

I July 31, 1873. The following opinions were read.

LORD CHELMSFORD.—This is an appeal from a decree of the Master of the Rolls, in a suit in which the appellant was plaintiff and the respondents were defendants, dismissing the appellant's bill without costs. The bill prayed in substance that the respondents, the directors of the company called the Overend and Gurney Co., and the respondents, the Messrs. Gibb, the executors of a deceased director, might be decreed to make good to the appellant or indemnify him against the loss which he had sustained by reason of his having become the purchaser of 2000 shares in the company, and having been, as he alleged,

deceived and misled by a prospectus put forth by the respondents and the deceased director, containing several misrepresentations and suppressions of material and important facts, with a view to deceive and mislead the public, and the appellant as one of the public. The Master of the Rolls dismissed the appellant's bill, solely on the ground of his delay in instituting proceedings, but he dismissed it without costs, because in his opinion "the directors were guilty of gross misconduct in concealing the insolvency of the old firm" of Overend and Gurney. Upon the argument of this appeal, the respondents very properly declined to insist upon the point of delay as an answer to the appellant's suit. The Master of the Rolls proceeded upon the principle, established by many decided cases, that an allottee, or purchaser of shares in a company, who seeks to divest himself of his shares upon the ground of having been induced to purchase them by misrepresentation, cannot be relieved if he has continued to hold the shares without objection after knowledge, or with the full means of knowledge, of the falsehood by which he has been drawn in to acquire them. These cases proceeded upon the ground of acquiescence, and on the application of a more general principle that an agreement induced by fraud is not absolutely void, but that it is entirely in the option of the person defrauded whether he will be bound by it or not. The suit in the present case is not for the rescission of the contract, but is founded upon the loss the appellant has sustained, and may sustain, in consequence of his being bound by the contract he has entered into. It is a proceeding similar to an action at law for deceit; and the only amount of delay which could be a bar to relief is fixed by the Statute of Limitations, by analogy to which equity generally proceeds in question of laches.

The questions to be determined upon this appeal are (i) whether the respondents ought to be decreed to indemnify the appellant for the loss he has sustained upon the shares he was induced to purchase by reason of their misrepresentation or concealment of facts material to be known; (ii) whether, as the appellant was not an original allottee, but a purchaser of shares in the market, any injury he has sustained by becoming a holder of the shares is not too remote to entitle him to relief against the respondents?

In dealing with the first question, it will not be necessary to enter into a minute detail of the affairs of the firm of Overend and Gurney, who had for many years carried on a most extensive business as bill brokers and money dealers, with the highest credit and reputation in the commercial world. With the exception of the panic year, 1857, their business had, prior to the year 1860, been carried on profitably, but from 1861 to 1865 no profits were divided. This is attributed to a departure from the legitimate business (as it is called) of the firm by making advances to various persons upon securities of a speculative and uncertain character, these doubtful advances amounting to upwards of £4,000,000 sterling. But even upon bills discounted in the regular course of the legitimate business of the firm during the above four years, there had been losses averaged at £32,532 per annum, but which is said to have included one year (1864) of very unusual pressure. This state of things occasioned great anxiety, and led to a careful investigation of the affairs of the firm, when it appeared from the books that there were outstanding debit balances to the above amount of £4,000,000 and upwards; but it was estimated that of this sum £1,082,000 would be realized; leaving a sum of upwards of £3,000,000 to be provided for. No doubt the firm was in a hazardous condition. Possibly, by care and circumspection in the future management of the business, the affairs might have been brought round. But the partners, as it is said,

"after mature deliberation considered it desirable that the business should be strengthened by the introduction of fresh capital, and in the result it was determined that such object should be accomplished by the formation of a joint stock company."

A It cannot be denied that, if the condition of the firm of Overend and Gurney had been disclosed, the result must have been their stoppage, and no hope could have been entertained of establishing a joint stock company upon the basis of a concern in such a state. The foundation of the projected company was, therefore, necessarily laid in concealment, and to render the scheme attractive to the public the promoters were not only compelled to hide the truth, but
B to give such a colour to the statements put forth in the prospectus as to render them (though, perhaps, literally true), yet, in the sense in which they must have known the statements would be understood by the public, really false.

The arrangement for the establishment of the company was carried out by two deeds, both dated and executed on July 27, 1865, though only one of them was referred to in the prospectus issued on July 12 as "the deed of covenant"
C which might be inspected at the offices of the solicitors of the company. By this deed the firm of Overend and Gurney agreed to sell, and the limited company agreed to purchase, the business of bill brokers and money dealers, for the sum of £500,000, the sum of £250,000, one moiety, to be paid or treated as paid, by being brought into account as being paid, in cash on the day of completion, and the other moiety to be paid, or treated as paid, by the limited company
D issuing to the firm of Overend and Gurney 16,666 shares of £50 each, on which £15 per share were to be treated as paid up, and allowed on account between the vendors and purchasers. It was agreed that the limited company should be entitled to have the price or sum of £500,000 applied and made available by way of material guarantee in aid of and for the purpose of ensuring the performance of the covenants of the vendors. The other deed, called the deed of arrangement, was never made known to the public, but was alleged in argument by the appellant's counsel to have been studiously concealed. By this deed it was arranged that during a period, called the "suspense period," from July 31, 1865, to Dec. 31, 1868, a suspense and guarantee account should be opened and debited with the balance of the excepted accounts (meaning
E the outstanding accounts, debts, liabilities, transactions, matters, affairs, and things connected with the business of the old firm), which the directors of the limited company should deem it desirable or expedient to be wound-up, settled, or arranged by the old firm itself. This suspense and guarantee account was to be credited with £250,000, the moiety of the sum to be paid for the transfer to the limited company of the business of the old firm, and also with the
G dividends payable in respect of the 16,666 shares, and with all sums of money received upon the sale of any of these shares. By this deed the complete liquidation of the excepted accounts, which were to be wound-up by the old firm, was limited to a period of three and a half years.

In these circumstances, where so much was to be concealed and so much varnished over to tempt the public to join the proposed company, the prospectus
H was prepared. It was drawn up by John Henry Gurney, and discussed and considered by all the persons who were afterwards directors, except Mr. Barclay. It was unnecessary to consider in detail the alterations which were made in the original draft, but one of them appears to me to deserve some attention. In the proposed prospectus there was a statement that the existing liabilities of the old firm which might be taken over by the company would be "most
I amply and satisfactorily guaranteed." It was suggested that these latter words should be omitted, and their place supplied by the words "under the guarantee of the vendors." The prospectus accordingly runs thus: "The vendors guaranteeing the company against any loss on the assets and liabilities transferred." This seems to be an indication of the opinion of the intended directors, who knew all the facts, and who, I assume, were desirous of making the statements in the prospectus as conformable to the truth as possible, that they could not truly represent the guarantee of the old firm to be an ample and satisfactory one. It is, however, sufficient to remark that the prospectus was not framed,

in the terms in which it was issued, carelessly or inconsiderately, but designedly and after deliberation. It does not appear that the old firm had at this time lost any of its estimation with the public, and the well-known name in capitals at the head of the prospectus was likely to possess no inconsiderable attraction.

The prospectus is ushered in with the following statement :

"The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. Overend, Gurney and Co. of their long-established business as bill-brokers and money dealers, and of the premises in which the business is conducted, the consideration for the goodwill being £500,000, one half being paid in cash, and the remainder in shares of the company, with £15 per share credited thereon, terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the shareholders."

This is followed by the statement already adverted to of "the vendors guaranteeing the company against any loss on the assets and liabilities transferred." What would be understood by any person reading these representations? Unquestionably that the old firm was a sufficiently flourishing concern for the goodwill of the business to be worth half a million, and that the proposed company, being guaranteed against any loss on the assets and liabilities transferred, the terms agreed upon for the transfer of the business could not fail to ensure a highly remunerative return to the purchasers. At this time the old firm was insolvent to the extent of £3,000,000, and the goodwill of the business was really not worth one farthing.

It is said that every statement in the prospectus is, literally, true; that the sum of £500,000 was actually the sum agreed to be paid as the consideration of the transfer of the business of the old firm; and that the company had really the guarantee of the vendors against any loss on the assets and liabilities of the firm. I am compelled, however, to question even the literal truth of the representation that the consideration for the goodwill was £500,000, one half being paid in cash and the remainder in shares of the company. This imports, of course, that payment of the £250,000 was to be really made to the partners in the old firm, and the shares to be delivered to them for their own benefit. But so far was this from being the case that under the deed of arrangement (the deed not referred to in the prospectus), instead of the £250,000 being paid to the partners, it was to be paid to the limited company, and the suspense and guarantee account was to be credited with that amount in discharge of so much of the liabilities of the old firm; and with regard to the shares (the other moiety of the consideration), all benefit derived from them by the partners in the old firm was to be carried to the credit of the same account. Upon these facts was it true, even in a literal sense, that the consideration for the business was to be paid to the old firm of Overend and Gurney, one half in cash and the remainder in shares? If not, then undoubtedly there was a misrepresentation, for which the respondents would be liable.

The case must be examined with reference to the charge which is made against the respondents of having concealed material facts, by which the appellant alleges that he was deceived and drawn in to the purchase of his shares in the company. It was argued on his behalf that the concealment of material facts which a person is bound to communicate may be the ground of an action for deceit and of a suit for relief in equity. The concealment in the present case was of the all-important fact of the true state of the affairs of the old firm, which, if they had been disclosed, the wildest speculator would have turned away from a proposal to build a company on such a foundation. That there was a moral obligation upon the respondents not to put forward a scheme which depended for its success upon keeping the public in ignorance of what ought in fairness to have been made known to them, no one can doubt. It is said

A that the directors entertained a bona fide belief that the company would be a prosperous and profitable undertaking, and they evinced the sincerity of their belief by all of them becoming holders of shares to a considerable amount; but they knew that the company could not possibly be upheld without the introduction of fresh capital, and that this fresh capital could only be obtained by concealing the real condition of the old firm, and, however they might be convinced that, with additional capital and a careful and prudent management, the affairs of Overend and Gurney might be brought round and afterwards a profitable business be carried on, yet, as this was an experiment which was to be made with the money of other persons as well as their own, they were bound to give all those other persons such information as they themselves possessed, to enable a competent judgment to be formed as to the prudence of joining the proposed company.

C The question, however, is not as to the moral obligation of the respondents, but whether their intentional concealment, from whatever motive, of a fact so material that if it had been made known no company could have been formed renders them liable to an action for damages, or to the analogous proceeding in equity, by the appellant, who was led by it to purchase shares in the company, by which he has been subjected to a most serious loss. This case is entirely different from suits instituted either to be relieved from, or for the enforcement of, contracts induced by the fraudulent concealment of facts which ought to have been disclosed; nor does it resemble such cases as *Burrowes v. Lock* (1) and *Slim v. Croucher* (2), where a person making an untrue representation to another, about to deal in a matter of interest upon the faith of that representation, has been compelled to make good his representation, whether he knew it to be false, or made it through forgetfulness of the fact. It is a suit instituted to recover damages from the respondents for the injury the appellant has sustained by having been deceived and misled, by their misrepresentations and suppression of facts, to become a shareholder in the proposed company, of which they were the promoters. It is precisely analogous to the common law action for deceit. There can be no doubt that equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at law and in equity.

G I am not aware of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally bound to disclose. *Keates v. Earl Cadogan* (3) may be mentioned as an authority to the contrary. There it was held upon demurrer that an action for deceit would not lie against the owner of a house, who knew it to be in a ruinous and unsafe condition, for not disclosing the fact to a proposed tenant who wanted the house for immediate occupation. In the course of the argument *Hill v. Gray* (4) was cited, where the agent for the sale of a picture, knowing that the vendee laboured under a delusion (as it is called) that the picture was the property of Sir Felix Agar, did not remove it, and Mr. Gray, under this misapprehension, purchased the picture. LORD ELLENBOROUGH, upon proof of these facts, said (1 Stark. at p. 436):

I "The case has arrived at its termination, since it appears that the purchaser laboured under a deception, in which the agent permitted him to remain, on a point which he thought material to influence his judgment."

It is to be observed that *Hill v. Gray* (4) was not an action for deceit, but was brought by the owner of the picture against the purchaser upon the contract; and JERVIS, C.J., in his judgment in *Keates v. Earl Cadogan* (3), took some pains to shew that there was something more in the case than mere concealment, and what amounted (as he called it) to aggressive deceit on the

part of the agent of the seller. After quoting the following words of LORD ELLENBOROUGH (*ibid.* at p. 435):

"The agent ought...not to have let in a suspicion on the part of the purchaser which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it,"

he added: "That shews something like an act done." It may be questionable whether this effect could properly be given to the silence of the agent; but the attempted explanation shews the anxiety of JERVIS, C.J., to reconcile *Hill v. Gray* (4) with the judgment of the court in the case before it—that the mere non-disclosure by the owner of the house of its ruinous state was no ground for an action for deceit.

Assuming that mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into a contract, but that there must be something actively done to deceive him and draw him in to deal with the person withholding the truth from him, it appears to me that this additional element exists in the present case. The concealment of the insolvent state of the old firm of Overend and Gurney was absolutely essential towards the formation of the limited company, and the respondents not merely were silent as to this important fact, but actively represented that the firm was in such a flourishing condition that the goodwill of the business was worth half a million. It is said that the prospectus is true as far as it goes, but half a truth will sometimes amount to a real falsehood, and I go farther and say, that to my mind it contains a positive misrepresentation. The language of the prospectus must be read in the sense in which the respondents must have known it would be understood. In that sense it is not true (as already observed) that the sum of £500,000, the consideration for the business, was paid to the old firm in cash and in shares, for the whole of it was to be applied in liquidation of the enormous debt of that firm, the existence of which was designedly kept from the public to whom the prospectus was addressed. I cannot doubt that there was, beyond the passive concealment of the state of the affairs of the old firm, an active misrepresentation of the truth by the respondents, for which they were answerable either at law or in equity.

The second question to be considered is whether the appellant, who alleges that he purchased his shares upon the faith of the prospectus, has a remedy against the respondents for the misrepresentations which it contains. The appellant contends that the prospectus being addressed to the public for the purpose of inducing them to join the proposed company, any one of the public who is led by it to take shares, whether originally as an allottee, or by purchase of allotted shares upon the market, is entitled to relief against the persons who issued the prospectus. The respondents, on the other hand, insist that the prospectus, not being an invitation to the public ultimately to become holders of shares, but to join the company at once by obtaining allotments of shares, those only who were drawn in by the misrepresentations in the prospectus to become allottees, can have a remedy against the respondents. There can be no doubt that the prospectus was issued with the object alleged by the respondents. It is addressed from the temporary offices of the company for allotment and registration of shares. It states how much is to be paid upon application for shares, and how much upon allotment, and how and where the application for shares is to be made, and it gives the form of payment to the bankers and of the receipt to be given by them to the applicant for shares to be allotted. But the learned counsel for the appellant, not denying the original purpose of the prospectus, contended, upon the authority of decided cases, that the prospectus, having reached the hands of the appellant, and he, relying upon the truth of

A the statement it contained, having been induced to purchase shares, the respondents were liable as for a misrepresentation made to him personally. I must, therefore, examine shortly the authorities relied upon.

B *Bedford v. Bagshaw* (5) is a case where the defendant and others forming the board of management of a joint stock company for the purpose of getting the shares of the company inserted in the official list of the Stock Exchange untruly represented that two-thirds of the scrip had been paid upon. The shares being in consequence of that representation inserted in the official list, the plaintiff, knowing the requirements of the Stock Exchange, on the faith that two-thirds of the scrip had been paid upon, purchased shares in the company. The jury found that the representation was made fraudulently. The Court of Exchequer held that the defendant was liable to the damages sustained by the plaintiff, although the representation was not made to him directly. Two of the learned judges, MARTIN, B., and BRAMWELL, B., considered the case to be concluded by a former decision in *Seymour v. Bagshaw* (6) against the same defendant. The proceedings in that case, however, hardly appear to recommend it as an authority. The action was tried by JERVIS, C.J., who told the jury that if the plaintiff was induced, by seeing the shares quoted in the official list of the Stock Exchange, to purchase them, and if they believed that the insertion of the shares in the list was procured by the false and fraudulent representation of the defendant, the plaintiff was entitled to recover. A bill of exception was tendered to the Chief Justice's ruling. In the Exchequer Chamber judgment was pronounced by consent without argument, for the purpose of going at once to the House of Lords. This is stated in the COMMON BENCH REPORTS (18 C.B.N.S. 903), but BRAMWELL, B., in the EXCHEQUER REPORTS, says (4 H. & N. at pp. 547, 548) that the judgment in the Exchequer Chamber did not pass sub silentio. No other trace, however, of the manner in which the case was disposed of is to be found, except in the short notice of it in the COMMON BENCH REPORTS. On the case being called on in the House of Lords, the counsel for Bagshaw, the appellant, said he did not think he could usefully occupy the time of the House by arguing it, and he at once submitted to a judgment for the respondent. How, under these circumstances, this case could be considered as a conclusive authority by the judges who decided *Bedford v. Bagshaw* (5) it is hard to understand. But the cases themselves cannot, in my opinion, be supported. The actions were brought upon the allegation of a false representation made to the plaintiff. But no representation at all was made which reached either his eyes or his ears. From his knowing the rules of the Stock Exchange he assumed that a certain representation had been made, and acted upon it. According to the judgment, it was his knowledge of the rules which led him to appropriate the representation to himself, and, therefore, it could not be taken to be made to any one who was ignorant of these rules. The decisions, and the grounds on which they proceeded, appear to me to be extraordinary, and I cannot bring my mind to agree with them.

I In *Scott v. Dixon* (7), which is to be found in the note to *Bedford v. Bagshaw* (5), an action was brought against a director of a banking company for falsely, fraudulently, and deceitfully publishing and representing to the plaintiffs that a dividend was about to be paid out of the profits, which were sufficient for payment of the dividend, and that the shares were a safe investment for the money. The plaintiffs bought their shares upon the faith of a report made by the directors to the shareholders which contained the false representations. Copies of this report were left at the bank, and were to be had by share-brokers or any persons applying for it, who were desirous of information with regard to the affairs of the bank, with a view to the purchase of shares. The plaintiffs purchased at the bank, through their broker, a copy of the report. The Court of Queen's Bench held that, there being positive evidence that the

report was to be bought by any person who thought of becoming a purchaser of shares, that it came into the hands of the plaintiffs in this manner, and that by the perusal of it they were induced to buy shares in the bank, there was a publication to the plaintiff in the sense of the declaration. I do not doubt the propriety of this decision. The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares, and the representation must be regarded as having been made, not indirectly, but directly to each person who obtained the report from the bank where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director.

Gerhard v. Bates (8) is supposed to be an authority in support of the argument that a prospectus containing untrue representations may be made the ground of an action by a purchaser of shares, who has been deceived and induced by the representations to become a shareholder. That case, however, establishes no such proposition, but rather, as I read it, the contrary. The question arose upon a demurrer to a declaration, upon which of course all the facts alleged were, for the purpose of the argument, taken to be true. The second count of the declaration, which was founded upon the deceitful representation by the defendant, alleged that the defendant and others had formed a company with 96,000 shares, of which 12,000 were to be appropriated to the public at 12s. 6d. per share, free from further calls; that the defendant being the promoter and managing director of the company, intending to defraud, deceive, and injure the public who might become purchasers of the 12,000 shares, and to induce them to become purchasers, falsely, etc., caused it to be publicly advertised, by a prospectus issued by the defendant as such director; that the promoters did not hesitate to guarantee to the bearers of the 12,000 shares a minimum annual dividend of 33 per cent., etc., and that the defendant, by means of false, etc., pretences and representations, wrongfully and fraudulently induced the plaintiff to become, and the plaintiff by reason thereof actually became, purchaser and bearer of 2500 of the 12,000 shares at 12s. 6d. per share, whereas the statement was false and fraudulent to the knowledge of the defendant; and the defendant had no ground for offering such guarantee to the public. LORD CAMPBELL, in giving judgment for the plaintiff, said (2 E. & B. at p. 489) :

"Had it been alleged that the defendant meaning to deceive and injure the plaintiff, and to induce him to purchase shares in the company under the belief that it was a safe and profitable undertaking, fraudulently delivered to the plaintiff the prospectus containing the false representation, whereby the plaintiff was induced to purchase the shares, there can be no doubt that the count would have been sufficient. The allegations which it does contain appear to us to be equivalent."

He afterwards adds :

"If the plaintiff had only averred that having seen the prospectus he was induced to purchase the shares, objection might have been made that a connection did not sufficiently appear between the act of the defendant and the act of the plaintiff from which the loss arose"

—a remark which has a direct application to the present case.

Gerhard v. Bates (8), therefore, is no authority for holding that, upon a prospectus addressed to the public by the directors of a company, any one of the public who, at any time and under any circumstances has been led to take shares upon the faith of the representations thus published can maintain an action against them. The observations of LORD CAMPBELL rather indicate a contrary opinion. It appears to me that there must be something to connect the directors making the representation with the party complaining that he has been deceived and injured by it—as in *Scott v. Dixon* (7), by selling a report

A containing the misrepresentations complained of to a person who afterwards
purchases shares upon the faith of it, or, as suggested in *Gerhard v. Bates* (8),
by delivering the fraudulent prospectus to a person who thereupon becomes a
purchaser of shares, or by making an allotment of shares to a person who
has been induced by the prospectus to apply for such allotment. In all these
B cases the parties in one way or other are brought into direct communication;
and in an action the misrepresentation would be properly alleged to have been
made by the defendant to the plaintiff; but the purchaser of shares in the market
upon the faith of a prospectus which he has not received from those who
are answerable for it cannot by action upon it so connect himself with them
as to render them liable to him for the misrepresentations contained in it,
C as if it had been addressed personally to himself. I, therefore, think that the
appellant cannot make the respondents responsible to him for the loss he has
sustained by trusting to the prospectus issued by them inviting the public to
apply for allotments of shares; and upon this ground only (being different
from that on which the Master of the Rolls proceeded) I submit to your Lord-
ships that the decree appealed from should be affirmed. -

D **LORD COLONSAY.**—I agree in the result at which my noble and learned
friend has arrived. We must take this case upon the footing upon which it
is presented to us, not of a guarantee, but of a transfer or purchase of shares;
and we must look at the allegation of the purchaser, that he was misled by
certain statements which were contained in the prospectus issued by the respon-
E dents. I think with my noble and learned friend that this prospectus did
suppress important matter, and if it did not contain any direct allegation of
what was false, it was at least of a misleading character. It was a *suppressio*
veri, which, if it did not amount to an *allegatio falsi*; at least amounted to
a *suggestio falsi*, and I cannot see any grounds upon which I could justify
it. I think that there is very great difficulty in distinguishing the cases of the
F different defendants, or respondents, from each other. Those who were con-
cerned in issuing that prospectus can hardly be listened to when they say
that they did not know what were the contents of it, or that they had not
sufficiently examined into the matter before putting it forth. That would be
a reckless putting forth of statements which they did not know to be true,
and which were calculated to induce people to subscribe. But that does not
G solve this case. I agree in the view taken by the respondents' counsel that
the proper office of a prospectus is to invite persons to become original partners
in a company, that is to say, allottees of shares; and I do not think that the
responsibility towards those allottees which attached to the directors who issued
the prospectus followed the shares when they were transferred to any number
of persons however distant from the allottees, persons who ultimately purchased
H those shares. I think that the office of the prospectus was fulfilled when the
allottee got his shares as far as regarded those shares. I think, further, that
in a case of this kind it is necessary to make out some direct connection
between the directors and the party who alleges that he was deceived.

I do not find that any of the authorities that have been cited support the
opposite view of the matter. I shall only notice one of those cases with which
I happen to be familiar. I mean *Cullen v. Thomson* (9). That was a case
not at all in point with the present. In the first place, the question that came
to this House in that case was a question whether the manager and the
accountant of a bank, as being servants of the directors, were personally liable for
the false allegations contained in a report. The court below had been of opinion
that the directors were responsible, but that there was not, in a very confused
record, sufficient issuable matter to be sent to trial as against the officials.
This House thought otherwise. We thought that there might be extracted from
the record, confused as it was, sufficient issuable matter, and we sent back

the case to the court below accordingly. What were the facts as regards Mr. Cullen, and what was the ground upon which that case proceeded? Mr. Cullen was an original proprietor and allottee of shares, and being, as such, a partner in the company, and being present at a meeting of the company to receive a report of the directors, that report was read to him and to others, and it was transmitted to him and to others who were shareholders. Not only so, but upon some inquiry of his there was a letter written and a circular sent to the shareholders containing all those misrepresentations and misstatements upon which he founded his case. In consequence of these misrepresentations he purchased 170 additional shares, and afterwards brought his action against the directors for having communicated to him this false statement, and he claimed to hold them liable in damages for it. So far from that being in point with a case of a party having no such communication made to him, and yet making such a claim, it is the very reverse. It is the case of a party who had a most direct and positive representation made to him by the directors, against whom, therefore, he was entitled to institute proceedings. I do not find, as I have said, that there is any case which supports the conclusion that the appellant seeks to arrive at in this case, according to the very clear and very ingenious speech that was presented to us on his behalf. Therefore, my Lords, I concur in the judgment which has been proposed by my noble and learned friend.

LORD CAIRNS.—This case was argued at your Lordships' Bar very elaborately and with great ability; but the points of the case upon which the decision of your Lordships must, as it seems to me, turn, lie in a very small compass. I agree with my noble and learned friends who have preceded me that the delay in instituting this suit is not a ground upon which the Master of the Rolls can be supported. The suit is in the nature of an action for damages for misrepresentation; it is in the nature of an action or proceeding *ex delicto*, and it appears to me that to such an action or proceeding there is no bar arising from delay, unless that delay be such as would bring the Statute of Limitations applicable to the case into operation.

The two questions which, as it appears to me, it is material to answer are these: (i) Did the respondents, in the prospectus issued as to the company, make representations which in point of fact were untrue? (ii) Is the appellant able to connect himself with these representations so as to enable him to say that they were made to him, or were made to induce him to act on them, and that he did so act? I have limited the first question to the prospectus, because that is really the only matter to which your Lordships need direct your attention; nothing else is relied upon in the bill as a ground for relief. It is true that a good deal was said during the argument about the proceedings taken to obtain a settling-day on the Stock Exchange; but, although the obtaining of a settling-day on the Stock Exchange is mentioned in the pleadings, it is not made any ground for relief. Your Lordships will observe that in the bill it is stated that:

"The plaintiff made the purchases of shares and entered into the contracts of membership solely on the faith of the statements contained in the prospectus."

That allegation excludes any reference to any other alleged misstatement. It is impossible to say, and it would be impossible to say, even though the pleadings had been different, that anything that passed with the committee of the Stock Exchange was, in this case, a representation either made to the appellant or made for the purpose of being communicated to the appellant.

This brings me, therefore, to the consideration of the prospectus; and, before looking at the terms of it, I may say that I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could

A not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, B such a partial and fragmentary statement of fact that the withholding of that which is not stated makes that which is stated absolutely false. This prospectus is certainly free from many of those extravagant terms and flattering descriptions which we are accustomed to see in documents of this kind. I will not dwell upon the words that the terms made, "in the opinion of the directors cannot fail to ensure a highly remunerative return to the shareholders." That was a C reference, not to fact, but to opinion; and, strange as it may appear to us now, looked at by the light of subsequent events, I am not satisfied that this statement as to the opinion of the directors was not perfectly consistent with the opinion which they really held. I do not dwell upon any of the later sentences in the prospectus, and the only two sentences to which I will direct your Lordships' attention are the first and the second.

D The first sentence runs thus :

"The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. Overend, Gurney and Co. of their long-established business as bill brokers and money dealers, and of the premises in which the business is conducted; the consideration E for the goodwill being £500,000, one half being paid in cash, and the remainder in shares of the company with £15 per share credited thereon."

It appears to me that any person reading that statement would be entitled to say: "Here is a company, with the name of which we are quite familiar, and here are new directors, persons of known wealth and character in the commercial world, joining that company for the purpose of making a new and limited partnership. They are independent of the old partnership, and able F to form an independent judgment upon it: they are going to put in fresh capital themselves, and we understand from this statement that there is to be a transfer of the assets and liabilities of the old concern—the whole business as a going concern is to be taken over. We, the outside public, have no opportunity of looking into the accounts of the old concern, but these new directors have done G so, and, having looked into the accounts and estimated the relative value of assets and liabilities, they think that the whole business upon this footing is worth a sum, for the goodwill of it, of half a million of money. One half of that amount is to be paid down and taken away by the old partnership; the other half is to be given by the old partnership as so much capital in the new concern." In this point of view, which, as it appears to me, is the H point of view in which, I repeat, any member of the outside public might regard and understand this statement, the payment of so large a sum for the goodwill of the concern, the actual payment of half, and the actual assignment of the other half by way of capital, would become a material guarantee that the bargain was, at all events in the opinion of those who made it, a good and sound bargain. But in order to understand the full meaning of this statement, your I Lordships must take into account the second sentence in the prospectus also :

"The business will be handed over to the new company on Aug. 1 next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred."

I read that again as meaning, consistently with the sentence which I read in the first instance, that there is to be a transfer of all the assets and all the liabilities; that the business (to use the expression I used before) is to be

transferred as a going concern, and is to be transferred at a value which is placed at half a million in money, on the basis of all the assets and liabilities being made over, and a guarantee given, on the part of the old partners, that whatever valuation was put upon the assets and liabilities was a valuation which would be secured by them and made good by them; so that, on the one hand, the assets would not be deficient, and, on the other hand, the liabilities would not be excessive, as compared with the valuation which had been put upon both. In point of fact, the sentences which I have read to your Lordships appear to me to represent what I may term an out-and-out transaction; the business transferred, the money paid, and a sum assigned for the goodwill upon the footing of a transaction of that kind.

Were these the facts of the case? I will contrast with this statement in the prospectus the statement of the real transaction, which I will take, for brevity, from the Case of the Messrs. Gurney, now laid before this House. In the Case of Gurney and Birkbeck I find this statement, which is entirely in accordance with the evidence, and is in point of fact a summary of it:

"Under these circumstances, the scheme of the proposed joint stock company was that it should purchase the goodwill of the bill broking and bill discounting business carried on by Overend, Gurney and Co., which was of a most profitable character, for £500,000."

Observe even in that sentence there is a complete alteration, a complete departure from the prospectus: "That it should purchase the goodwill of the bill broking and bill discounting business"; a distinction being drawn in those words between that portion of the business and the portion of the business which was not described as bill broking and bill discounting, as indeed the Case goes on to explain:

"That it should purchase the goodwill of the bill broking and bill discounting business carried on by Overend, Gurney and Co., which was of a most profitable character, for £500,000, and that the doubtful accounts [a matter altogether separate], which made up the said sum of £4,194,000, should not be transferred, but should be excepted out of the assets made over to the company; and should be retained and wound-up by the vendors, and that all sums of money received therefrom, and all other sums of money payable by the company to the vendors (including the said sum of £500,000, which was payable half in cash and half in shares), should be applied towards the liquidation of the amount of the excepted accounts, with which the vendors were to be debited in the books of the company under the head of suspense and guarantee account."

Here I may point out that that is a wholly different transaction. That is a transfer, not of the business, but of a portion of the business which is described as a profitable part, namely, the bill broking and bill discounting. There is a separation from that portion of the business of other businesses which had resulted in doubtful accounts to the amount of £4,194,000, which doubtful accounts were not transferred to the new company, but made the subject of a separate piece of book-keeping, involving the non-transfer of them, and in that separate book-keeping the sum of £500,000 was applied on the opposite side of the account.

At another part of the Case, your Lordships will find a succinct statement of the deed No. 2, which is the deed that gave effect to this part of the arrangement. The deed No. 2 regulated the details of the arrangement contemplated by deed No. 1, and provided for the liquidation of the accounts which, by virtue of that arrangement, were excepted from the accounts of Overend, Gurney & Co. transferred to the limited company. It, in effect, provided that a separate account to be called "Overend, Gurney & Co.'s suspense and guarantee account" should be opened in the books of the limited company, and should

A be debited with the total amount of the balance which, as struck on July 31, 1865, should appear to the debit of the accounts specified in the schedule, which I may say were the accounts amounting to upwards of four millions, and be credited with £250,000 (being one moiety of the price of the goodwill) and also with £45,000, the price of the business premises of the firm and the balances due to the partners on their private accounts, and the amount from
B time to time realized by the sale of the shares which were issued to the vendors as part of the said purchase-money. The account was to be closed on Dec. 31, 1868, when the balance, if on the credit side, was to be paid by the company to the members of the firm within a month, and if on the debit side to be deemed a debt due to the company from the firm. So that, I may say in passing,
C if by any accident, which was a most improbable contingency, these accounts had turned out, not hopeless, but accounts from which a larger sum than was expected should be realized, the benefit of it was to go, not to the new limited company, but to the old partners. It gave to the company a lien on the 16,666 shares to be issued in payment of one moiety of the purchase-money of £500,000, and on all property retained by the firm, to be applied in winding-up the excepted accounts, and the company was to be entitled to have the shares and
D property made available, through the medium of a sale or otherwise, to secure the performance of the vendors' covenants and to indemnify the company.

To complete the narrative of this arrangement I must also read to your Lordships this statement with regard to it from the answer of Mr. John Henry Gurney:

E "In the investigation of the state of the affairs of Overend, Gurney & Co., prior to the formation of the limited company, it appeared from their books that there were then outstanding various debit balances, which were considered to be of a doubtful nature, to the amount of £4,199,000, or thereabouts; but upon a careful estimation of the securities held in respect
F of them, and the probable winding-up of such of them as were not secured, it was estimated that of the total amount of £4,199,000 the sum of £1,082,000 would be realized, leaving therefore the sum of £3,117,000 still to be provided for. At this period it was estimated that the balances to the credit of the partners, when made up in the private ledger, would amount to £940,000, and which balances had been calculated as liabilities of the firm; but,
G deducting the amount thereof from the balance of £3,117,000 so left unprovided for, there remained the sum of £2,177,000 still outstanding and to be provided for. Upon a careful examination and estimate of the private estates of the several partners comprising the firm of Overend, Gurney & Co., and of their interest in the banking business carried on in Norfolk and elsewhere, it was estimated that such several private estates would produce the further aggregate sum of £2,320,000; and after taking credit for
H the £500,000 to be received for goodwill, and for £45,000 as the estimated value of the premises in Lombard Street, there would have remained a surplus of £688,000 in favour of the individual partners after providing for every liability of the firm of Overend, Gurney & Co."

I The result of these statements appears to me to be obvious. There was nothing paid for the goodwill of the firm; there was no transfer of assets and liabilities as something which, upon a proper valuation, were worth paying for in the shape of goodwill, with an independent guarantee from the old partners that those assets and liabilities would produce the amount at which they were valued. The principle of the valuation proceeded upon this—that, if all the assets and all the liabilities were looked at, there was an enormous deficiency. The mode in which that deficiency was made up was this. The accounts, amounting to upwards of £4,000,000, which caused the deficiency, were not really transferred; they were carried to a separate suspense account by them-

selves, and upon the other side of that account, or for the purpose of balancing the admittedly disastrous outcome of those accounts, there was taken into account the value of the private estates of the partners (upon which I must observe at the same time that no security whatever binding those estates was taken), and there was taken into account also the £500,000, the sum which had been fixed upon as the estimated value of the goodwill. In point of fact, therefore, your Lordships will observe that the use that was made of the private estates and of the sum named for the goodwill was to fill up that vacuum of insolvency which was apparent on the mere statement of the figures to which I have referred, and that, so far from any sum being paid for goodwill, nothing was paid whatever, and so far from the sum named for the goodwill being a test of the excellence of the bargain, it was exactly the opposite, because, upon the same principle as this sum of £500,000 was appropriated in the manner that I have mentioned, had the insolvency been greater, had there been £500,000 more of insolvency, the value of the goodwill might have been estimated at a million, and the million might have been used in the same way that the £500,000 were used.

I have stated shortly the facts as they present themselves to my mind, and I am bound to say that, now that we know these facts, and now that we compare these facts with the statement in the first two sentences of the prospectus, I am unable to arrive at any other conclusion than this—that the statement in those two first sentences was a statement of that which was not justified by the facts of the case. We were pressed very much in argument with considerations as to the motives of those who made this statement, and it was pointed out with great accuracy that upon a trial in the nature of a criminal proceeding it had been held that they were not chargeable with that which was laid to their charge in that proceeding. I must say that, so far as I understand the case, I entirely agree with the result at which the jury arrived in that proceeding; and, strange as it may appear, I think there is a great deal in the papers before your Lordships to show that the gentlemen who formed this company were themselves, judging by the extent to which they embarked their means and continued their property in the concern, labouring under the impression that this transaction, disastrous as it ultimately turned out, had in it the elements of a profitable commercial undertaking, and so far as motive is concerned they may be absolved from any charge of a wilful design or motive to mislead or to defraud the public. But in a civil proceeding of this kind all that your Lordships have to examine is the question: Was there or was there not misrepresentation in point of fact? And if there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done.

Having answered the first question as I am obliged to answer it, I come to the second question in the case, namely: How does the appellant connect himself with this statement? The prospectus was issued on July 12 or 13, 1865, and a copy was received or was obtained by the appellant. It is not proved from whom he obtained it. The object of the prospectus on the face of it is clearly to invite the public to take shares in the new company. The prospectus is, as is usual in such cases, an invitation, and there is appended to it a form of application for shares, which was to be filled up, and upon which form the invitation was to be answered. It is a prospectus in this shape, addressed to the whole of the public, no doubt, and any one of the public might take up the prospectus and appropriate it in that way to himself by answering it upon the form upon which it is intended by the prospectus that it should be answered. The appellant, however, did not take up and did not appropriate the prospectus in this way. For reasons which it is unnecessary to inquire into he declined to take, or at all events he did not originally take, any shares in the company. The allotment of shares began on July 24; it appears to have been completed

A on July 28; and it is stated that two or three times the number of shares to be had in the company were applied for. The allotment having been completed, the prospectus, as it seems to me, had done its work; it was exhausted. The share list was full; the directors had obtained from the company the money they desired to obtain. The appellant subsequently, upon Oct. 17, several months afterwards, bought 1000 shares at a premium of something over £7, and again, **B** still later, on Dec. 6, he bought 1000 other shares at a premium of something over £6. He bought them on the Stock Exchange, and he, of course, did not know in the first instance from whom he bought them. In point of fact, it appears that as to the greater part of them they were shares which had originally been allotted to one of the old partners, Samuel Gurney, by whom they were transferred to a nominee for himself, in whose name they were **C** registered. They were then sold upon the market, and re-sold apparently several times, because the premium seems to have risen from a much smaller to a much larger sum, and ultimately they were sold, at the premium which I have stated, to the appellant, and were registered in his name.

I ask the question, How can the directors of a company be liable, after the full original allotment of shares, for all the subsequent dealings which may **D** take place with regard to those shares upon the Stock Exchange? If the argument of the appellant is right, they must be liable ad infinitum, for I know no means of pointing out any time at which the liability would, in point of fact, cease. Not only so, but, if the argument be right, they must be liable no matter what the premium may be at which the shares may be sold. That premium **E** may rise from time to time from circumstances altogether unconnected with the prospectus, and yet, if the argument be right, the appellant would be entitled to call upon the directors to indemnify him up to the highest point at which the shares may be sold, for all that he may expend in buying the shares. I ask, is there any authority for this proposition? I am aware of none. During the course of the argument I took the liberty of putting to the learned counsel **F** for the appellant a case which I think was not answered, and to which, so far as I know, no answer can be given that would be favourable to the appellant. I put the case of a person having built a house and desiring to sell it. He comes to me and wishes me to purchase it; he describes it as a highly advantageous purchase, and makes statements of fact to me with regard to the house which are untrue and are misrepresentations; but I decline to purchase, **G** and our overtures come to an end. He subsequently sells it to some other person, upon what terms I know not. That other person completes the purchase, and that other person, desiring to raise money on mortgage, applies to me to lend him money. I lend him money upon a mortgage of the house. The facts stated to me originally turn out to be untrue, and are so material as that the house, not being as represented, becomes comparatively worthless. I **H** then apply to the original vendor, remind him of what he told me, and complain to him that my money lent upon mortgage has been lost, and I commence an action against him for damages to recover my loss. Could such an action be maintained? I know of no authority for it, and I am of opinion that an action of that kind would not lie.

I My Lords, I take the rule on this point to have been happily stated in some expressions of my noble and learned friend LORD HATHERLEY, when he was vice-chancellor, in *Barry v. Croskey* (10), in passages which I will take the liberty of reading to your Lordships. The first occurs during the argument. Upon a reference to *Langridge v. Levy* (11), the vice-chancellor said (2 John. & H. at pp. 17, 18):

“I take the ground of that decision to have been, that the false representation was made by the defendant with a view that it should be acted upon by the son in the manner that occasioned the injury. PARKE, B., says;

"There is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way.' The father, acting upon the faith of that representation, put the gun into the hands of his son, who fired it off, when it burst and injured him. Suppose a stranger knowing nothing of what had passed between the father and the defendant, to have found the gun, lying for instance at an inn. If a stranger so finding the gun had taken it up and fired it, and the gun had burst and injured him, would he have had his action against the defendant upon the ground that Nock's name appeared upon the gun, and the defendant had sold it with that name appearing upon it, and as a gun made by Nock."

Again, in the course of the argument, the vice-chancellor, addressing counsel, says (*ibid.* at pp. 18, 19) :

"Your argument would show that every person who in consequence of De Berenger's frauds upon the Stock Exchange was induced to purchase stock at an advanced price, in reliance upon the false rumour he had circulated that peace was concluded, was entitled to maintain an action against De Berenger for the increase in price. Would not such consequences be too remote to form ground for an action?"

Finally, in giving judgment, the vice-chancellor stated (*ibid.* at pp. 22, 23) what he understood to be the principles applicable to such a case :

"First. Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified. Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting, is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss."

Thirdly, he continues (*ibid.* at pp. 23, 24) :

"But, to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss."

His Honour comments a second time on *Langridge v. Levy* (11) as consistent with that principle.

My Lords, upon the grounds which I have mentioned, and upon the principles laid down in *Barry v. Croskey* (10), which appear to me to be consistent with what is stated by all the authorities that might be referred to, I am of opinion that the appellant in the present case has entirely failed to connect himself with the representations made in the prospectus, of which, in my opinion, an original allottee might have complained, but of which the present appellant cannot, I think, complain. On these grounds, therefore, I agree to the motion of my noble and learned friend that this appeal ought to be dismissed.

Appeal dismissed.

MOULE v. GARRETT AND OTHERS

[COURT OF EXCHEQUER CHAMBER (Sir Alexander Cockburn, C.J., Willes, Blackburn, Mellor, Brett and Grove, JJ.), February 3, 1872]

[Reported L.R. 7 Exch. 101; 41 L.J. Ex. 62; 26 L.T. 367;
20 W.R. 416]

Landlord and Tenant—Lease—Assignment—Liability of assignee—Re-assignment—Breach of covenant by ultimate assignee—Liability to lessee (original assignor).

The plaintiff, lessee of premises under a lease for years containing a covenant to repair, assigned the term to B., who subsequently assigned it to the defendants, the indenture of assignment in each case containing express covenants by the respective assignees with their respective immediate assignors to indemnify them against all subsequent breaches of covenant. The defendants, during the time they were in possession, committed breaches of the covenant to repair, and then assigned over to another person. The plaintiff, having been compelled in an action on his covenant brought against him by the lessor's representatives to pay damages in respect of such breaches, brought an action to recover from the defendants the amount of those damages.

Held: the defendants were liable to reimburse the plaintiff the amount expended by him in satisfying the claim of the lessor's representatives because (i) the defendants had acquired the same estate as that which the plaintiff acquired originally under the lease, and they took that estate subject to all the liabilities which the covenants contained in the lease imposed on the plaintiff; (ii) the plaintiff had been compelled to pay damages by reason of the legal default of the defendants, and so, by implication, he was entitled to recover from them the amount so paid.

Notes. Distinguished: *Bonner v. Tottenham and Edmonton Permanent Investment Building Society*, [1895-9] All E.R. Rep. 549. Considered: *Johns v. Pink*, [1900] 1 Ch. 296; *Rendall v. Morphew* (1914), 84 L.J.Ch. 517. Referred to: *Roberts v. Crowe* (1872), L.R. 7 C.P. 629; *Whitaker v. Forbes* (1875), 45 L.J.Q.B. 140; *Seaward v. Drew and Farmer* (1898), 67 L.J.Q.B. 322; *Compania Naviera Vasconzada v. Churchill and Sim*, *Same v. Burton*, [1906] 1 K.B. 237; *Matthey v. Curling*, [1922] All E.R. Rep. 1; *Brooks Wharf and Bull Wharf, Ltd. v. Goodman Bros.*, [1936] 3 All E.R. 696.

As to the liabilities of the assignee of a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 651-658; and for cases see 31 DIGEST (Repl.) 447 et seq.

H Case referred to:

- (1) *Dering v. Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; 26 Digest (Repl.) 145, 1065.

Also referred to in argument:

- Burnett v. Lynch* (1826), 5 B. & C. 589; 8 Dow. & Ry. K.B. 368; 4 L.J.O.S.K.B. 274; 108 E.R. 220; 31 Digest (Repl.) 458, 585J.
- Wolveridge v. Steward* (1833), 1 Cr. & M. 644; 3 Moo. & S. 561; 3 Tyr. 637; 3 L.J. Ex. 360; 149 E.R. 557, Ex. Ch.; 31 Digest (Repl.) 458, 5819.
- Humble v. Langston* (1841), 7 M. & W. 517; 2 Ry. & Can. Cas. 533; H. & W. 72; 10 L.J. Ex. 442; 151 E.R. 871; 31 Digest (Repl.) 444, 5704.
- Smith v. Peat* (1853), 9 Exch. 161; 2 C.L.R. 424; 23 L.J. Ex. 84; 22 L.T.O.S. 106; 156 E.R. 69; 31 Digest (Repl.) 459, 5860.
- Penley v. Watts* (1841), 7 M. & W. 601; 10 L.J. Ex. 229; 151 E.R. 907; 30 Digest (Repl.) 519, 1583.

Neale v. Wyllie (1824), 3 B. & C. 533; 5 Dow. & Ry. K.B. 442; 107 E.R. 831; 30 Digest (Repl.) 521, 1595.

Appeal by the defendants from a decree of the Court of Exchequer (CHANNELL and PIGOTT, BB., CLEASBY, B., dissenting), reported L.R. 5 Exch. 192, making absolute a rule nisi granted to the plaintiff to enter a verdict for him in an action brought by him to recover from the defendants inter alia the amount which he had paid to the landlord of premises of which he (the plaintiff) was the head tenant in respect of breaches of covenants in the lease, of which the defendants were assignees.

By an indenture of lease, dated June 16, 1845, one Thurgood demised to the plaintiff a messuage, No. 15, Tottenham Court Road, Middlesex, for twenty-four and three-quarters years less twenty-one days, from Lady Day, 1845, at £69 yearly rent, subject to covenants for payment of rent reserved, and repairing and painting the demised premises in the declaration more particularly set forth. By an indenture dated Jan. 8, 1856, the plaintiff assigned the lease and premises to E. Bailey, and after divers mesne assignments, by indenture dated Feb. 21, 1859, the lease again became vested in the plaintiff. On May 3, 1860, a memorandum of agreement was made and entered into by and between the plaintiff and the defendants, who were brewers carrying on business at the Camden Brewery, Camden Town, and signed on their behalf by the defendant Whitaker, which agreement was in effect that the plaintiff agreed to sell, and the defendants to purchase, the lease of the messuage, of which about ten years were unexpired, at a rental of £69, with all fixtures, for the sum of £60, the plaintiff to pay all rent, rates, and taxes to May 9 next, on which day he would give up possession. In pursuance of the agreement, the defendants appointed one F. Bartley, and the plaintiff thereupon, by indenture dated May 17, 1860, assigned to Bartley the residue of the term created by the lease of June 16, 1845, subject to the performance of the covenants therein contained. By an indenture dated July 14, 1860, Bartley executed to the defendants a mortgage by demise of the premises for the then residue of the term, except the last two days thereof, subject to redemption, on payment by Bartley to the defendants of the principal sum of £350 and interest thereon. By an indenture dated Nov. 23, 1860, Bartley assigned the premises, freed from the equity of redemption, to the defendants, subject to the payment of the rent and the performance of the covenants therein contained, and by the same indenture the defendants expressly covenanted for themselves, their heirs, executors, and assigns, with Bartley, his heirs, executors, and administrators, that they, their heirs, etc., would from time to time pay the rent of £69, and observe and perform the covenants reserved and contained by and in the lease, on the part of the lessee, his executors, administrators, and assigns, thenceforth to be paid, observed, and performed. The defendants, accordingly, became possessed of the demised premises, and remained in such possession until Jan. 29, 1867. On July 4, 1866, the executors of the lessor, Thurgood, then deceased, served on the plaintiff a notice to repair the demised premises. The defendants denied that there was any liability on them to perform the repairs. On Jan. 29, 1867, the defendants assigned to T. Higgins, subject to the performance of the covenants in the original lease, the said T. Higgins also expressly covenanting with the defendants to perform such covenants. Higgins remained in possession for some time, and was then ejected by the ground landlord. In June, 1867, at the suit of Thurgood's executors, judgment was recovered against the plaintiff for £110 damages for breaches of covenant in the lease of June 16, 1845, and £14 8s. 6d. taxed costs.

The plaintiff then brought the present action against the defendants claiming payment of rent for two quarters, which he alleged was owing; reimbursement of the damages and costs which he had paid in the action by Thurgood's

A executors against him; and payment of his own costs in that action. The
defendants denied that there was any privity of contract between them and the
plaintiff and contended that, therefore, he could not recover. It was agreed by
counsel for the plaintiff and the defendants that, if it should be held that any
liability existed in law, the verdict should be entered for the plaintiff for
B £75, a sum agreed upon as the damages for breaches of covenant committed
during the time of the defendants' occupancy of the demised premises.
Pigott, B., thereupon directed a verdict to be entered for the defendants with
leave to the plaintiff to move to enter a verdict for £75. In pursuance of
such leave a rule was obtained by Cole, Q.C., for the plaintiff, to enter a
verdict for the plaintiff for £75 on the ground that, during the time the
C defendants were assignees of the lease, a duty was cast on them to perform the
covenants of the lease and to hold the plaintiff harmless therefrom, and, that
not having done so, they were liable to the plaintiff in this action. The Court
of Exchequer (CHANNELL and PIGOTT, BB., CLEASBY, B., dissenting) made the
rule absolute to enter the verdict for the plaintiff for £75. The defendants
appealed to the Court of Exchequer Chamber.

D *Risdon Bennett* (with him *Manisty*, Q.C.) for the defendants.
Cole, Q.C., and *Merewether* for the plaintiff.

SIR ALEXANDER COCKBURN, C.J.—I am of opinion that the judgment of
the majority of the Court of Exchequer in this case is right, and that it should
be affirmed. The defendants are the ultimate assignees of a lease, and the
E plaintiff, who is suing them upon an alleged indemnity by them against the
consequences of a breach of one of the covenants contained in that lease, is the
original lessee thereunder, and there can be no doubt that the alleged breach of
covenant here is one for which the defendants, as assignees of the lease, are
liable at any rate to the original lessor, and doubtless, too, also to their
immediate assignor. The defendants have, no doubt, by various mesne assign-
F ments, acquired the same estate as that which the plaintiff, the original lessee,
took in the first instance, and I think that, taking this estate immediately from
the plaintiff's assignee, they must be held to have taken it subject to all the
liabilities which the covenants and provisions contained in the original lease
imposed upon the plaintiff not only as regards the previous assignee, their
immediate assignor, and the original lessor, but also as regards the original
G lessee, the plaintiff. It is, I think, the same estate burdened with the same
covenants and conditions as those which the plaintiff, the original lessee, took
it subject to, and they are subject, therefore, to all the same liabilities as, not
only their immediate assignor, but, the original lessee, the plaintiff, is subject to.

There is another ground, and I think a preferable one, put by the court
below, upon which, I think, the decision may be upheld, which is this.
H It is clear that the premises, which are the subject-matter of the original lease,
being in the possession of the defendants as ultimate assignees, they were the
persons whose duty it was to observe and perform the various covenants in
that lease with respect to such premises. Thus it was their duty to keep
the premises in repair, and it was they by whose default in that respect the
plaintiff, the original lessee, although he had parted with the estate, became
I liable by the terms of his covenant to make good to the lessor the expenses
and damage arising from the default of the defendants. The damage, therefore,
accrued through the default of the defendants; and I take it to be a general
proposition of law, that, where one person has been compelled to pay
damages by reason of the legal default of another person, the person so
compelled to pay can recover the amount so paid from the other person by
whose default the damage was caused. That proposition is applicable to the
present case, and the general doctrine is well stated in LEAKE ON THE LAW OF
CONTRACTS, at p. 41, as follows:

"This contract is created in law upon an implied request without any request existing in fact, where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."

Whether, then, the liability is put on the ground of an implied contract, or on that of a legal obligation arising and imposed by law, is immaterial: in either case the duty is such as the law will enforce, and in either case a defendant is equally liable. The plaintiff, the original lessee, has been compelled, through the default of the defendants, who were bound to repair during the time they were assignees of the term, to supply their omission to repair these premises, and the latter, therefore, are liable to reimburse and make good to him the amount thus expended by him. The majority of the court below were, therefore, in my opinion right in holding that the defendants were liable to make good such loss to the plaintiffs.

WILLES, J.—I concur in the judgment which the Lord Chief Justice has just delivered, on the ground that if A. is liable at law by reason of privity of contract, and such contract confers a benefit, and its obligations are common to both A. and B. but B. receives all the benefit, then B. is liable to indemnify A. against loss occasioned by the performance of such obligations. The defendants here have derived the whole benefit of the contract entered into by the plaintiff as the original lessee, and, according to the principle of the decision in *Dering v. Earl of Winchelsea* (1), they are liable, on that ground, to the plaintiff in this action.

BLACKBURN, J.—I am of the same opinion. I agree with the opinions which have been already expressed by my Lord and **WILLES, J.**, and I think that **CHANNELL, B.**, put the case on its right footing in his judgment in the court below.

MELLOR, BRETT and **GROVE, JJ.**, concurred.

Appeal dismissed.

GIPPS v. GIPPS AND HUME

[HOUSE OF LORDS (Lord Westbury, L.C., Lord Wensleydale and Lord Chelmsford), April 18, May 6, 27, 1864]

[Reported 11 H.L.Cas. 1; 4 New Rep. 303; 33 L.J.P.M. & A. 161; 10 L.T. 735; 10 Jur.N.S. 641; 12 W.R. 937; 11 E.R. 1230]

Divorce—Connivance—Acquiescence in adultery by spouse—Acceptance of payment to withdraw petition—Connivance at certain acts of adultery—Effect on right of petitioner to obtain divorce on ground of subsequent adultery—Connivance spending itself.

Connivance as a bar to the grant of a decree of divorce or judicial separation is not to be limited to the literal meaning of wilfully refusing or affecting not to see or become acquainted with that which one knows or believes is happening or about to happen. It must include the case of a spouse acquiescing in, by

A wilfully abstaining from taking any steps to prevent, that adulterous intercourse which from what passes before his or her eyes he or she cannot but believe or reasonably suspect is likely to occur. Still more must the words "conniving at" include the case of a husband who, having discovered the adultery of the wife, takes a sum of money from the co-respondent on an engagement not to complain of the acts of the wife, but to abandon the legal remedy, and then leaves the wife in such a situation as cannot but facilitate the continuance or renewal of the adulterous intercourse.

B Per LORD CHELMSFORD: Connivance is a figurative expression, meaning a voluntary blindness to some present act or conduct and is inapplicable to anything past or future. If a husband, ignorant at the time of his wife's infidelity, afterwards discovers it and leaves it unnoticed and unpunished, whatever be the motive for his silence, he cannot be said to connive at the first adultery, much less at any future intercourse between the guilty parties.

C Per LORD WESTBURY, L.C.: If a husband is proved to have connived at the adultery of his wife with A., he cannot obtain a dissolution of his marriage on account of her adultery with B., nor, if he has connived at adultery committed by his wife with a particular person at one time, can he complain of adultery committed with the same person at a subsequent time.

D Per LORD CHELMSFORD: It is unnecessary [in the present case] to express any opinion as to the right of a husband to complain of the adultery of his wife with another man after such a bargain made to silence his complaint of prior adultery [i.e. acceptance of a money payment in consideration of not pursuing a divorce petition].

E **Notes.** The effect of connivance at certain acts of adultery on the right of the petitioner to obtain a divorce on the ground of subsequent adultery is dealt with in 12 HALSBURY'S LAWS (3rd Edn.) 300 and Supp., and cases there cited, in some of which the court proceeded on the view that the connivance had spent itself and so did not apply to subsequent adultery.

F Distinguished: *Preger v. Preger*, [1926] All E.R. Rep. 302. Applied: *Lloyd v. Lloyd and Leggeri*, [1938] 2 All E.R. 480. Explained: *Churchman v. Churchman*, [1945] 2 All E.R. 190. Considered: *Manning v. Manning*, *Fellows v. Fellows*, [1950] 1 All E.R. 602; *Douglas v. Douglas*, [1950] 2 All E.R. 178. Not Followed: *Gorst v. Gorst*, [1951] 2 All E.R. 956. Referred to: *Dotzauer v. Dotzauer* (1925), 41 T.L.R. 289; *Lankester v. Lankester and Cooper*, [1925] P. 114.

G As to connivance, see 12 HALSBURY'S LAWS (3rd Edn.) 297-300; and for cases see 27 DIGEST (Repl.) 381 et seq.

Cases referred to:

- (1) *Timmings v. Timmings* (1792), 3 Hag. Ecc. 76; 162 E.R. 1086; 27 Digest (Repl.) 400, 3299.
- H (2) *Lovering v. Lovering* (1792), 3 Hag. Ecc. 85; 162 E.R. 1089; 27 Digest (Repl.) 378, 3119.
- (3) *Moorsom v. Moorsom* (1792), 3 Hag. Ecc. 87; 162 E.R. 1090; 27 Digest (Repl.) 384, 3161.
- (4) *Gilpin v. Gilpin* (1804), 3 Hag. Ecc. 150; 162 E.R. 1112; 27 Digest (Repl.) 383, 3148.
- I (5) *Phillips v. Phillips* (1844), 1 Rob. Eccl. 144; 3 Notes of Cases, 444; on appeal (1846), 10 Jur. 829; 4 Notes of Cases, 523; affirmed (1847), 5 Notes of Cases, 435, P.C.; 27 Digest (Repl.) 383, 3149.
- (6) *Glennie v. Glennie and Bowles* (1862), 32 L.J.P.M. & A. 17; 8 Jur.N.S. 1158; 11 W.R. 28; 27 Digest (Repl.) 384, 3166.

Also referred to in argument:

- Hoar v. Hoar* (1801), 3 Hag. Ecc. 137; 162 E.R. 1108; 27 Digest (Repl.) 379, 3123.
Crewe v. Crewe (1800), 3 Hag. Ecc. 123; 162 E.R. 1102; 27 Digest (Repl.) 389, 3220.

Appeal by the petitioner (the husband) from an order of the Divorce Court dismissing a petition for divorce presented by the appellant.

The appellant, Augustus Pemberton Gipps, set forth in his petition that he was married to the respondent, Helen Etough Gipps, on Oct. 15, 1851; that he cohabited with her, and had issue of the marriage two children; that they afterwards separated, and that during such separation, in or about August, 1861, she committed adultery with the co-respondent, W. Wentworth Fitzwilliam Hume, in consequence whereof she gave birth to twins on May 4, 1862; that between Sept. 1, 1862 and the date of the petition she had been constantly visited by the co-respondent at her different lodgings, and had on divers occasions during that time committed adultery with him; and that, about October, 1861, she visited and stayed in the house of the co-respondent at Monkton Farleigh, in Wiltshire, and on divers occasions during such time committed adultery with him. The co-respondent filed an answer denying the charges, and, further alleging that the appellant had connived at the adultery set forth in his petition; that he had, by his wilful misconduct, conduced to the adultery; that before the adultery complained of, the appellant, having filed his petition alleging that the respondent had committed adultery with the co-respondent, and when the petition was about to be heard in the court, in consideration of the receipt of a large sum of money to be paid by the co-respondent with a full knowledge of all the circumstances of the case, agreed with the co-respondent to withdraw his petition then about to be heard in the Divorce Court; that thereupon the co-respondent paid the appellant a large sum of money, and afterwards, when the petition came on to be heard, the appellant refused to offer evidence in support of his petition, and that thereupon a verdict was found against the appellant. The appellant replied, denying that he had connived at or by his wilful misconduct conduced to the respondent's adultery, and alleging that the residue of the averments in the answer were irrelevant except so far as they might be admissible as evidence of connivance, and that the said averments only partially and incorrectly set forth the circumstances connected with the former trial in the Divorce Court. The case was tried before SIR CRESSWELL CRESSWELL, who held that, in the circumstances, the appellant had been guilty of connivance, and dismissed the petition. The present appeal was then brought.

By s. 31 of the Matrimonial Causes Act, 1857 (which has been replaced by s. 4 (2) (b) of the Matrimonial Causes Act, 1950; see 29 HALSBURY'S STATUTES (2nd Edn.), 338):

"In case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage . . . then the court shall pronounce a decree declaring such marriage to be dissolved. . . ."

Macaulay, Q.C., and *Sir Hugh Cairns, Q.C.* (with them *Dr. Spinks* and *Hannen*), for the appellant.

No counsel appeared for the respondent or the co-respondent.

Their Lordships took time for consideration.

June 27, 1864. The following opinions were read.

LORD WESTBURY, L.C.—This case appears to me to depend partly on the construction of s. 31 of the Matrimonial Causes Act, 1857, by which the Divorce Court was established, and partly on the question what is the proper legal description or effect of the acts and conduct of the petitioner. In framing s. 31 of the Act of 1857 the legislature appears to have been desirous of recognising and giving effect to the general principle that a husband shall not be entitled to a divorce if he has been guilty of any neglect or misconduct which

A has conduced to the adultery of the wife. The word "adultery" in this section is not to be confined to the particular acts of adultery or to the particular adulterous intercourse alleged or proved by a petitioner for dissolution of marriage. If a husband is proved to have connived at the adultery of his wife with A., he cannot obtain a dissolution of marriage on account of her adultery with B., nor, if he has connived at adultery committed by his wife with a particular person at one time, can he complain of adultery committed with the same person at a subsequent time. It would be contrary to the spirit of the Act, and highly prejudicial to public morality, if any other interpretation were adopted. It would be a disgrace to the law to suppose that a husband may connive at the adultery of his wife on Monday, and yet be at liberty to complain of a repetition of the adultery on the Tuesday following.

C The next question is: What is the legal force and effect of the words in the section, "conniving at the adultery"? The word "conniving" is not to be limited to the literal meaning of wilfully refusing or affecting not to see or become acquainted with that which you know or believe is happening or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which from what passes before his eyes he cannot but believe, or reasonably suspect, is likely to occur. Still more must the words "conniving at" include the case of a husband who, having discovered the adultery of the wife, takes a sum of money from the adulterer upon an engagement not to complain of the acts of the wife, but to abandon the legal remedy, and then leaves the wife in such a situation as cannot but facilitate the continuance or renewal of the adulterous intercourse.

E Let us now see what has been the conduct of the petitioner. In the year 1860 the petitioner discovered that an adulterous intercourse existed between his wife and the co-respondent. He determined to take proceedings in the Divorce Court for a dissolution of his marriage. But before his petition was presented an agreement was come to between the husband and the adulterer that the latter should pay and the former accept the sum of £3000 as compensation, and that the intended petition should be presented praying for a dissolution of the marriage, but without any prayer for costs or damages against the adulterer. Accordingly the sum of £3000 was paid by the adulterer to the husband, and the petitioner presented his petition against his wife, praying for a dissolution of the marriage. On the day on which the petition was appointed to be heard by the Divorce Court, a further proposition was made, and after some treaty a memorandum of agreement was signed by the husband and the adulterer, which was in the following words:

H "In the matter of *Gipps v. Gipps and Hume*. In consideration of your having agreed to accept from the co-respondent the sum of £3000 as your costs and damages, and upon the co-respondent agreeing to secure to you the further sum of £4000, payable upon the death of his mother, and in the meantime paying you thereon or as you may direct interest after the rate of 5 per cent. per annum, and you, with a full knowledge of all the circumstances, undertaking to withdraw your suit now about to be heard in the Divorce Court, I do hereby, as the solicitor acting for Mr. Hume, the co-respondent in this matter, undertake and agree on his behalf that he shall, within one month from the date hereof, execute such documents as may be necessary for securing you the payment of £4000 and interest."

I After this agreement had been concluded the petition came on to be heard, and the petitioner, not having given any evidence in support of his charges, a verdict was given in favour of the respondent and the petition was dismissed.

In making this agreement I consider Mr. Hume as acting on behalf of the wife. His own indemnity had been purchased from the petitioner by the payment of the £3000. What remained was, the petitioner's complaint against his wife,

and his claim to a divorce on the ground of her adultery, and these are given up and released by the petitioner in consideration of the agreement to pay him £4000. For that sum he sold his right to complain of his wife's infidelity. He did not condone the offence by taking his wife back to live with him again. The law is very charitable, and seems to give much encouragement to meek condonation. I do not say, if the offence had been bona fide condoned by the husband, that he would have lost his right to complain of a subsequent renewal of the adulterous intercourse. That, however, was not the case, but on the contrary, as soon as the agreement for the money is signed, the legal remedy is given up, and, so far as the husband is concerned, the wife is abandoned to the adulterer. For some time previous to the agreement of June 18, the petitioner and his wife had been living separate and apart from each other. The children of their marriage resided with, and were under the care of, the petitioner, their father. The wife, therefore, was alone. The petitioner has given no evidence as to the place of her residence at the very time when the agreement was made. For aught that appears, the adulterer may have come from the arms of his wife to conclude the agreement with the husband, and then returned to them again. There is no proof that the petitioner made any stipulation as to her residence or future conduct. She was left at liberty to go wherever she pleased. No care or anxiety was shown by her husband to separate her from Mr. Hume, or to stipulate for a severance of the connection. Accordingly, the adulterous intercourse appears to have been immediately renewed, if it was ever interrupted. In the beginning of August, 1861, Mrs. Gipps and Mr. Hume are found cohabiting together at an hotel at Dorking. They afterwards went to France and Switzerland, and the intercourse seems, from the evidence, to have continued without interruption. Mrs. Gipps was confined of twins in the month of May, 1862.

The conduct of her husband in the meantime is extremely significant. While he believed that the agreement to pay the £4000 would be fulfilled, or was capable of being enforced, he does not appear to have taken any care to watch or ascertain the conduct of his wife; but, in consequence of some refusal or delay in the payment of the £4000, the petitioner in August, 1861, filed a bill in the Court of Chancery to enforce the performance of the agreement of June 18, 1861. Mr. Hume demurred to the bill, and the demurrer was allowed by PAGE-WOOD, V.-C., on Nov. 15, 1861. After the demurrer was filed, and, as appears from the evidence of Evans, the appellant's solicitor, a detective officer was employed by the appellant at the end of October, 1861, to watch the movements of the wife, and he appears to have quickly obtained, if he did not already possess, abundant evidence of the continuance of the old adulterous intercourse. The times and places are specified in particulars of demand, as they are called, delivered by the appellant. These, together with the evidence of Amelia Haddon and Amelia Francis, lady's maids to Mrs. Gipps, show how completely the wife was left at liberty, and how she availed herself of that liberty to continue her intercourse with Mr. Hume. After the failure of the appellant's Chancery suit, and before presenting the present petition, some letters passed between the solicitors of the several parties, the appellant requiring the payment of the £4000 to himself, Mr. Hume offering to pay it on the death of his mother, and in the meantime to allow Mrs. Gipps £200. I am obliged to arrive at the conclusion that if the £4000 had been paid the present petition would not have been presented. It was, however, presented in June, 1862, and was, in my judgment, most properly dismissed by the Judge Ordinary.

I have one more observation to make on the circumstances of this painful case. It was asserted by the appellant's counsel at the Bar (although I find no evidence to support it) that at the date of the agreement of June 18, 1861, the petitioner believed that his wife was and would continue under the care of her mother. The only evidence as to any inquiry by the petitioner on that subject is in the evidence of Mr. Evans, her solicitor. He says: "I have asked White

A [White was one of the solicitors of Mrs. Gipps, a partner in the firm of Broughton and White] where she was soon after the end of my first suit. He never told me." If the appellant knew, or had reason to believe, that his wife was residing with her mother, I have now the painful duty of bringing out of the appellant's own mouth what was the nature of that evidence. And what was the character of that case? The appellant Mr. Gipps has produced a variety of letters by his wife, and among them there is one plainly written anterior to the commencement of the first suit, and plainly in his possession prior to the agreement. It is a letter from the respondent Mrs. Gipps to her mother Mrs. Taynton :

C "Dearest Mamma,—Pemberton has intercepted my letter to you enclosing one for Mr. Hume. I shall be round in Dover Street in as short a time as I am able; as I cannot go in there, will you get a lodging? I am very ill."

The material part of the letter to the mother which the wife describes her husband as having intercepted is as follows: "Tuesday.—My dearest Mother." The first paragraph is immaterial: the second paragraph runs thus: "I wish D you would send to me, it is so much safer. I cannot trust P." (that seems to be the initial of the appellant's Christian name, Pemberton). "Sist. is the only one I can, and I cannot well be without her. How dreadfully cold it is! I am obliged to enclose *his*" (which appears to have been underlined) "without even a cover, for I am watched, so will you explain and do it for me?" The pronoun *his* plainly meant a letter to Mr. Hume. Accordingly, it is produced E by the appellant; it follows the letter which I have read, and is dated Tuesday. It will be seen here that the adulteress sent this letter without a cover to her mother to be forwarded to Mr. Hume, the adulterer. If this be proved, this is the person to whose care we were told at the Bar the appellant left his wife and properly left her. The open letter that the adulteress sent to her mother as an enclosure is in these words :

F "My own dearest,—I only write you a few lines in answer to your letter received yesterday, the one written from Mr. Nesbit; the other from M.F. Do not worry about me. I shall soon be all right, and I am much better. I cannot help being irritable at not seeing you, but when I can I will soon be myself again. Do think and manage with mamma about some mode of G getting me away from here."

She appeals to the co-respondent to arrange with her own mother

H "about some mode of getting me away from here—P.G. [that is the husband] says I shall not go—of course I know, if I choose to go, I can, but then it makes him my enemy—at least I suppose it would."

She then refers to her medical man, and she adds at the end these words :

I "How I wish we were all off out of the way. He is so happy and delighted at seeing me, so powerless that no one would feel inclined to pity him. I will write again today, after receiving the letter you have written to me through mamma. God bless you, dearest.—Your poor little pet, HELEN."

The mother lived, at the time of the agreement, in Somers Place, near, I think, Hyde Park Square, and the particulars of the alleged adultery given by the petitioner himself are these. He charges

"that at divers times between Sept. 1, 1861, and Oct. 1 following the co-respondent visited respondent at 4, Somers Place, Hyde Park [the mother's house]."

I think, if this be true (I earnestly hope it may not be true, but it is the case made by the appellant), a more painful scene of profligacy was hardly ever presented in a court of justice. A

I think it right to advert for a moment to the decisions that have taken place in the ecclesiastical court upon the subject of connivance. In one of them, *Timmings v. Timmings* (1), which is the only case that could be appealed to by the appellant, SIR WILLIAM SCOTT is reported to have used the following words (3 Hag. Ecc. at p. 84): B

"It is true that a husband is not barred by a mere permission of opportunity for adultery, nor is it every degree of an intention on his part which will deprive him of relief; but it is one thing to permit and another to invite. He is perfectly at liberty to let the licentiousness of the wife take its full scope." C

I cannot believe that these words were uttered by the learned judge, because they are wholly inconsistent with the tenour of the rest of his judgment. But, as they are attributed to him in this report, I think it right to say that so far as my judgment extends that is not the law, and that it would be a disgrace to the law if it were so. If a husband, knowing the tendency and the evil habit of the wife, let the licentiousness of the wife take its full scope without reproof or interference, I hold that he would never obtain any remedy in a court of justice. In subsequent cases a very different rule is represented. D

In *Lovering v. Lovering* (2), SIR WILLIAM SCOTT refers to the case of a husband who was charged with connivance, and he says (3 Hag. Ecc. at p. 86): E

"There is one circumstance here which distinguishes this husband's conduct from proper condonation, and marks an improper consent. If he were induced to forgive his wife, yet when he sees an indecent familiarity with his own apprentice, would he suffer the man to remain one moment in his house? That is impossible to reconcile with a due care of his own honour. If he had pardoned his wife and discharged his servant, there would have been nothing in the condonation. The act of his permitting him to continue in his house after he knew of great and indecent familiarities, and till she is guilty with another man, amounts almost to consent, and is a degree of delinquency which renders him unworthy of a remedy as far as that man is concerned. . . . The ecclesiastical court requires two things, that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife, and if he has relaxed with one man, he has no right to complain of another." F

The same language is used in *Moorsom v. Moorsom* (3), in which the same learned judge says (3 Hag. Ecc. at p. 95): G

"It is not necessary to prove connivance to actual adultery any more than it is necessary on the other side to prove an actual and specific fact of adultery. If a system of connivance at the improper familiarity almost amounting to proximate acts be established, I shall infer a corrupt intention as to the result, and shall not call for more direct proof." H

In *Gilpin v. Gilpin* (4), the language of SIR WILLIAM WYNNE is this (3 Hag. Ecc. at p. 153): I

"Connivance is the word used. It has been argued that it must be such as to show knowledge of and privity to the actual commission of adultery; but that is not so. If there has been such extreme negligence as to the conduct of his wife, such an encouragement of acquaintance and familiar intimacy as was likely to lead to the consequence that ensued—an adulterous intercourse—it would subject him deservedly to a refusal of the sentence he prayed." J

A Ordinarily speaking, there is difficulty in proving connivance, because in ordinary cases the fact of adultery has not been established. But in the present case the petitioner knew the fact of the adultery; and, according to his own statement (though I trust it is not true), he knew that that adultery had taken place with the sanction—if I may use such a word—of the mother as an accessory thereto. What had happened he knew was likely to happen again. He left his wife, therefore (taking the price of his dishonour), in the hands of the mother. He left her, therefore, in a situation in which that was likely to occur which, according to his own statement, actually did occur, namely, that the wife did continue that adultery at the house of her mother and with her consent. I hope that your Lordships will have no hesitation as to this case. I should be extremely sorry if the law were left in such a state as to admit a doubt upon the subject, for if ever there be a court in which it is incumbent to hold up a maxim that a man who seeks relief shall come with clean hands, it is undoubtedly the Divorce Court. I hope that your Lordships will carry out the spirit of the Act of Parliament, and that you will not in any manner, in the slightest degree, detract from the strictest enforcement of that principle in the Divorce Court.

D
LORD WENSLEYDALE.—The question for your Lordships in this case is not whether, if this were an application to your Lordships in your legislative capacity to pass a Bill for a divorce under the old system, there are circumstances belonging to it of such a character as might induce you to hesitate in acceding to it. Upon that question I offer no opinion. But the question now is simply whether, according to the law now established by the statutes allowing divorce, the appellant is or is not entitled as a matter of right upon the facts proved to a divorce from his wife, or at least to a further inquiry before it is refused. The law of divorce is now entirely regulated by the Matrimonial Causes Act, 1857, and subsequent statutes on the same subject, to which latter it is unnecessary to refer. By ss. 29, 30, and 31 of the Act of 1857 the court is bound to pronounce a decree of dissolution of the marriage upon certain conditions mentioned particularly in the Act. These are the conditions. The court is to be satisfied, as far as it reasonably can, that the adultery has been proved, and that the petitioner has not been in any manner accessory to or conniving at the adultery, and that he has not condoned the same. These are the only material parts of the Act to which it is necessary to advert as applicable to this case. Of the fact of the adultery being committed, which is the subject of this suit, there is no question. In August, 1861, the adultery unquestionably took place. Twins were born in May, 1862, and the petition in this suit was presented in June, 1862. That the appellant was accessory to that adultery in the sense in which that word seems to be used in the Act of Parliament, being more than mere connivance—that he was a party aiding and assisting, is equally out of the question. That he has condoned it in the proper sense of the word, is also out of the question. The only matter to be inquired into and decided is, whether he connived at the adultery, the subject of the suit for which this petition was presented.

I
SIR CRESSWELL CRESSWELL was of opinion, as expressed in his judgment, for the reasons there given at length, that he had connived at the adultery, the subject of this suit, committed in August, 1861. After hearing the argument at your Lordships' Bar, I have satisfied myself that the learned judge's reasons for the opinion he has given are insufficient, and that he has come to a wrong conclusion. He proceeds entirely upon what had occurred on the settlement of the former suit of the petitioner (the appellant) for a divorce for the adultery of his wife with Mr. Hume, the co-respondent in the first suit as well as in the second now under appeal, and from the mode of settlement of that suit by compromise, the learned judge drew the inference of connivance by the appellant

in the adultery, the subject of complaint in this. I think that inference was unwarranted. A

The circumstances are these. It appears that the petitioner and Mrs. Gipps were married in October, 1851. They lived together till 1860. In 1860 she committed adultery with Mr. Hume. The petitioner filed a petition in February, 1860, for a divorce against Mrs. Gipps, and against Mr. Hume, as co-respondent. A meeting took place before the actual filing of the petition between the petitioner, his attorney, and Mr. Halliwell, a friend of both parties, and it was then agreed that £3000 should be paid by Mr. Hume for costs and damages, and that the petition should not contain a claim for damages. The £3000 was afterwards paid. When the cause was to be tried on June 18, 1861, on the eve of the trial, Mr. Halliwell produced an agreement proposed by him that in consideration of the receipt of the £3000, and upon the co-respondent securing to the petitioner the further sum of £4000 on the death of his mother and interest in the meantime, the petitioner undertook to withdraw the suit, and to execute a deed of separation. The petitioner agreed, except to the deed of separation. The petitioner on the hearing offered to withdraw the record. The counsel for the co-respondent objected and insisted on the verdict being given for the respondent and co-respondent, which was done. The £3000 for costs and damages had been paid previously. For the £4000 agreed to be paid as the price of the giving up of the suit and allowing the acquittal of the co-respondent, the appellant filed a bill, but PAGE-WOOD, V.-C., held, very properly, that the bill could not be maintained, because it was clearly against the policy of the Act, which, while it allows damages to be recovered by s. 33, gives the court the power to direct in what manner they shall be paid and applied, and the payment to the petitioner himself absolutely entirely disappoints that arrangement, and puts the money into the hands of the petitioner, and, therefore, no doubt the covenant is altogether void as against the policy of the law. B C D E

But still the claim is made for redress for an injury done—for a compensation for that injury to which the petitioner claims to be justly entitled, and which is paid as a compensation for that injury, and does not in the least imply that the petitioner consented to its commission. That the petitioner stipulated illegally for an additional compensation to be paid to him for consenting that the charge should not be published, by assenting to a public acquittal, does not the less show the payment of the £3000 to be payment of damages and costs; and the not subjecting that payment to the discretion of the court cannot make the payment anything but a compensation for a wrong done which was inexcusable, and for which compensation was justly due. To put this on the footing of adultery committed with the actual consent of the husband, or by his tacit assent implied by connivance by wilfully shutting his eyes to what he must have known beforehand—before it was about to be done, or after it was done by taking no notice of it—is, in my judgment, an error. And it is on that principle the judgment proceeds. F G H

Connivance excuses on the principle of *volenti non fit injuria*. To constitute it there must be corrupt intention, as laid down, upon full consideration of the authorities, by SIR HERBERT JENNER FUST, in *Phillips v. Phillips* (5), in the Court of Arches in 1846, which was acted on by SIR CRESSWELL CRESSWELL in *Glennie v. Glennie and Bowles* (6), when he said, that to prove connivance it is necessary to show, not only that the husband acted in such a manner as that the wife's adultery might result, but also it must be proved that it was his intention that adultery should result. If the petitioner really had consented to the first adultery with Hume, or connived at it in the true sense of the word, it is quite unnecessary to dispute the proposition that he could not complain of a fresh adultery with the same man or with another, as laid down by LORD STOWELL and confirmed by SIR CRESSWELL CRESSWELL in this case. SIR CRESSWELL CRESSWELL's judgment is that there has been no consent to the first I

A adultery, and no connivance in the proper sense of the word by insisting and receiving compensation for one admitted wrong, though paid in an irregular and unauthorised manner; but still its nature is not altered, it is still nothing but a payment of damages for an injury wholly inexcusable. That he made no stipulation at the time of the settlement for the good conduct of his wife seems to me to be of no weight. It cannot be supposed that he should make such a bargain with the adulterer. There is some evidence that in an attempted settlement with his wife for her maintenance he did. I proceed entirely upon this, that there is no proof of anything like connivance in the legal sense by insisting, as he was entitled, to a compensation for an injury undoubtedly committed, though not a compensation in an authorised mode. There are certainly some circumstances in the subsequent conduct of the petitioner in looking after his wife which may require some consideration. He appointed a detective to discover her conduct. He may have realised his effects while he was waiting for the decision of PAGE-WOOD, V.-C., on the demurrer to his bill.

C These circumstances were not considered or acted upon by the Judge Ordinary, and may require further investigation. But I think justice requires that we should not form our judgment upon the very imperfect materials which are before us, and that as the judgment of SIR CRESSWELL CRESSWELL ought, in my opinion, to be set aside, we ought to act on the authority given by s. 58 of the Act, and remit the case to the court for further inquiry. The parties have consented to the court trying the original suit itself without the aid of a jury, but a doubt may be entertained whether in the new trial the appellant may not have a right to insist under s. 28 to have the disputed facts tried by a jury. That consideration induces me the more to advise your Lordships that a new trial may be ordered.

E **LORD CHELMSFORD.**—The question upon which the propriety of the decree appealed from depends is whether the appellant was in any manner accessory to or conniving at the adultery complained of in his petition. The learned Judge Ordinary thought, from the circumstances connected with his former petition for a divorce, on which he claimed damages from the same person, who was the co-respondent to the petition in question, that the petitioner must be taken to have given a tacit consent to any future intercourse between her and her paramour, and he dismissed the petition on that ground that the petitioner had connived at the adultery.

G I agree with my noble and learned friend, LORD WENSLEYDALE, that the learned Judge Ordinary was in error in holding that the compromise of the first petition amounted in itself to connivance at what is called the subsequent adultery. Connivance is a figurative expression, meaning a voluntary blindness to some present act or conduct—to something going on before the eyes, and is inapplicable to anything past or future. If a husband, ignorant at the time of his wife's infidelity, afterwards discovers it, and leaves it unnoticed and unpunished, whatever may be the motive of his silence, even if it be the base and sordid one of making a profit out of his own dishonour, he cannot be said to connive even at the first adultery, much less at any future intercourse of the guilty parties. But, although the learned Judge Ordinary may have been wrong in his description of the character of the compromise, yet I think it constituted in itself an ample ground for the dismissal of the petition.

I I quite agree in the observation made by counsel for the appellant that the adultery mentioned in ss. 29 and 31 of the Matrimonial Causes Act, 1857, means the particular adultery which is the foundation of the petition. But it seems to me to be incorrect to call the criminal intercourse of the wife with her former paramour after the agreement upon which the former petition was abandoned, such adultery as in the contemplation of the Act could be the subject of a second petition for a divorce. It must be borne in mind that the offence of

adultery is complete in a single instance of guilty connection with a married woman. It is the first act which constitutes the crime; and though the adulterous intercourse between the parties should be continued for years, there is not a fresh adultery upon every repetition of the guilty acts, although all and each of them may furnish proofs of the adultery itself. The inference which I draw from this view of the subject is that if a husband having the right to divorce his wife for adultery abandons that right in consideration of a sum of money received from the adulterer, he can never afterwards be a petitioner for a divorce on the ground of his wife's criminal intercourse with the same person. A husband who so deals with the man who has dishonoured him must be taken to have consented to his own shame, so far as ratification amounts to consent. The principle upon which LORD STOWELL's judgment proceeded in the cases which have been cited applies, and debars him ever after from using any future criminal intercourse as the ground of another petition for a divorce.

It is unnecessary to enter into the consideration of any nice questions which might arise out of cases of condonation after a compromise like that in the present case, or to express any opinion as to the right of a husband to complain of the adultery of his wife with another man after such a bargain made to silence his complaint of prior adultery. I confine myself entirely to the case before me, and say that a husband who sells his right to obtain a separation from a guilty wife to the man who is the partner of her guilt, can never afterwards be heard to renew his application for a divorce on the ground of criminal intercourse with the same individual, which is not, strictly speaking, fresh adultery, but merely further evidence of the adultery which had been committed when the bargain was made to purchase a disgraceful silence. But even if this general view of the character and effect of the compromise should be questionable, there appears to me to be ample evidence in the circumstances of the case to justify the dismissal of the petition on the ground that the appellant was either accessory to, or that he connived at, the adultery of which he complains. I do not understand the word "accessory" in the Act in the legal sense of one who counsels or commands another to commit an offence, or who conceals the offender. But from the words "in any manner" coupled with it, it seems to be used in its popular sense of aiding in producing or contributing to produce some effect. If this is a correct view of the meaning of the legislature in the use of this word, I should feel no difficulty in holding that a husband who sells to the adulterer his right to complain of his wife's adultery, and afterwards discards her without providing her with any means of living, or taking any precaution to protect her against any future intercourse with the adulterer, must be considered as an accessory to the renewal of that intercourse in the sense of contributing to produce the effect.

But I think that, looking to all the circumstances connected with and following upon the compromise, there is strong evidence to warrant the conclusion that the appellant connived at the subsequent adultery. After the arrangement of the former suit the sole object of the appellant was to obtain the bond for £4000, the consideration for his relinquishing his right to obtain a divorce. For this purpose, after the suit was ended by a verdict by consent, which negatived the adultery, negotiations were carried on as to the allowance to be made to the appellant's wife, and as to the mode in which the £4000, to be secured by the bond, should be settled. In the course of the negotiations the appellant certainly stipulated that the proposed allowance to his wife should continue only during her good conduct. But as no such stipulation entered into the arrangement of the original suit, the Learned Judge Ordinary seems to have been justified in the fear which he expressed that it was intended rather for the protection of the appellant's purse than as a security for his wife's future good behaviour. Upon the disagreement of the parties as to the manner in which the £4000 should be settled, the appellant, in August, 1861, filed a bill against Mr. Hume for specific

- A performance of this agreement to give the bond, to which bill there was a demurrer. Pending the suit in Chancery, the appellant in October, 1861, employed a detective to discover where and in what manner his wife was living, and obtained information which must have satisfied him that the intercourse between her and Mr. Hume still continued. From the subsequent conduct of the appellant it is not unfair to assume that this employment of the officer was not with a view of protecting his wife against the continuance of Mr. Hume's further intercourse, but to obtain information which might be used as the means of influencing the pending negotiations. For what was his conduct after the discovery? Did he instantly reject the idea of receiving the stipulated price of his previous dishonour, and break off at once all further communication with the adulterer? Without the slightest remonstrance, or even allusion to the fact, he calmly continues the negotiations as to the £4000, leaving no doubt in my mind that if they had led to a satisfactory result his feeling as to his wife's misconduct would have been suppressed, and the second suit in the Divorce Court would never have been heard of. But having failed to come to terms with the man who was hindering the return of his wife to that good conduct which he professed to have so much at heart, he still clung to the hope of obtaining the stipulated satisfaction for his former dishonour through his suit in Chancery until it was ultimately determined against him. Under these circumstances I cannot hesitate to believe that the appellant knowing that the intercourse between his wife and Mr. Hume was going on, took no notice of it as long as it suited his purpose to forbear, and that he thereby connived at the adultery upon which his second petition was founded.
- E Agreeing, therefore, in the conclusion of the learned Judge Ordinary, though differing with his reasons, I think that this decree ought to be affirmed.

Appeal dismissed.

ALLHUSEN v. WHITTELL

- G [VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), June 27, 28, 1867]

[Reported L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695]

Administration of Estates—Debts—Legacies—Discretion of executors—Presumption as to payment.

- H Although executors will be justified in paying a testator's debts and legacies out of such property as they think best in an administration, in adjusting the rights between the parties, they will be treated as paying the debts, legacies and other charges out of such part of the capital of the estate as, together with the income on that part for a year, is necessary to pay such debts and legacies and other charges.

- I *Administration of Estates—Residuary estate—Income—Right of tenant for life.*

A tenant for life of residue is entitled to the income from the death of the testator of all such part of the residue as is not required for the payment of debts and is found to be in a proper state of investment. Where part of the residue is not in an actual state of investment it is to be taken as invested in consols at the death of the testator.

Administration of Estates—Residuary estate—Contingent pecuniary legacy—Right of tenant for life to intermediate income from fund set aside.

Where a will contains a contingent pecuniary legacy and the residuary estate is settled, the tenant for life of the residue is, in the absence of a contrary direction, entitled to the intermediate income from the fund set aside for the payment of the legacy, but, if the legacy becomes payable, they are no longer residue, and the tenant for life is not entitled to the income of the fund set apart.

Notes. Applied: *Lambert v. Lambert* (1873), L.R. 16 Eq. 320; *Marshall v. Crowther* (1874), 2 Ch.D. 199. Distinguished: *Re Harrison, Townson v. Harrison* (1889), 43 Ch.D. 55. Considered: *Re Bacon, Grissel v. Leathes* (1893), 62 L.J.Ch. 445. Distinguished: *Re Whitehead, Peacock v. Lucas*, [1891-4] All E.R. Rep. 636. Considered: *Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211. Applied: *Re Perkins, Brown v. Perkins*, [1904-7] All E.R. Rep. 273. Distinguished: *Re Hanbury, Comiskey v. Hanbury* (1909), 101 L.T. 32. Applied: *Re Poyser, Landon v. Poyser*, [1908-10] All E.R. Rep. 374. Explained: *Re McEuen, McEuen v. Phelps*, [1911-13] All E.R. Rep. 176. Applied: *Re Wills, Wills v. Hamilton*, [1914-15] All E.R. Rep. 289. Considered: *Dr. Barnardo's Homes v. Income Tax Special Comrs.*, [1921] 2 A.C. 1. Applied: *Re Shee, Taylor v. Stoger*, [1934] All E.R. Rep. 623. Distinguished: *Re Fenwick, Fenwick v. Stewart*, [1936] 2 All E.R. 1096. Considered: *Corbett v. I.R. Comrs.*, [1937] 4 All E.R. 700. Distinguished: *Re Darby, Russell v. Macgregor*, [1939] 3 All E.R. 6. Applied: *Re Ullswater, Barclays Bank, Ltd. v. Lowther*, [1951] 2 All E.R. 989; *Re Wynn, Public Trustee v. Newborough*, [1952] 1 All E.R. 341. Referred to: *Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226; *Re Hawkins, White v. White*, [1916] 2 Ch. 570; *Re Oldham, Oldham v. Myles* (1927), 71 Sol. Jo. 491; *I.R. Comrs. v. Pilkington* (1941), 24 Tax Cas. 160; *Re Hey's Settlement Trusts and Will Trusts, Hey v. Nickell-Lean*, [1945] 1 All E.R. 618; *Re Holliday's Will Trusts, Houghton v. Adlard*, [1947] 1 All E.R. 695; *Re Cunliffe-Owen, Mountain v. I.R. Comrs.*, [1953] 2 All E.R. 196; *Re Berry*, [1961] 1 All E.R. 529.

As to settled residuary estate, see 16 HALSBURY'S LAWS (3rd Edn.) 379-384; as to outgoing in respect of settled property, see 34 HALSBURY'S LAWS (3rd Edn.) 637-641; as to capital and income, see 38 HALSBURY'S LAWS (3rd Edn.) 879-883; and for cases see 23 DIGEST (Repl.) 475 et seq.

Cases referred to:

- (1) *Angerstein v. Martin* (1823), Turn. & R. 232; 2 L.J.O.S.Ch. 88; 37 E.R. 1087. L.C.; 23 Digest (Repl.) 400, 4719.
- (2) *Hewitt v. Morris* (1824), Turn. & R. 241; 2 L.J.O.S.Ch. 87; 37 E.R. 1090, L.C.; 43 Digest 616, 575.
- (3) *Sitwell v. Bernard* (1801), 6 Ves. 520; 31 E.R. 1174, L.C.; 23 Digest (Repl.) 421, 4919.

Also referred to in argument:

- Holgate v. Jennings* (1857), 24 Beav. 623; 53 E.R. 498; 44 Digest 204, 332.
- Amphlett v. Parke* (1827), 1 Sim. 275; 5 L.J.O.S.Ch. 139; 57 E.R. 580; subsequent proceedings, 4 Russ. 75; on appeal (1831), 2 Russ. & M. 221; 9 L.J.O.S.Ch. 161, L.C.; 40 Digest (Repl.) 710, 2053.
- Macpherson v. Macpherson* (1852), 19 L.T.O.S. 221; 16 Jur. 847; 1 W.R. 8; 1 Macq. 243, H.L.; 23 Digest (Repl.) 413, 4839.
- Crawley v. Crawley* (1835), 7 Sim. 427; 4 L.J.Ch. 265; 58 E.R. 901; 40 Digest (Repl.) 711, 2059.
- Fullerton v. Martin* (1860), 1 Drew & Sm. 31; 29 L.J.Ch. 469; 1 L.T. 531; 6 Jur.N.S. 265; 8 W.R. 289; 62 E.R. 290; 40 Digest (Repl.) 487, 5.
- Cranley v. Dixon* (1857), 23 Beav. 512; 26 L.J.Ch. 529; 29 L.T.O.S. 119; 3 Jur.N.S. 531; 53 E.R. 201; 44 Digest 1253, 10813.
- Dimes v. Scott* (1828), 4 Russ. 195; 38 E.R. 778, L.C.; 40 Digest (Repl.) 730, 2192.
- Morgan v. Morgan* (1851), 14 Beav. 72; 51 E.R. 214; 40 Digest (Repl.) 733, 2219.
- Harris v. Lloyd* (1823), Turn. & R. 310; 37 E.R. 1119; 44 Digest 293, 1252.
- Leake v. Robinson* (1817), 2 Mer. 363; 35 E.R. 979; 44 Digest 1056, 9092.

A Bill filed to obtain the decision of the court as to the rights and interests of parties who claimed as tenants for life of the income of residuary personal estate and as remaindermen.

B Joshua Field, being possessed of real and leasehold estate and personal estate to a large amount, by his will dated July 10, 1858, bequeathed certain legacies (including legacies amounting to £3000 to his servants to be paid as soon as conveniently after his decease), and the will contained the following direction :

C "I direct that all legacies given by this my will, unless I have otherwise directed, shall be payable at the end of one year from my death, or bear interest at the rate of £4 per cent. per annum, except the legacy to the Royal Hospital, which, I direct to be paid as soon as conveniently can be after my decease. But in case my executors shall think it right, out of regard to any liability attaching to them by reason of my proprietorship of any share in a joint-stock banking company, to defer the payment of the capital of all or any of such legacies for a period not exceeding three years from my death they shall be at liberty to do so."

D Subject to the payments of his just debts, funeral, and testamentary expenses and legacies, the testator gave, devised, and bequeathed all the residue of his real and personal estate and effects, whatsoever and wheresoever not otherwise disposed of unto, and to the use of Eugene T. Curzon Whittell, his heirs, executors, and administrators. The testator executed two codicils to his will, which did not affect the questions to be disposed of. He died on May 2, 1863, and the will and codicils were duly proved by the executors. The total amount of the legacies bequeathed by the will was £183,870, and his estate sworn under £250,000. The executors paid his funeral and testamentary expenses and debts, and the legacies to his servants, and the legacy to the Royal Hospital. They also paid, by the direction of the residuary legatee, the said Eugene T. C. Whittell in his lifetime, £1580 on account of other legacies.

F After the death of Eugene T. C. Whittell they realised the personal estate of the testator, and paid all his legacies remaining unpaid at the time appointed by the testator, and had paid and transferred the whole of the residue to the plaintiffs, the executors of Eugene T. C. Whittell. Eugene T. C. Whittell made his will, dated June 15, 1863, by which he gave several legacies, some of them contingent on the legatees attaining twenty-one; and bequeathed the residue of his estate to the defendant, Joshua F. Whittell, for life with remainder over. He died on Sept. 4, 1863, and his will was duly proved by the plaintiffs, his executors therein-named. The estate of the first testator Field was out upon investments, all duly authorised, and some of these securities had to be sold to pay legacies. Some of them, however, were not sold until after the death of Eugene T. C. Whittell; others had been transferred to the executors of the second testator, Eugene J. C. Whittell, and they also retained in their hands a considerable portion of Field's estate to meet the contingent legacies bequeathed by his will.

I The principal question now raised was whether Joshua F. Whittell, the tenant for life of the residue under Eugene T. C. Whittell's will was or was not entitled to the income of the property required for the payment of debts and legacies. He also laid claim to the income of the funds and securities set apart to meet the contingent legacies under Field's will. The bill prayed the usual accounts and a declaration of the rights of the respective parties.

Willcock, Q.C., and *W. W. Cooper* for the executors of Whittell's will.

Amphlett, Q.C., and *Everitt* for Joshua F. Whittell.

W. M. James, Q.C., and *W. W. Mackeson* for the remaindermen.

Caldecott for the ultimate remainderman.

June 28, 1867. **PAGE-WOOD, V.-C.**—The question in this case has been repeatedly before the court, and both the points are, in my opinion, concluded by authority; but I must say I have found some difficulty in penning the exact order which ought to be made. A

The question arises in this way. There are two testators. The first, whose name was Field, gave his property to the second testator, Whittell. Field's estate was very large, and after the payment of his debts and legacies, which, as far as the executors were concerned, they were at liberty to pay in any manner they pleased, there remained a very considerable surplus in specie, which was handed over to the executors of Whittell. Whittell died in less than six months after the death of Field, and that circumstance has created some embarrassment. Before the property of Field passed over to Whittell's executors, a large proportion of what had been received by the executors of Field consisted of income which had accrued due after the death of Whittell. Of course, up to the death of Whittell, the whole of Field's estate was capital coming to his (Whittell's) estate; and there is no necessity for distinguishing between capital and income, as to anything accruing due between the death of Field and the death of Whittell, as was conceded very properly in the argument. But after the death of Whittell, the whole of Field's estate, whatever it might be, would come to his executors. All that was not wanted when Field's assets had been administered, and his debts and legacies paid, would be the property of Whittell; and any income arising from the estate, so far as it was not wanted for the payment of Whittell's debts and legacies, would be income payable to the tenant for life. B C D

The question has been somewhat confused in consequence of the argument which has arisen on the form of the certificate; there having been a direction to find out how much income has accrued from Field's estate since Whittell's death, and how much of that income was derivable from capital which was not wanted for the payment of Field's debts and legacies, and how much from that which was so wanted. I think we must confine ourselves entirely to Whittell's estate, and fasten our minds entirely upon that. We have to ascertain Whittell's assets, including, of course, in that inquiry, what were those assets at the death of Field. Executors are not bound to hold their hands from taking any fund which may be coming to them for the purpose of paying debts; they are not bound to attend to the sources of income as between the persons who may have successive rights in the property. But the court, whenever the debts have been paid, either of the one testator or the other, will take care that the accounts shall be modelled in such a way as to do justice to all persons who may be interested in the estate. E F G

There appear to be two points well covered by authority. One is that every tenant for life of residue is entitled to the income of all such part of the residue as is not required for the payment of debts, and which is found to be in a proper state of investment. He is entitled to the income of that property from the death of the testator. There have been numerous decisions on this point, some of the earliest being those of *Angerstein v. Martin* (1), and *Hewitt v. Morris* (2). These authorities clearly show that, supposing a testator has a large sum, say £50,000 or £60,000, in the funds, and has only £10,000 worth of debts, the executors will be justified, as between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration. But the executors, when they have dealt with the estate, will be taken by the court as having applied in payment of debts such a portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts. It is curious that I find none of the authorities pointing out this rule, but probably it has never been thought necessary to make so nice a distinction. It is quite clear that the executors must not be taken to have applied the whole income. Until the debts and legacies were paid, there would H I *

A have been no interest from the death of the testator which could by possibility have come to the tenant for life. What I apprehend to be the true principle is, that, in the bookkeeping which the court enters upon for the purpose of adjusting the rights between the parties, it is necessary to ascertain what part, together with the income of such part for a year, will be wanted for the payment of debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted. I have not been able to find a case in which that calculation has been made, but it appears to me to be the principle upon which alone the rights can be adjusted. It is clear that the tenant for life ought not to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way whatever. That being so, it occurs to me that the only way in which I can arrive at the correct mode of taking this account between all parties is, to direct the further inquiries, and make the declarations which I will presently read.

As regards the contingent legacies, there is a great deal of force in the argument that, if these legacies become payable, they are, like any other legacies, no longer residue, and, they being no longer residue, the tenant for life ought not, upon principle, to be entitled to the income of the fund set apart to meet them, any more than to the income of any other part of the fund which may be necessary for the payment of any other legacy. I am not sure that the courts, in some of the authorities cited, have sufficiently adverted to this reasoning; and, whether they have not too narrowly followed words rather than things, when they said that this income is income of residue; because when it comes to be taken out it is no longer residue. However, I think I am bound by authority, and, upon principle, I consider the question as analogous to the cases, like *Sitwell v. Bernard* (3) and others, where the court has been obliged, for the sake of not deferring to inconvenient periods the distribution of property, as it were to intervene, and cut the knot. I apprehend the principle may be rested upon this, that the fund is residue until it is wanted; and if it be said that it ceases to be residue when it is not wanted, that rule may be a very simple one in one case, and a very complicated one in another. The income may go on being paid for a long time, and the tenant for life may die before the right can be ascertained either one way or the other. The court has, therefore, thought fit to have regard to this possible delay, upon the same principle as in certain cases where persons are entitled to property, it will not allow after-born children to be considered, because it desires to distribute the estate.

HIS HONOUR then directed the following inquiries, and made the following declarations: (i) What amount of capital was required for payment of the testator Field's funeral and testamentary expenses, debts, and legacies, including all income for one year on the amount of capital to be ascertained as necessary for such payment; (ii) What amount of capital was in like manner required for payment of the funeral and testamentary expenses, debts, and legacies, of the testator Whittell, but not including the contingent legacies. Declare the surplus capital of Field's estate, subject to the first inquiry, to be capital of Whittell's estate. As to the surplus of Whittell's estate after the second inquiry, including in such estate the capital coming from Field's estate, declare defendant Whittell, the father, as tenant for life, entitled to the income thereof from the death of Whittell; such surplus, so far as it was not in an actual state of investment, to be taken as invested in consols at the death of Whittell. Declare the tenant for life entitled to the income arising from so much of Whittell's residuary estate as may be set apart for payment of the contingent legacies.

Decree and inquiries accordingly

TAYLOR v. CHESTER

[COURT OF QUEEN'S BENCH (Mellor and Hannen, JJ.), February 2, April 25, 1869]

[Reported L.R. 4 Q.B. 309; 10 B. & S. 237; 38 L.J.Q.B. 225;
21 L.T. 359; 33 J.P. 709]

Contract—Illegality—Immoral consideration—Provision of food and wine for consumption in brothel—In pari delicto potior est conditio possidentis.

The plaintiff deposited with the defendant the half of a £50 bank note by way of security for the payment of £20 due from him to the defendant for wine and food supplied by the defendant for consumption in a brothel kept by the defendant. In an action by the plaintiff to recover the half note,

Held: it being impossible for the plaintiff to make out his case except through the medium and by the aid of a transaction rendered illegal on the ground of immorality to which he was himself a party, the maxim *in pari delicto potior est conditio possidentis* applied, and, therefore, the plaintiff could not recover.

Notes. Explained: *Wilson v. Strugnell* (1881), 7 Q.B.D. 548. Applied: *Herman v. Jeuchner* (1885), 15 Q.B.D. 561. Distinguished: *Herman v. Charlesworth* (1905), 74 L.J.K.B. 620. Considered: *Gordon v. Metropolitan Police Chief Comr.*, [1908-10] All E.R. Rep. 192. Followed: *Parkinson v. College of Ambulance and Harrison*, [1924] All E.R. Rep. 325. Considered: *Alexander v. Rayson*, [1936] 1 K.B. 169. Explained and distinguished: *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*, [1944] 2 All E.R. 579. Referred to: *Scott v. Brown, Doering, McNab & Co., Slaughter and May v. Brown, Doering, McNab & Co.*, [1891-4] All E.R. Rep. 654; *Re Cronmire, Ex parte Waud*, [1898] 2 Q.B. 383; *Re Robinson's Settlement, Gent v. Hobbs*, [1912] 1 Ch. 717; *Farmers' Mart v. Milne*, [1915] A.C. 106.

As to incidents of illegal contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 147 et seq.; and for cases see 12 DIGEST (Repl.) 310 et seq.

Cases referred to:

- (1) *Edgar v. Fowler* (1803), 3 East, 222; 102 E.R. 582; 1 Digest (Repl.) 802, 3279.
- (2) *Collins v. Blantern* (1767), 2 Wils. 341; 95 E.R. 847; 12 Digest (Repl.) 290, 2229.
- (3) *Holman v. Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, 2404.
- (4) *Simpson v. Bloss* (1816), 7 Taunt. 246; 2 Marsh. 542; 129 E.R. 99; 12 Digest (Repl.) 311, 2399.
- (5) *Fivaz v. Nicholls* (1846), 2 C.B. 501; 15 L.J.C.P. 125; 6 L.T.O.S. 319; 135 E.R. 1042; sub nom. *Finan v. Nicholls*, 10 Jur. 50; 12 Digest (Repl.) 288, 2219.
- (6) *Feret v. Hill* (1854), 15 C.B. 207; 23 L.J.C.P. 185; 23 L.T.O.S. 158; 18 Jur. 1014; 2 W.R. 493; 2 C.L.R. 1366; 139 E.R. 400; 12 Digest (Repl.) 325, 2509.
- (7) *Scarfe v. Morgan* (1838), 4 M. & W. 270; 1 Horn. & H. 292; 7 L.J.Ex. 324; 2 Jur. 569; 150 E.R. 1430; 32 Digest (Repl.) 272, 183.

Demurrer to a replication in an action to recover the half of a £50 Bank of England note.

The declaration stated that, in consideration that the plaintiff, at the request of the defendant, delivered to the defendant the half of a £50 Bank of England note to be safely kept and taken care of by the defendant, and to be redelivered by the defendant to the plaintiff on request, the defendant promised the plaintiff to safely keep and take care of the half note and redeliver the same to the plaintiff on request. The breach alleged was the non-delivery of the same to the plaintiff on request. There was a second count in detinue. The defendant having pleaded the general issue, pleaded as a plea to the first count

A that the alleged agreement was subject to the term or condition that the half
note was to be kept by the defendant as a pledge or security for the
payment of £20 then due from the plaintiff to the defendant, that the defendant
received the half note for this purpose, that the plaintiff would not pay the
defendant the sum of £20, and that the defendant was prevented from per-
forming her agreement by the neglect and default of the plaintiff. The
B defendant pleaded a similar plea to the second count. The plaintiff replied to
both pleas that the alleged debts in respect of which the defendant justified the
non-delivery and detention of the security claimed by the plaintiff were due
for wine and suppers supplied by the defendant in a brothel and disorderly
house kept by the defendant for the purpose of being consumed there by the
plaintiff and divers prostitutes in a debauch, to incite them to riotous, dis-
C orderly and immoral conduct, and for money knowingly lent for the purpose
of being expended in riot and debauchery and immoral conduct in a brothel.
To this replication the defendant demurred.

Hopwood (*Holker*, Q.C., with him) for the defendant.

Herschell (*Pope* with him) for the plaintiff.

Cur. adv. vult.

April 25, 1869. **MELLOR, J.**, read the following judgment of the court, in
which he stated the facts and continued: On the trial before me at Manchester,
the plaintiff's case was that the note had not been deposited at all with the
defendant, but had been fraudulently taken and appropriated by her. The
E jury, however, did not adopt that view of the facts, but found that the note
was deposited by way of security as alleged by the defendant, and they further
found on the evidence that the debt was incurred and the money advanced as
alleged in the plaintiff's replication to the special pleas. On these findings,
the verdict was entered for the defendant, with liberty to the plaintiff to move
F to enter the verdict for him for £50, to be reduced to nominal damages in case
the note should be restored to the plaintiff. A rule was accordingly obtained
to enter the verdict for the plaintiff on the ground that the jury had found
all the issues tendered by the plaintiff in his favour. This rule and the
demurrer to the replication came on together for argument at the sittings in
banco after last Hilary Term before HANNEN, J., and myself, and, at the close
G of the argument, we took time to consider our judgment. It was argued on the
part of the defendant in showing cause against the rule, and in support of the
demurrer to the special replication of the plaintiff, that, on the finding of the
jury and the facts as admitted by the demurrer, the plaintiff and defendant were
"in pari delicto," and that, therefore, on the whole record judgment must be
entered for the defendant. On the part of the plaintiff, it was urged that it was
I the defendant who was relying on the illegality of the transaction as an
answer to a claim of the plaintiff, founded on his ownership of the note and
his right to recover back the same, and many startling consequences were
pointed out to us as likely to result from a decision that the plaintiff could
not recover.

We have fully considered the case, and are satisfied that the plaintiff cannot
recover under the circumstances found by the jury, and admitted on the record.
The maxim that in pari delicto potior est conditio possidentis is as thoroughly
settled as any proposition of law can be. It is a maxim of law established not
for the benefit of plaintiffs or defendants, but founded on the principle of
public policy which will not assist a plaintiff who has paid over money or
handed over property in pursuance of an illegal or immoral contract to
recover it back; for the court will not assist an illegal transaction in any respect:
LORD ELLENBOROUGH in *Edgar v. Fowler* (1); *Collins v. Blantern* (2); LORD
MANSFIELD in *Holman v. Johnson* (3). The true test for determining whether

or not the plaintiff and defendant were in *pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party: *Simpson v. Bloss* (4); *Fivaz v. Nicholls* (5). It is to be observed that, in this case, the illegality is not in a collateral matter as in *Feret v. Hill* (6), which was cited for the plaintiff, but is the direct result of the transaction on which the deposit of the half note took place.

Counsel for the plaintiff's argument was based on the hypothesis that, in spite of the findings of the jury, the plaintiff was entitled to recover by virtue of his property in the half note, and that it was the defendant alone who set up an immoral transaction as the answer to the plaintiff's claim. This argument appears to us to be founded on an entirely erroneous view of the facts. The plaintiff no doubt was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for, and money advanced to him by the defendant. Had the case rested there and no pleading raised the question of illegality, a valid pledge would have been created and a special property conferred on the defendant in the half note, and the plaintiff could only have recovered by showing payment or a tender of the amount due. In order to get rid of the defence arising from the plea which set up an existing pledge of the half note, the plaintiff had recourse to the special replication in which he was obliged to set forth the immoral and illegal character of the contract on which the half note had been deposited. It was, therefore, impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances, the maxim "*in pari delicto potior est conditio possidentis*" clearly applies, and is decisive of the case.

It would also appear, from *Scarfe v. Morgan* (7), per PARKE, B. (4 M. & W. at p. 282), in delivering the judgment of the court, that, notwithstanding the illegality of the transaction itself out of which the deposit in this case arose, the lien would exist, because the contract was executed, and the special property had passed by the delivery of the half-note to the defendant, and the maxim would apply. It is, however, difficult in the present case to determine it on the ground that the plaintiff could not recover without showing the true character of the deposit, and that being on an illegal consideration, to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. It is not necessary to consider what might have been the effect of a tender of the amount for which the note was pledged, as there is nothing to raise any such question in this case.

The result, therefore, will be that the verdict must stand for the defendant on the issues taken in the special pleas, and for the plaintiff on the issue taken on the replication; but as on the whole record it is manifest that the plaintiff cannot recover, judgment will be entered for the defendant.

Judgment for defendant.

FITZGERALD v. FITZGERALD

[COURT OF DIVORCE AND MATRIMONIAL CAUSES (Wilde, J.O.), November 27, December 22, 1868]

[Reported L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 575; 17 W.R. 264]

Divorce—Desertion—Evidence—Need to prove conduct bringing to end existing state of cohabitation.

One spouse cannot desert the other unless he actively and wilfully brings to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute desertion. But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime, either party may have the right to call on the other to resume their conjugal relations, and, if refused, to enforce their resumption, but such refusal cannot constitute the matrimonial offence of desertion.

Notes. Considered: *Garcia v. Garcia* (1888), 13 P.D. 216. Distinguished: *R. v. Davidson, etc., Durham JJ.* (1889), 5 T.L.R. 199. Considered: *Mahoney v. McCarthy*, [1892] P. 21; *Chudley v. Chudley* (1893), 62 L.J.M.C. 97; *Bradshaw v. Bradshaw*, [1895-9] All E.R. Rep. 1155. Distinguished: *Cowley v. Cowley* (1897), Times, Feb. 3. Considered: *Huxtable v. Huxtable* (1899), 68 L.J.P. 83; *De Laubenque v. De Laubenque*, [1895-9] All E.R. Rep. 478; *Kay v. Kay*, [1904-7] All E.R. Rep. 429; *Pulford v. Pulford*, [1922] All E.R. Rep. 121; *Papadopoulos v. Papadopoulos*, [1935] All E.R. Rep. 311; *Jordan v. Jordan*, [1939] 2 All E.R. 29; *Shaw v. Shaw*, [1939] 2 All E.R. 381; *Pardy v. Pardy*, [1939] 3 All E.R. 1; *Thomas v. Thomas*, [1946] 1 All E.R. 170; *Weatherly v. Weatherly* [1946] 2 All E.R. 1. Overruled: *Beeken v. Beeken*, [1948] P. 302. Referred to: *R. v. Leresche*, [1891-4] All E.R. Rep. 181; *Wilkinson v. Wilkinson* (1894), 58 J.P. 415; *Wassell v. Wassell* (1899), 68 L.J.P. 127; *Synge v. Synge*, [1900-3] All E.R. Rep. 452; *Harriman v. Harriman*, [1908-10] All E.R. Rep. 85; *Sotherden v. Sotherden*, [1940] 1 All E.R. 252; *Hopes v. Hopes*, [1948] 2 All E.R. 920; *Lennie v. Lennie* (1949), 65 T.L.R. 763.

As to the meaning of desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 241 et seq.; and for cases see 27 DIGEST (Repl.) 334 et seq.

Petition by the wife for dissolution of her marriage, on the ground of her husband's adultery coupled with desertion. There had been a previous petition which had been dismissed, and the parties had never resumed cohabitation.

The adultery was clearly proved, and the facts on which the charge of desertion rested were, that during the cohabitation, the husband had more than once expressed an intention of not living with his wife, and that, since the first petition had been dismissed, he had made no offer to return to cohabitation. The wife made no application to be received again, though she stated that she was willing to have returned to her husband had he asked her. WILDE, J.O., held the adultery to be proved, but took time to consider whether desertion had been proved.

Coleridge, Q.C. (with him *Giffard, Q.C.*, and *Dr. Swabey*) for the wife.

Dr. Spinks, Q.C. (*Searle* with him) for the husband.

Cur. adv. vult.

Dec. 22, 1868. **WILDE, J.O.**—The wife in this suit instituted a former suit against her husband a few years since, charging him with adultery and cruelty. She failed to establish those charges. The parties have never lived together since. Her present suit is founded on charges of adultery and desertion. Adultery since the conclusion of the former suit has been proved. The question which the court has reserved for consideration is whether the desertion is established. The facts are not doubtful. In the autumn of 1861, the wife received information which led her to believe that her husband had been guilty of adultery. At that time their home was at Braydon Hall, but at the moment when these suspicions were aroused they were both temporarily absent from it—he for a month at Cowes, she for a few days in London. Some attempt was made to establish the proposition that the husband, in leaving for his visit to Cowes, had, in fact, determined not to return to his wife. But his conduct immediately afterwards, and the contents of the correspondence which then passed between them sufficiently disprove any such resolve. On discovery of what the wife deemed proof of her husband's guilt, she wrote to him a letter charging him with it, and distinctly refused to return home, at least for the present. She says: "I have received a communication of such a nature, that it is impossible for me to return to Braydon for the present. In fact, I am so entirely upset by it that it must be some days before I can recover myself sufficiently to think what to do." After writing this letter, the wife went with her mother to Dover. Thither the husband followed her. It is needless to pass in review the passionate letters which the husband then wrote, entreating forgiveness for the past (whatever that was), and that his wife would receive him and live with him again. She refused to see him, and the burden of her letters was uniform—prove yourself innocent, and I will accede to your wishes; until then I have determined to live separate and apart from you.

The act of separation was, therefore, that of the wife. She withdrew herself from the common home and cohabitation; and, though strenuously pressed to resume it, she persistently refused. Whether she had good cause and reasonable excuse for her conduct is another matter. True, she failed to establish her husband's guilt to the satisfaction of the jury and the court. But it is not inconsistent with that to allege that she had such reasonable grounds for suspecting her husband as to warrant her in withdrawing from cohabitation until her suspicions were confirmed or dispelled. Believing that she could establish her husband's guilt, she instituted the suit to which I have above referred. The case was brought to trial at Christmas, 1863, and an appeal to the full court finally established the verdict against her early in the following year. Meanwhile, both parties had kept aloof from each other, as might be expected. After the first few months which immediately succeeded the withdrawal of his wife from Braydon Hall in 1861, the husband, so far as the court is aware, desisted from all attempts to induce her to return to him. The termination of the legal proceedings appears to have worked no alteration in the relations of the parties. On her part, the wife made no overtures to her husband to return to him. She says that she wrote one letter to him to a wrong address, which was returned through the Dead Letter Office. She says further, indeed, that she was willing to have returned if he had asked her, and that she was bound to accept the verdict of the jury. But, on being questioned, she could not and did not assert that his innocence was really established to her own satisfaction and belief, and the court may well hesitate to accept the conclusion that the trial had really removed her scruples or changed her determination, for she has repeated the same charges against him on the face of her present petition. She also alleges that for some time she did not know her husband's address; but she admitted that she first entertained the idea of reconciliation when she came to town in 1864, and that, within a day or two afterwards, she found her husband was leading an immoral life, and abandoned the idea again almost as soon as she had conceived it. So

A that, in the result, it is quite plain that the wife never demanded to be taken back again by her husband, and I think it tolerably plain that she never desired it. On the husband's part nothing seems to have been done since the first suit towards reconciliation. He has never sought his wife or asked her society, but, like her, has been well content that the breach made in 1861 should remain open, and cohabitation not resumed. But does all this amount to "desertion" on his part? That is the question.

B Putting the facts in the most favourable light for the wife, it would, I presume, be argued thus: After the first suit was at an end, the husband might at any time have demanded cohabitation of his wife; she was not unwilling to return to him; and, if she had been, the law would have compelled her. But he made no such demand; therefore, he wilfully kept apart from her; therefore, he deserted her. C If, indeed, keeping apart from a wife who has voluntarily quitted her husband against his will and withdrawn from cohabitation is the same thing as "deserting" her, the argument must prevail. But I cannot think that it is. It is one thing to make a breach, it is another to refrain from attempts to heal it. Desertion means abandonment, and implies an active withdrawal from a cohabitation that D exists. The word carries with it an idea of forsaking or leaving, and is hardly satisfied by the negative position of standing still. No doubt there are cases in which actual cohabitation does not exist at all, because the circumstances of the parties do not permit of it. I am not now dealing with such cases. No doubt, again, there are cases in which the parties may have innocently ceased for a time to be living together, separated by the calls of everyday life or the E exigencies of public duty, and the husband or wife, taking advantage of the separation, may have purposely rejected all subsequent opportunities of coming together again; and this may constitute desertion. For, in truth, in such cases the state of cohabitation was not, in the first instance, wholly relinquished, but only suspended till a fitting occasion for its resumption, and purposely to reject all such occasions is, practically, to abandon it. But such cases have no analogy F with a case in which a wife, who complains of desertion, has herself voluntarily ceased to live with her husband, and an actual separation has already occurred, not in obedience to any external necessity, but for the express purpose of avoiding continued intercourse. In this latter case, the cohabitation is not merely suspended, but determined by the wife herself, with or without good cause, as the case may be, and with or without a conditional intention on her part of possibly G resuming it at some indefinite future day, but still broken up and put an end to. In such a case desertion, if it exist at all, is rather the act of the wife herself than that of the husband.

I come then to the following conclusions as applicable to cases of this kind: No one can desert who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides H that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute desertion. But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion, in my judgment, becomes from I that moment impossible to either, at least until their common life and home have been resumed. In the meantime, either party may have the right to call on the other to resume their conjugal relations, and, if refused, to enforce their resumption, but such refusal cannot constitute the offence intended by the statute under the name of "desertion without cause." It results from these considerations that the wife's claim to a dissolution of her marriage must be rejected. She is entitled to a decree of judicial separation.

NELSON AND OTHERS *v.* COUCH AND OTHERS

[COURT OF COMMON BENCH (Willes, Byles and Williams, JJ.), June 24, 1863]

[Reported 15 C.B.N.S. 99; 2 New Rep. 395; 33 L.J.C.P. 46;
8 L.T. 577; 10 Jur.N.S. 366; 11 W.R. 964; 1 Mar. L.C. 348;
143 E.R. 721]

Estoppel—Res judicata—Determination of same matter between same parties in earlier action—Amount recovered in former proceedings insufficient to cover loss—Collision at sea—Negligence—Action in rem for damage to ship—Subsequent action in personam—Competency.

Admiralty—Jurisdiction—Action in rem—Subsequent action in personam—Res judicata.

Shipping—Collision—Negligence—Res judicata—Action in rem for damage to ship—Subsequent action in personam—Competency.

Owing to the negligence of the defendants' servants a ship owned by them collided with and sank a ship owned by the plaintiffs. The plaintiffs took proceedings in rem against the defendants' ship and its freight and obtained judgment, but the amount recovered was not sufficient to cover the loss suffered by the plaintiffs. The plaintiffs then commenced this action in personam against the defendants.

Held: the defendants could not raise a plea of *res judicata* because, although the earlier action had determined the same matter between the same parties, the plaintiffs had not had the opportunity of recovering in the former action what they now sought.

Notes. Since the Supreme Court of Judicature Acts, 1873 and 1875, a defendant in an action in rem who appears and puts in bail is now liable for the full amount of the damages and costs, even though these exceed the value of the *res* and the bail provided: see 1 HALSBURY'S LAWS (3rd Edn.) 50.

Explained: *Gibbs v. Cruickshank* (1873), L.R. 8 C.P. 454. Applied: *Midland Rail. Co. v. Martin*, [1893] 2 Q.B. 172. Considered: *Goldrei, Foucard & Son v. Sinclair and Russian Chamber of Commerce in London*, [1916-17] All E.R. Rep. 898; *Workington Harbour and Dock Board v. Trade Indemnity Co. (No. 2)*, [1937] 3 All E.R. 139. Referred to: *The Sylph* (1867), L.R. 2 A. & E. 24; *Brunsdon v. Humphrey*, [1881-5] All E.R. Rep. 357; *Serrao v. Noel* (1885), 15 Q.B.D. 549; *Birmingham Corpn. v. Allsopp* (1918), 88 L.J.K.B. 549; *The Joannis Vatis (No. 2)*, [1922] P. 213; *Ord v. Ord*, [1923] All E.R. Rep. 206.

As to actions in rem and in personam, see 1 HALSBURY'S LAWS (3rd Edn.) 48-50, and 35 HALSBURY'S LAWS (3rd Edn.) 718-720; as to *res judicata* and judgment recovered, see 15 HALSBURY'S LAWS (3rd Edn.) 184-191; and for cases see 21 DIGEST (Repl.) 274-275.

Cases referred to in argument:

Brown v. Wilkinson (1846), 15 M. & W. 391; 16 L.J.Ex. 34.

The John and Mary (1859), Sw. 471; 3 L.T. 123; 5 Jur.N.S. 1085; 166 F.R. 1221; 21 Digest (Repl.) 280, 523.

The Bold Buccleugh, Harmer v. Bell (1852), 7 Moo. P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 11 Digest (Repl.) 551, 1580.

The Kalamazoo (1851), 18 L.T.O.S. 66; 15 Jur. 885; 21 Digest (Repl.) 314, 723.

The Hope (1840), 1 Wm. Rob. 154; 1 Digest (Repl.) 265, 1659.

The Volant (1842), 1 Wm. Rob. 383; 1 Notes of Cases, 503; 5 L.T. 185, 525; 6 Jur. 540; 1 Digest (Repl.) 163, 507.

The Fortitudo (1815), 2 Dods. 58; 165 F.R. 1415; 21 Digest (Repl.) 314, 722.

A **Action** in which the plaintiffs, owners of the ship *Peri*, which had been sunk in a collision with the *Lord Chancellor*, a ship owned by the defendants, claimed damages for negligence against the defendants.

The plaintiffs had earlier taken proceedings in rem against the defendants' ship and its freight, but the amount realised was not sufficient to cover the loss suffered by the plaintiffs. The defendants raised a plea of *res judicata*.

B *Archibald (Lush, Q.C., with him) for the plaintiffs.*
Brett, Q.C. (J. Sharpe with him) for the defendants.

WILLES, J.—I am of opinion that, in order to let in a plea of *res judicata*, it must be shown that the same matter has been determined between the same parties. Where there is the same matter and same parties, there is a bar; but it remains to be made out here that the plaintiffs (but for their own fault) had the opportunity of recovering in the former action what they seek in this. For the defendants it has been contended that the judgment of the Admiralty Court was for the whole of the damage. No doubt the judge of that court did give damages, but he could only do so to the amount of the lien held by the plaintiffs, i.e. the ship. If a creditor, having a lien and power to sell, were to do so, and only realised half his debt, could he not sue for the residue? Surely he could. It would be most extraordinary to hold that an action in personam was no bar to further proceedings, but that an action in rem was.

BYLES, J., concurred.

WILLIAMS, J., who left before the conclusion of the case, intimated to the court that he was of the same opinion.

Judgment for plaintiffs.

ANDERSON v. ANDERSON

G [VICE-CHANCELLOR'S COURT (BACON, V.-C.), January 19, 23, 27, 1872]

[Reported L.R. 13 Eq. 381; 41 L.J.Ch. 247; 26 L.T. 12;
 20 W.R. 313]

H *Will—Attestation—Wife of legatee as witness—Codicil attested by independent witnesses—Republication—Validation of will.*

By her will the testatrix devised a share in the residue of her estate to one of her sons G. G.'s wife was one of the attesting witnesses to the will. By a codicil, which was attested by other witnesses, the testatrix, after directing an extension of time for the payment of what might be owing to her from one of the legatees, confirmed her will in other respects.

I **Held:** the codicil confirming the will re-published and incorporated the will, and, accordingly, rendered the gift to G. valid notwithstanding its attestation by his wife.

Notes. Applied: *Re Trotter*, *Trotter v. Trotter*, [1899] 1 Ch. 764; *Re Hardyman*, *Teasdale v. McClintock*, [1925] All E.R. Rep. 83. Referred to: *Re Tredgold*, *Midland Bank Executor and Trustee Co. v. Tredgold*, [1943] 1 All E.R. 120; *Re Sebag-Montefiore*, *Sebag-Montefiore v. Alliance Assurance Co.*, [1944] 1 All E.R. 672.

As to attestation of will by a spouse, see 39 HALSBURY'S LAWS (3rd Edn.) 870, 871; and for cases see 44 DIGEST 274 et seq. For the Wills Act, 1837, ss. 15 and 34, see 26 HALSBURY'S STATUTES (2nd Edn.) 1338, 1353.

Cases referred to :

- (1) *Allen v. Maddock* (1858), 11 Moo. P.C.C. 427; 31 L.T.O.S. 359; 6 W.R. 825; 14 E.R. 757, P.C.; 44 Digest 243, 698.
- (2) *Croker v. Marquis of Hertford* (1844), 4 Moo. P.C.C. 339; 3 Notes of Cases, 150; 8 Jur. 863; 13 E.R. 334, P.C.; sub nom. *Re Marquis of Hertford's Will*, 3 L.T.O.S. 257, P.C.; 44 Digest 239, 654.

Also referred to in argument :

- Vincent v. Stansfeld, Habergham v. Vincent* (1793), 4 Bro. C.C. 353; 2 Ves. 204; 29 E.R. 931, L.C.; 44 Digest 231, 569.
- Doe d. York v. Walker* (1844), 12 M. & W. 591; 13 L.J.Ex. 153; 2 L.T.O.S. 424; 152 E.R. 1334; 44 Digest 372, 2067.
- Re Earl's Trust* (1858), 4 K. & J. 673; 70 E.R. 280; 44 Digest 372, 2069.
- In the Goods of Lady Truro* (1866), L.R. 1 P. & D. 201; 35 L.J.P. & M. 89; 14 L.T. 893; 14 W.R. 976; 44 Digest 389, 2229.
- Thomason v. Moses* (1842), 5 Beav. 77; 6 Jur. 403; 49 E.R. 506; 44 Digest 573, 3909.
- Lee v. Delane* (1850), 4 De G. & Sm. 1; 16 L.T.O.S. 102; 14 Jur. 861; 64 E.R. 707; 44 Digest (Repl.) 333, 1632.

Bill by the plaintiff that, as an attesting witness to the testatrix's will was the wife of one of the legatees, all gifts in favour of the legatee were forfeited.

Fry, Q.C., and *Key* for the plaintiff.

Willcock, Q.C., and *F. T. White* for the defendants.

BACON, V.-C.—The question which arises in this suit is, I believe, entirely novel. The subject to which it relates is unquestionably of great importance, involving, as it does, a very valuable provision in the Wills Act, 1837, by which the law, as it previously existed, has been greatly altered and improved. Before the statute, any beneficial interest given by will to the persons by whom such wills might be attested was null and void, but the attesting witnesses were not disqualified from proving as witnesses the due execution of the testamentary instrument: 25 Geo. 2, c. 6. The existing statute, keeping in view the principle of public policy which is obviously involved in the former law, has extended its operation; and by s. 15 it is enacted :

"That if any person who shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise . . . shall, so far and only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or the invalidity thereof, notwithstanding such devise . . . mentioned in such will."

The plaintiff's claim is founded on that provision.

The bill, which is filed by H. F. Buonaparte Anderson, stated the will of his mother Hannah Anderson, which was dated Dec. 10, 1868, by which she disposed of the whole of her property in favour of several of her children, and among them of her son George, but not making any disposition in favour of, or mentioning the name of, the plaintiff. To this will Hannah Anderson,

A who was and is the wife of the testatrix's son George, was one of the attesting witnesses, and the bill alleging this fact insists that all the bequests and dispositions purporting to be contained in the will in favour of George Anderson are consequently null and void, and that the shares and interests in the real and personal estate of the testatrix so purporting to be bequeathed or disposed of in his favour have devolved, as undisposed of, to the heir at law and next of kin respectively of the testatrix. And the bill prayed for a declaration to the same effect, and for such inquiries as would be properly consequent on such declaration if made. The facts are admitted by the defendant, George Anderson, to whom probate of the will, and of a codicil subsequently executed by the testatrix, have been duly granted by the Court of Probate as executor. It appears by his answer that the testatrix made a codicil to her will, dated Jan. 22, 1869, by which, after directing her executors to allow to her son Thomas an extended time for the payment of what might be owing to her from him, "she confirmed her said will in other respects." This codicil was duly executed in the presence of two witnesses.

D On this very simple state of facts, the plaintiff has contended that the provision of the Wills Act, 1837, applies in direct terms, and that, by the effect of it, all such interest as George Anderson would have taken under the will is forfeited, and that the testatrix must be held to have died intestate as to so much of her estate as George Anderson would have taken according to the tenor of the will, if his wife had not been one of the attesting witnesses. The defendant, on the other hand, insists that the will and codicil together form one, and but one, testamentary instrument; that the object and effect of the codicil was to repeat and confirm the bequests contained in the will; that its operation was to incorporate the will with the codicil; and that the latter instrument having been duly executed by the testatrix, and attested by unobjectionable witnesses, neither the letter nor the spirit of the statute are infringed; that all the requirements of the law are complied with, and that there is no foundation for the plaintiff's suit. In order to decide the point which is just raised, the first question to be solved is what is the will of the testatrix? The statute (s. 9) enacts that no will shall be valid unless it be in writing, signed or acknowledged by the testator in the presence of and attested by two witnesses. If the codicil in question can be held to be the will of the testatrix these requisites are complied with.

G In the course of the argument reference was made to several cases, the most important of which, as well as the most recent, appears to be *Allen v. Maddock* (1), in which the testatrix, having made what purported to be a will, dated in December, 1851, but attested by one witness only, had afterwards in September, 1856, executed a testamentary paper which was duly attested, and which commenced with the words, "This is a codicil to my last will and testament." H The Court of Probate, being satisfied that the instrument of 1851 was the will which the testatrix referred to in the codicil, decreed probate of the two papers as together constituting the will of the testatrix, and it was from that decision that the appeal to the Privy Council was brought. The argument in that case principally turned on the question whether the codicil had sufficiently identified the paper of 1851, and it was contended that parol evidence of that I fact on which the court below had proceeded was inadmissible for the purpose of proving such identity. No such point exists in the present case, because the two papers, will and codicil, having been together admitted to probate, the identity of the paper of 1851 with the will mentioned in that testatrix's codicil, must be taken to be established. The Privy Council decided that the parol evidence was admissible, and that it proved satisfactorily the identity of the paper referred to in the codicil; but the greater value of this most valuable judgment is that it decides in very express terms, and by reference to numerous authorities, as well before as since the Wills Act, 1837, that the due execution

by a testator of a codicil amounts to a republication of a former will, and that without any regard to the fact whether or not the paper so referred to complied with the requirements of the law as to the execution or attestation of such paper; and, referring to the attestations introduced by the existing statute, it pronounces that thereby the ceremonies necessary to authenticate the instrument are altered, but no alteration is here made in the effect to be given to words used in it. It would seem that a paper which would have been incorporated in a will executed according to the Statute of Frauds must now be incorporated in a will executed according to the Wills Act, 1837, and their Lordships, referring to *Croker v. Marquis of Hertford* (2), point out and adopt the distinction to be made since the new Act with respect to the unattested papers referred to, the identity of which was not clearly proved.

With these authorities, the law is too clear to admit of any doubt on the single question raised. Section 24 of the Wills Act, 1837, enacts that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; and s. 34 enacts that :

“Every will re-executed or re-published, or revived by any codicil, shall, for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived.”

It was much pressed in the argument on the part of the plaintiff that the very existence of the will could not be proved except by the persons who had attested it, and, therefore, that the will which the statute sought to prevent would be admitted unless the legacy in question were declared to be forfeited. I do not know, and I have no right to inquire, on what evidence the Court of Probate decided. But I am clearly of opinion that there is no reason to apprehend that, by treating the codicil duly attested as a re-publication or confirmation of the will, any relaxation of the wholesome provision of s. 15 would be effected. That in the execution and attestation of the codicil in question all the requisites of the statute were complied with is clear. None of the evils which the statute intended to prevent can arise, and it would be as much beyond the provisions and the contemplation of the statute, as it would be opposed to good sense and reason, to hold that the codicil, duly executed and attested, had not the effect of re-publishing the will and making it a new and original disposition by the testatrix in January, 1869, of the estate which she had dealt with by the will of December, 1868. To hold otherwise would be to hold that any error in a will, once duly executed, could not be corrected but by an entirely new will, for which proposition there is no authority. It cannot be said that the testatrix could not have made a new will if she had been so minded. Suppose that, by the codicil, she had said, “I am aware that my will is so erroneously attested that my son’s legacy will be forfeited, and to prevent that I execute this codicil, and do hereby confirm my will.” There can be no doubt that she was competent to do this up to the latest moment of her life. I am of opinion that she has done this by the duly executed codicil; that the whole contents of the previously existing will were incorporated in the codicil, and, therefore, that the plaintiff’s bill must be dismissed, and dismissed with costs.

Bill dismissed.

R. v. LANYON

[COURT OF QUEEN'S BENCH (Quain, J., in Chambers), September 13, 17, 1872]

[Reported 27 L.T. 355]

Bastardy—Affiliation order—Order incorrectly drawn up—Power of justices to draw order up correctly without fresh summons.

Where an affiliation order as drawn up does not correctly embody the terms of the order made by the justices, the mother can apply for a correct copy of the order without having the incorrect order quashed or instituting fresh proceedings.

R. v. Brisby (1) (1849), 2 Car. & Kir. 962, explained and distinguished.

R. v. Hinchliff (2) (1847), 10 Q.B. 356, distinguished.

Notes. Referred to: *Cooper v. Cooper*, [1940] 3 All E.R. 579; *Cohen v. Cohen*, [1947] 2 All E.R. 69.

As to affiliation orders, see 3 HALSBURY'S LAWS (3rd Edn.) 122 et seq.; and for cases see 3 DIGEST (Repl.) 461 et seq.

Cases referred to:

- (1) *R. v. Brisby* (1849), 2 Car. & Kir. 962; 1 Den. 416; T. & M. 109; 3 New Mag. Cas. 167; 3 New Sess. Cas. 591; 18 L.J.M.C. 157; 13 L.T.O.S. 266; 13 J.P. 365; 13 Jur. 520; 3 Cox, C.C. 476, C.C.R.; 3 Digest (Repl.) 463, 468.
- (2) *R. v. Hinchliff* (1847), 10 Q.B. 356; 2 New Mag. Cas. 106; 16 L.J.M.C. 78; 8 L.T.O.S. 515; 11 J.P. 312; 11 Jur. 514; 116 E.R. 138; 3 Digest (Repl.) 463, 467.
- (3) *Ex parte Johnson* (1863), 3 B. & S. 947; 2 New Rep. 111; 32 L.J.M.C. 193; 27 J.P. 661; 9 Jur.N.S. 1128; 11 W.R. 620; 122 E.R. 354; sub nom. *R. v. Essex JJ.*, 8 L.T. 275; 3 Digest (Repl.) 461, 446.
- (4) *Wilkins v. Hemsworth* (1838), 7 Ad. & El. 807; 3 Nev. & P.K.B. 55; 1 Will. Woll. & H. 10; 7 L.J.M.C. 28; 2 Jur. 94, 301; 112 E.R. 674; 3 Digest (Repl.) 463, 469.

Also referred to in argument:

R. v. Flintshire Justices (1846), 3 Dow. & L. 537; 1 New Mag. Cas. 460; 2 New Sess. Cas. 236; 15 L.J.M.C. 50; 6 L.T.O.S. 376; sub nom. *R. v. Flintshire Justices, Ex parte Roden*, 10 J.P. 342; sub nom. *R. v. Flintshire Justices, Roden v. Jones*, 10 Jur. 475; 33 Digest (Repl.) 360, 1731.

R. v. Cheshire Justices (1833), 5 B. & Ad. 439; 2 Nev. & M.M.C. 25; 2 Nev. & M.K.B. 827; 2 L.J.M.C. 95; 110 E.R. 852; 33 Digest (Repl.) 248, 783.

Summons for habeas corpus to obtain the discharge from custody of the prisoner who had been committed for disobeying a bastardy order.

Murch showed cause.

Folkard in support of the summons.

Cur adv. vult.

Sept. 17, 1872. **QUAIN, J.**—This is an application for a habeas corpus in order to obtain the discharge from custody of the prisoner, who has been committed for disobeying an order in bastardy whereby he was adjudged the father of a bastard child, and ordered to pay 2s. a week towards its maintenance. It was objected on behalf of the prisoner that the order in bastardy was invalid, and that the commitment founded on it was consequently illegal.

The facts were these. On Jan. 30, 1872, an application was made to two justices for an order of affiliation in the usual way, and they, after hearing the evidence adduced before them, made an order adjudging the prisoner to be the

father of the child, and directed him to pay 2s. a week to the mother. By mistake of the clerk to the justices a written order was drawn up ordering the prisoner to pay 2s. 6d. a week instead of 2s., and omitting to state the date of the birth of the child from which time the payments were to be made. The justices by mistake signed the order so drawn up, and this order was served on the prisoner. It was stated in the affidavit of the prisoner that he refused to obey this order, as he was advised that it was a nullity; and the applicant also swore that she made no attempt to enforce it on the same ground, and no step was taken to enforce this order except serving it on the prisoner. Two months later the applicant went before the same two justices and asked that the order made by them on Jan. 30 should be correctly drawn out and signed, in order that she might enforce it, and, accordingly, an order was then drawn up and signed and dated as of Jan. 30 (the day when the original order was made) correctly embodying the terms of the original order, and a correct order was then delivered to the applicant. This last order was served on the prisoner, and, on his failure to obey it, he was committed to prison, and this was the imprisonment of which he now complains.

It was objected that the justices had no power to make the second order till the first had been quashed on appeal or certiorari, or that, if the applicant was entitled to treat the first order as a nullity, no second order could be made except after a fresh summons and a fresh hearing, and after tender of the costs of the first summons. I am of opinion that this objection is not well founded, and that the commitment of the prisoner is right. It has been decided in *Ex parte Johnson* (3), that an order in bastardy is made when the judgment of the justices is pronounced orally in court, and that the formal written order is merely the record of the adjudication, and may be drawn up afterwards and signed at any time, and that, consequently, the time for appeal against such an order is from the oral adjudication in petty sessions and not from the time when the written order is signed or served. The applicant had a right to have the order made in her favour correctly drawn up. The order first drawn up did not embody correctly the terms of the order made, and in fact no such order as that first drawn up was ever really made by the justices, their signatures having been appended by mistake to a wrong order. It is an error, therefore, to allege that a second order was made. The only order made was the oral order of Jan. 30 and, an incorrect record of that order having been delivered to the applicant, I think that she was entitled to apply to the same justices and to request that a correct record of their order should be delivered to her. This is all that she did, and, as there was in fact no second order made, it follows that no fresh summons and fresh hearing were necessary.

R. v. Brisby (1), was cited as an authority that a new summons was required before a second order could be drawn up. In that case, the point now raised was not involved, nor was there any opinion expressed on the subject. The second application in that case appears to have been made to other justices than those who heard the first, and, of course, if other justices are called on to make an order, there must be a fresh hearing before them. But here the same justices who heard the first application were called on merely to draw up a correct record of their own order. That case, however, is a distinct authority for the proposition that, where the order first drawn up is bad on the face of it as in the first case, and, therefore, a nullity, there is no necessity to have it quashed on appeal or certiorari before a second application to the other justices is made. Nor was there any necessity in this case to tender the costs of the first summons; that course is required to be adopted only where the first hearing is admitted to have been altogether abortive, and, therefore, the proceedings have to be commenced over again.

Under such circumstances, *R. v. Hinchliff* (2), decides that the justices are not bound to entertain a second application until the costs of the first have been

A paid or tendered, and the defendant has been thereby replaced in his original position. In this case, however, so far from the first adjudication being admitted to have been abortive, that is the only adjudication which the applicant now seeks to enforce. What she asks is that a correct record of that adjudication should be drawn up, and she seeks for no fresh hearing nor judgment in the case, nor is the prisoner subjected to any fresh costs by reason of the mistake made in drawing up the first record of the order. It is clear, therefore, that no tender of costs is required in this case where the first and only adjudication was right, and the applicant seeks to enforce that adjudication. *Wilkins v. Hemsworth* (4) may also be referred to. In that case, the justices signed two orders intended to be duplicates, but, by mistake, the order served on the father ordered the mother instead of the father to pay 1s. 6d. a week. Afterwards a correct copy of the order was drawn up and served on the father, and it was held that, as there was but one order made, the service of an incorrect copy of it could not vitiate the order, but that a correct copy might afterwards be drawn up, served, and enforced.

For these reasons, I am of opinion that the commitment of the prisoner was right, and this summons must, therefore, be dismissed.

Summons dismissed.

SMITH v. LONDON AND SOUTH WESTERN RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Kelly, C.B., Martin, Bramwell, Channell and Pigott, BB., Blackburn and Lush, JJ.), November 30, 1870]

[Reported L.R. 6 C.P. 14; 40 L.J.C.P. 21; 23 L.T. 678;
19 W.R. 230]

Railway—Fire arising from sparks from engine—Damage to neighbouring property—Negligence—Evidence—Passing of engines on line just before fire seen.

The defendants, in the course of a very dry summer, allowed hedge trimmings and cut grass to accumulate in heaps on an embankment along which their railway ran. When the heaps had lain there for a fortnight they caught fire, and, the wind being high and the country in a very parched state, the fire spread through the hedge that bounded the defendants' property, over a stubble field, and across a lane to the plaintiff's cottage, about 200 yards from the place where the fire broke out, destroying it. There was evidence that, just before the fire was first seen two locomotives of the defendants had passed along the railway line close to the spot where the fire broke out, but there was no direct evidence to show how the fire originated.

Held: there was evidence for the jury that the fire had been started by sparks from the engines, and to show that it originated in the hedge trimmings; accordingly, the defendants were liable to the plaintiff since they had been negligent.

Notes. Considered: *Bull v. Shoreditch Corpn.* (1902), 67 J.P. 37; *H.M.S. London*, [1914] P. 72; *Re Polemis and Furness, Withy & Co., Ltd.*, [1921] All E.R. Rep. 40. Referred to: *Canadian Pacific Rail. Co. v. Roy*, [1902] A.C. 220; *McDowall v. Great Western Rail. Co.* (1902), 71 L.J.K.B. 330; *Clinton v. J. Lyons & Co., Ltd.*, [1911-13] All E.R. Rep. 577; *Weld-Blundell v. Stephens*, [1920] All E.R. Rep. 32; *Thomas and Evans, Ltd. v. Mid-Rhondda Co-operative Society, Ltd.*, [1940] 4 All

E.R. 357; *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; *Overseas Tankship (U.K.), Ltd. v. Morts Dock Engineering Co., Ltd.*, [1961] 1 All E.R. 404; *Smith v. Leech Brain & Co., Ltd.*, [1961] 3 All E.R. 1159.

As to liability of railway undertaking in consequence of exercise of statutory powers, see 31 HALSBURY'S LAWS (3rd Edn.) 472 et seq.; and for cases see 38 DIGEST (Repl.) 395 et seq.

Cases referred to :

- (1) *Vaughan v. Taff Vale Rail. Co.* (1858), 3 H. & N. 743; 28 L.J.Ex. 41; 23 J.P. 23; 4 Jur.N.S. 1302; 7 W.R. 120; reversed (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 38 Digest (Repl.) 13, 54.
- (2) *Brand v. Hammersmith and City Rail. Co.* (1867), L.R. 2 Q.B. 223; 36 L.J.Q.B. 139; 16 L.T. 101; reversed sub nom. *Hammersmith and City Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12; 38 Digest (Repl.) 15, 59.

Also referred to in argument :

- Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294; 156 E.R. 1047; 38 Digest (Repl.) 13, 50.
- Fletcher v. Rylands* (1865), 3 H. & C. 774; 34 L.J.Ex. 177; 13 L.T. 121; 13 W.R. 992; reversed (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 4 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70 H.L.; 36 Digest (Repl.) 282, 334.
- Jones v. Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733; 9 B. & S. 835; 37 L.J.Q.B. 214; 18 L.T. 902; 32 J.P. 693; 17 W.R. 28; 38 Digest (Repl.) 400, 613.
- Vaughan v. Menlove* (1837), 3 Bing. N.C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L.J.C.P. 92; 1 Jur. 215; 132 E.R. 490; 36 Digest (Repl.) 29, 126.
- Cornman v. Eastern Counties Rail. Co.* (1859), 4 H. & N. 781; 29 L.J.Ex. 94; 33 L.T.O.S. 302; 5 Jur.N.S. 657; 157 E.R. 1050; 36 Digest (Repl.) 127, 639.
- Fremantle v. London and North Western Rail. Co.*, *Bliss v. London and North Western Rail. Co.* (1861), 10 C.B.N.S. 89; 31 L.J.C.P. 12; 5 L.T. 556; 9 W.R. 611; 142 E.R. 383; 38 Digest (Repl.) 400, 607.
- Turbervill (Turbervil) v. Stamp* (1697), Holt, K.B. 9; Carth. 425; Skin. 681; Comb. 459; 1 Com. 32; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; 90 E.R. 846; 2 Digest (Repl.) 91, 551.

Appeal by the defendants from a decision of the Court of Common Pleas, reported L.R. 5 C.P. 98, discharging a rule to enter a verdict for the defendants or a nonsuit.

The plaintiff brought an action for negligence against the defendants. The case was tried before KEATING, J., and at the end of the plaintiff's case, counsel for the defendants submitted that there was no case to go to the jury. By consent a verdict was taken for the plaintiff for £30 damages, leave being reserved to the defendants to obtain a rule nisi to set it aside and enter a verdict for the defendants. The defendants obtained a rule which was discharged by the Court of Common Pleas, and the defendants appealed.

Kingdon, Q.C. (Lopes, Q.C., and March with him) for the defendants.
Cole, Q.C. (Bere, Q.C., with him) for the plaintiff.

KELLY, C.B.—I have entertained some doubt on the case in the course of the argument, but, on mature consideration of the facts and of the form in which they come before us, I cannot help arriving at the conclusion that there was evidence of negligence on the part of the defendants, and of negligence which caused damage to the plaintiff's house. It appears that, very shortly after two engines (which we all know do emit sparks, and which I, therefore, assume

A emitted sparks in the present case, which may, and indeed must, have fallen on the adjacent land) had passed the spot where the fire broke out, the fire was discovered. I think, then, under the circumstances, we may reasonably infer that the fire was caused by a spark from one of these engines. It appears that the season was extraordinarily dry, and the defendants, probably with a view to preventing mischief, had cut the grass between the railway and the hedge, and that, together with the trimmings of the hedge, was placed in small heaps between the railway and the hedge. On the other side of the hedge was a stubble field, which was also extremely dry, and 200 yards from the spot, across the stubble field and a highway, was the plaintiff's house. This was the state of things at the time. Shortly after the passing of the trains, these trimmings and grass caught fire. There was a strong south-east wind blowing at the time. There is no distinct evidence of the progress of the fire, because none of the witnesses saw it till some minutes afterwards. There can, however, be no doubt that the fire spread from the verges of the railway through the hedge to the stubble field.

The first question to be asked is how did the fire originate. It is unfortunate, that, as the case never really went to the jury, we have no charge from the learned judge who presided at the trial to assist us. It was agreed that, if there were evidence to go to the jury, the verdict should be sustained; but, if the case had gone to the jury in the ordinary manner, the questions might have been decided (as to which we are left in great doubt) whether the fire was caused by a spark from an engine, and, if so, whether the spark fell on the trimmings in the hedge or on the stubble field. On the whole, however, I think that there was ample evidence to show that the fire arose from a spark from one of the engines falling on the heaps of trimmings, and that it spread thence over the stubble field to the plaintiff's house. If that was so, then the question arises whether there was any negligence on the part of the defendants for which they can be made responsible. The defendants must be taken to have known that engines were continually passing this spot, and that these engines emitted sparks which would fall on the adjacent land, and that it was exceedingly probable that one of these sparks might fall on one of the heaps which, from the dry state of the weather, would be easily ignited. Was it not then a question for the jury whether, under the circumstances, there was not negligence on the part of the defendants in leaving these heaps so long there; foreseeing, as the defendants must, that, if a spark fell on one of them, and it caught fire, it was not unlikely that the fire might spread with the wind beyond their own boundary fence? On these grounds, I think that there was evidence from which the jury might reasonably infer that there was negligence in not gathering up the grass and trimmings as soon as possible.

I now come to consider the grounds on which BRETT, J., dissented from the rest of the court below—grounds which I must own have had considerable weight on my own mind. He said (L.R. 5 C.P. at p. 103):

"I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding they are of the best construction, and were worked without negligence; and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on fire. But I am of the opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubble-field, and to get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage."

I quite think, too, that no reasonable man could be expected to foresee the concurrence of the many accidents which together led to the destruction of the plaintiff's house. But, conceding that the defendants were not bound to anticipate all these consequences, still we ought to consider that they were aware that these heaps had been lying for a fortnight on the verges of the line and that the season

was most extraordinarily dry and hot, so that the heaps must be so very dry and inflammable that a single spark would suffice to ignite them. Knowing all this, they were bound to provide against the possible consequences of such an accident. If, therefore, they were bound to anticipate that the heaps would, under certain circumstances, catch fire, I think that they were bound to remove them, in order to save their neighbours from the possible consequences of such a fire. I think, then, that there was negligence on the part of the defendants, and that that negligence caused the accident. The fact that the plaintiff's house was some distance from the line does not alter the effect of these circumstances.

In my judgment, the decision of the court below must be affirmed.

MARTIN, B.—I am of the same opinion. The only question which we have to decide is whether there was evidence of negligence on the part of the defendants, and whether such negligence, if it existed, caused the destruction of the plaintiff's house. The facts are these: Here is a man, whose house, without any fault on his part, is burnt down by a fire coming from the defendants' line. Did this fire originate through the negligence of the defendants? It did. The evidence shows that these trimmings had been lying at the side of the line for a fortnight, and, under the circumstances, it seems to me plain enough that they were set on fire by a spark from an engine, and that is how the fire originated. The circumstances of the distance of the plaintiff's house has nothing to do with the question.

BRAMWELL, B.—I am of the same opinion.

CHANNELL, B.—I, also, am of the same opinion. I think that there was evidence to show that the fire originated through the negligence of the defendants, and, that being so, it is no defence for the defendants to say that it spread much further than they could ever have anticipated.

BLACKBURN, J.—I agree with CHANNELL, B. I have certainly, during the argument, entertained great doubts on the question, which even now are barely removed. If the decision of the question rested with me, I should like to have further time to consider it; as it is, as all my brothers are agreed in thinking that the judgment in the court below was right, it is not worth while to do so. I do not dissent from their opinion—indeed, I am not prepared to do that—but I still have my doubts on the subject. Since the decisions in *Vaughan v. Taff Vale Rail. Co.* (1), and *Brand v. Hammersmith and City Rail. Co.* (2), it has been undoubted law that, where a railway company is authorised by Act of Parliament to use locomotive engines, it is not responsible for the consequences resulting from the use of those engines, unless negligence be proved. That being so, a railway company that has the verges of its railway in its possession is bound to use all reasonable care in seeing that these verges are not in such a state as to increase the danger necessarily attending the use of locomotives. In the present case, assuming, as I do, that the fire was caused by a spark from the engines, no negligence was proved against the defendants in the management or construction of the engines, and, as the defendants are authorised by Act of Parliament to use the engines, they are not responsible for the escape of the spark, which I assume to have caused the fire.

But then we come to the question whether there was evidence of negligence in leaving the verges of the line in the condition in which they were. To decide that question, it is important to see whether the consequences which resulted from leaving the heaps on the verges, were such as might naturally have been expected by reasonable and prudent men. Here is the point on which I have great doubt. Of course, if the defendants were to strew petroleum or any other well-known inflammable substance along their line and a fire broke out by reason

A of their so doing, the case would be clear enough. But all they did was to leave ordinary hedge trimmings and grass until such time as it was convenient to carry them away. If they were guilty of negligence at all, it was in leaving inflammable substances on the verges of the line. If, by leaving the heaps there, the defendants increased the probability of a fire, no doubt there would be some evidence, but my own impression is that it was the fact of the hedge catching fire that made the fire burn so fiercely. The hedge was extremely dry, so that, on its catching fire, the fire escaped beyond the bounds of the line. It is quite clear that the defendants, when planning the line, could not have been expected to anticipate that the fact of a hedge being there would be dangerous, so that there was no negligence in planting a hedge instead of building a wall. I think, then, that the defendants can hardly be said to have been guilty of negligence in leaving the trimmings there, as, to my mind, it was the presence of the hedge, rather than of the trimmings, that caused so fierce a fire. These are the reasons which have led me to have great doubt on the subject. I agree with CHANNELL, B., in thinking that, if it is established that the defendants were wrongdoers, it is no answer to say that greater damage resulted from their wrongful act than they could ever have expected. If I shoot across a public road and kill a man, I must pay a compensation; if I have killed a rich man, and am called on to pay heavy compensation, it is no answer for me to say, in mitigation of damages, that, though I might have thought a peasant might be there, I never could be expected to think that I should shoot a rich man.

E **PIGOTT, B.**—I am of the same opinion. I had some difficulty at one time, but in the result I agree in the judgment given by KEATING, J., in the court below. He said (L.R. 5 C.P. at p. 105):

F “But that which presses upon my mind is, that it is impossible to say that the accumulation of such materials at such a season of the year, and permitting them to remain there so long, was not some evidence of negligence.”

G The evidence shows that these trimmings, which had been left all along the line in heaps, were extremely dry, so that I think that the defendants must be taken to have known that, by leaving them there, they were very much adding to the chances of a fire. I cannot, therefore, help thinking that it was a question for the jury whether the fire broke out in this way.

H **LUSH, J.**—I am of the same opinion. I think that we must conclude that the fire arose from a spark falling on one of the heaps which were extremely dry at that time. We thus very well account for the fire. I think that there was negligence in leaving the heaps there so long at so dry a season, and the more likely the hedge was to catch fire the more incumbent was it on the defendants to see that no inflammable substance was near it.

Appeal dismissed.

R. v. BOYES

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Crompton, Hill and Blackburn, JJ.), May 27, 1861]

[Reported 1 B. & S. 311; 30 L.J.Q.B. 301; 5 L.T. 147; 25 J.P. 789;
7 Jur.N.S. 1158; 9 W.R. 690; 9 Cox, C.C. 32; 121 E.R. 730]

Criminal Law—Evidence—Witness—Protection—Incriminating question—Need to prove reasonable apprehension of danger.

On the trial of an information against the defendant for bribery at a Parliamentary election filed by the Attorney-General in pursuance of a resolution of the House of Commons, a person, alleged in the indictment to have been bribed, was called as a witness, but he refused to answer any question on the ground that the answer would tend to criminate him. A pardon under the Great Seal was then handed to the witness, but he still refused to answer, upon which the judge compelled him to answer, and on his evidence the defendant was convicted.

Held: the pardon took away the privilege of the witness so far as any risk of prosecution at the suit of the Crown was concerned; and though the witness might still be liable to impeachment by the House of Commons, notwithstanding the pardon, by reason of the Act of Settlement, 1700, yet that was so unlikely to happen that the witness could not be said to be in any real danger, and he was, therefore, rightly compelled to answer.

Per Curiam: To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things, and not a danger of an imaginary character having reference to some barely possible contingency.

Notes. Considered: *Lamb v. Munster*, [1881-4] All E.R. Rep. 465. Followed: *Re Reynolds, Ex parte Reynolds*, [1881-4] All E.R. Rep. 997. Applied: *Re Genese, Ex parte Gilbert* (1886), 3 Morr. 223. Referred to: *R. v. Hamilton, Kinglake and Lovibond* (1870), 22 L.T. 316; *Evans v. Evans and Blyth*, [1904-7] All E.R. Rep. 1031; *R. v. Christie*, [1914-15] All E.R. Rep. 63; *R. v. Cohen* (1914), 10 Cr. App. Rep. 91; *Triplex Safety Glass Co. v. Lancegaye Safety Glass, Ltd.*, [1939] 2 All E.R. 613; *Blunt v. Park Lane Hotel, Ltd., and Bristol*, [1942] 2 All E.R. 187; *Davies v. D.P.P.*, [1954] 1 All E.R. 507.

As to pardons, see 7 HALSBURY'S LAWS (3rd Edn.) 242-245; as to contempt by witnesses, see 8 HALSBURY'S LAWS (3rd Edn.) 5; as to privilege of a witness in criminal proceedings, see 10 HALSBURY'S LAWS (3rd Edn.) 479-480; and for cases see 22 DIGEST (Repl.) 391 et seq. For the Act of Settlement, 1700, see 4 HALSBURY'S STATUTES (2nd Edn.) 158.

Cases referred to:

- (1) *Osborn v. London Dock Co.* (1855), 10 Exch. 698; 3 C.L.R. 313; 24 L.J.Ex. 140; 24 L.T.O.S. 262; 1 Jur.N.S. 93; 3 W.R. 238; 156 E.R. 620; 18 Digest (Repl.) 225, 1927.
- (2) *Sidebottom v. Adkins* (1857), 29 L.T.O.S. 310; 3 Jur.N.S. 631; 5 W.R. 743; 18 Digest (Repl.) 225, 1916.

A Also referred to in argument :

The People v. Mather, 4 Wendell's New York Rep. 254.

Fisher v. Ronalds (1852), 12 C.B. 762; 22 L.J.C.P. 62; 20 L.T.O.S. 100; 17 Jur. 393; 1 W.R. 54; 138 E.R. 1104; 22 Digest (Repl.) 391, 4187.

R. v. Lord Shaftesbury (1681), 8 State Tr. 759, 817; 22 Digest (Repl.) 392, 4197.

3 **Rule Nisi** for the new trial of an information filed by the Attorney-General against the defendant for bribery committed at the Parliamentary election for the borough of Beverley, Yorkshire, in April, 1859.

The information contained various counts, each charging a distinct act of bribery to different voters. One charged the defendant with having given a bribe to a voter named John Pougher. The trial took place at the Yorkshire Assizes in 1860, before MARTIN, B. In support of this count John Pougher, the voter bribed, was called as a witness, and the learned judge considered it to be his duty to tell him that he was not bound to answer, if by answering he would criminate himself. The witness declined to answer the questions. Upon that the Solicitor-General handed to the witness a pardon under the Great Seal. The witness still declined to answer, but MARTIN, B., told him he must answer the questions, and he then gave evidence to the effect that he had been bribed by the defendant. The jury convicted the defendant on this count. The defendant obtained a rule for a new trial, and the Crown applied to discharge the rule.

This case is only reported here on the question whether the witness ought to have been compelled to answer the questions.

E *Cleasby* for the Crown.

Edward James for the defendant.

Cur. adv. vult.

May 27, 1861. **SIR ALEXANDER COCKBURN, C.J.**, read the following judgment of the court.—On the trial of the defendant on an information by the Attorney-General for bribery, a witness who was called to prove the fact of his having received a bribe from the defendant, objected to give evidence, on the ground that the effect of the evidence he was called upon to give would be to criminate himself. Thereupon the counsel for the Crown handed in a pardon under the Great Seal to the witness, who accepted it. The witness, however, still objected to give evidence. [His LORDSHIP then dealt with the procedure by which the point had been brought before the court, and continued:] The pardon took away the privilege of the witness, so far as regarded any risk of prosecution at the suit of the Crown; but it was objected that a pardon was no protection against an impeachment by the Commons in Parliament, and on this point the case was argued before us in the last term. The question on which our opinion is now required is, whether the enactment of s. 3 of the Act of Settlement, 1700, "that no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament," is a sufficient reason for holding that the privilege of the witness still existed in this case, on the ground that the witness, though protected by the pardon against every other form of prosecution, might possibly be subject to parliamentary impeachment. In support of this proposition it was urged on behalf of the defendant that bribery at the election of members to serve in Parliament being a matter in which the House of Commons would be likely to take a peculiar interest, as immediately affecting its own privileges, it was not impossible that if other remedies proved ineffectual, proceedings by impeachment might be resorted to. It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made mala fide, would be received as conclusive. With the latter of these propositions we are altogether unable to concur.

Upon review of the authorities, we are clearly of opinion that the view of the law propounded by LORD WENSLEYDALE in *Osborn v. London Dock Co.* (1), and acted upon by STUART, V.-C., in *Sidebottom v. Adkins* (2), is the correct one, and that to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Indeed, we quite agree that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt, as observed by ALDERSON, B., in *Osborn v. London Dock Co.* (1), that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to put the witness in peril. Further than this, we are of opinion that the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.

In the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding in the, unhappily, too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of. To suppose that such a proceeding would be applied to the case of this witness would be simply ridiculous, more especially as the proceeding by information was undertaken by the Attorney-General by the direction of the House itself, and it would, therefore, be contrary to all justice to treat the pardon provided in the interest of the prosecution to insure the evidence of the witness as a nullity, and to subject him to a proceeding by impeachment. It appears to us, therefore, that the witness in this case was not in a rational point of view in any the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings, and that it was therefore the duty of the presiding judge to compel him to answer.

Rule discharged.

HYDE v. HYDE AND WOODMANSEE

[COURT OF DIVORCE AND MATRIMONIAL CAUSES (Wilde, J.O.), January 20, March 20, 1866]

[Reported L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188;
12 Jur.N.S. 414; 14 W.R. 517]

Conflict of Laws—Marriage—Dissolution—Polygamous marriage celebrated under foreign law—Jurisdiction of English court to dissolve.

Marriage—Validity—Polygamous marriage.

A husband presented a petition for divorce, the "marriage" having been celebrated at Utah and according to the Mormon law which permitted plurality of wives.

Held: for the purposes of the matrimonial law of England, marriage might be defined as the voluntary union for life of one man and one woman to the exclusion of all others; persons joined in a union not complying with that requirement could not be considered husband and wife in the sense in which those words must be interpreted in the Divorce Acts, and so such persons were not entitled to the remedies, the adjudication, or the relief provided by such law; therefore, the court could not entertain the petition.

Per Curiam: The court is not professing to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons which people, living under the sanction of such unions, may have created for themselves.

Notes. Considered: *Re Ullee*, Nawab Nazim of Bengal's Infants (1885), 53 L.T. 711; *Re Bozzelli's Settlement*, *Husey-Hunt v. Bozzelli's*, [1902] 1 Ch. 751; *Nachimson v. Nachimson*, [1930] All E.R. Rep. 114; *Baindail (Otherwise Lawson) v. Baindail*, [1946] P. 122; *Apt (Otherwise Magnus) v. Apt*, [1947] 2 All E.R. 677. Applied: *Risk (Otherwise Yerburch) v. Risk*, [1950] 2 All E.R. 973; *Sowa v. Sowa*, [1961] 1 All E.R. 687. Referred to: *Re Bethell*, *Bethell v. Hildyard*, [1886-90] All E.R. Rep. 641; *R. v. Dibden*, *Ex parte Thompson* (1909), 101 L.T. 106; *R. v. Hammersmith Superintendent Registrar of Marriages*, *Ex parte Mir-Anwaruddin*, [1916-17] All E.R. Rep. 464; *Apted v. Apted and Bliss* (1930), 143 L.T. 353; *Fender v. Mildmay*, [1936] 1 K.B. 111; *Srini Vasan (Otherwise Clayton) v. Srini Vasan*, [1945] 2 All E.R. 21; *Mehta (Otherwise Kohn) v. Mehta*, [1945] 2 All E.R. 690; *Baxter v. Baxter*, [1947] 2 All E.R. 886; *R. v. Rahman*, [1949] 2 All E.R. 165; *Way v. Way*, *Rowley v. Rowley*, *Kenward v. Kenward*, [1949] 2 All E.R. 959.

As to necessary requirements of a marriage recognised by English Law, see 7 HALSBURY'S LAWS (3rd Edn.) 88 et seq.; and for cases see 11 DIGEST (Repl.) 455 et seq.

Cases referred to:

(1) *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli. N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, 250.

(2) *Ardaseer Cursetjee v. Perozeboye* (1856), 10 Moo. P.C.C. 375; 14 E.R. 533.

Petition by a husband for dissolution on the ground of the wife's adultery, the question raised being whether a Mormon marriage, celebrated at Utah, could be recognised as a valid marriage by an English Matrimonial Court.

The petitioner was an Englishman, who joined the Mormons when he was fifteen or sixteen years of age. He then lived in London, and soon afterwards he was ordained a Mormon priest, and in 1851 he was appointed to a French mission. At the end of 1849 the respondent and her mother, who were also Mormons, went to the Salt Lake City. The petitioner joined them there in 1853, and in

the November of that year the marriage took place. It was celebrated by Brigham Young, the governor and high priest of the Mormon body, according to forms used by the Mormons, and the petitioner and respondent afterwards lived together as man and wife at Utah, and had children.

After a cohabitation of two or three years the petitioner was directed to go to the Sandwich Islands as a Mormon missionary, and he, accordingly, went, leaving his wife in Utah. During his voyage to the Sandwich Islands he became convinced that the Mormon doctrines were erroneous, and on his arrival he publicly renounced Mormonism and preached against it. When this became known at the Salt Lake City, he was excommunicated according to the forms of the Mormons, and by the sentence of excommunication he was divorced from his wife, who was pronounced free to marry again. He was unable to return to the Salt Lake City, as his life would have been in danger, but he wrote to his wife, asking her to leave the country and join him. She refused, declaring that polygamy was preferable to licentiousness, and subsequently married the co-respondent, with whom she has since lived at the Salt Lake City, and had children by him.

An artist, who had married a sister of the respondent, and who had himself for some time professed Mormonism, proved that polygamy was allowed among the Mormons at Utah, each man taking as many wives as he was able to support, but he was certain that the petitioner had never more than one wife while he was among them. Silas M. Fisher, a counsellor of the Supreme Court of the United States, proved that a marriage by Brigham Young, as head of the Mormon body in Utah, would be recognised as a valid marriage by that court, provided both parties were unmarried at the time, and that there was no legal objection to their being married. The local court of each state, however, had exclusive jurisdiction in matrimonial suits, and the Supreme Court had no appellate jurisdiction over the local courts in these suits. To give the Supreme Court jurisdiction in the matter the petitioner would have to be resident in the district of Columbia. A second marriage would be held polygamous by it or by any of the courts of the United States. Utah was a territory not within any state. The court of the territory of Utah had jurisdiction in matrimonial suits arising in Utah. In such a case as this the judge would be governed by the laws of the United States, for although the people of the territory might make their own territorial laws, yet, if they were contrary to the laws of the United States, they would be void, and would not be recognised by the judge of the court.

Dr. Spinks for the petitioner.

Cur. adv. vult.

Mar. 20, 1866. **WILDE, J.O.**—The petitioner in this case claims a dissolution of his marriage on the ground of the adultery of his wife. The alleged marriage was contracted at Utah, in the territories of the United States of America, and the petitioner and the respondent both professed the faith of the Mormons at the time. The petitioner has since quitted Utah and abandoned the faith, but the respondent has not. After the petitioner left Utah, the respondent was divorced from him, apparently in accordance with the law obtaining among the Mormons, and has since taken another husband. This is the adultery complained of. Before the petitioner could obtain the relief he seeks, some matters would have to be made clear and others explained. The marriage, as it is called, would have to be established as binding by the *lex loci*, the divorce would have to be determined void, and the petitioner's conduct in wilfully separating himself from his wife would have to be accounted for.

I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered husband and wife in the sense in which these words must be interpreted in the Matrimonial Causes Act, 1857 [now Matrimonial

A Causes Act, 1950.] Further reflection has confirmed this doubt, and has satisfied me that this court cannot properly exercise any jurisdiction over such persons. Marriage has been well said to be something more than a contract, either religious or civil—to be an institution. It creates mutual rights and obligations, as all contracts do; but, beyond that, it confers a status. The position or status of husband and wife is a recognised one throughout Christendom. The laws of all
B Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring.

What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different nations; but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some
C prevailing identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others. There are, no doubt, countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms—countries in which this
D institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian “wife.” In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection
E they live. There are no doubt in those countries laws adapted to this state of things—laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word “wife.” But there is no magic in a name, and if the relation there existing between men and women is not the relation which in Christen-
F dom we recognise and intend by the words “husband” or “wife,” but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer. The language of LORD BROUGHAM, in *Warrender v. Warrender* (1), is very appropriate to these considerations. He said (2 Cl. & Fin. at pp. 531-533):

G “If, indeed, there go two things under one and the same name in different countries, if that which is called marriage is of a different nature in each, there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one
H and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing—a different status—from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and
I validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore, all the courts of one country have to determine is whether or not the thing called marriage, that known relation of persons, that relation which those courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had, the relation has been instituted, and these courts will deal with the

rights of the parties under it according to the principles of the municipal law which they administer. . . . Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there the essence of the contract."

It is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce; and that of the husband, if coupled with bigamy, is followed by the same penalty; personal violence, open concubinage or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband, under the name of alimony, at the rate of about one-third of his income. If these and the like provisions and remedies were applied to polygamous unions, the court would be creating polygamous duties, not enforcing them, and furnishing remedies where there was no offence. For it would be quite unjust, and almost absurd, to visit a man who, among a polygamous community, had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriage, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers.

If, then, the provisions adapted to our matrimonial system are not applicable to such a union as the present, is there any other to which the court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements; and it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex. This is hardly denied in argument, but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions as a Christian marriage, and all subsequent unions, if any, as void—the first woman taken to wife as a "wife" in the sense intended by the Matrimonial Causes Act, 1857, and all the rest as concubines. The inconsistencies that would flow from an attempt of this sort are startling enough. Under the provisions of the divorce Acts the duty of cohabitation is enforced on either party at the request of the other in a suit for restitution of conjugal rights. But this duty is never enforced on one party if the other has committed adultery. A Mormon husband, therefore, who had married a second wife, would be incapable of this remedy, and this court could in no way assist him towards procuring the society of his wife if she chose to withdraw from him. And yet, by the very terms of his marriage compact, this second marriage was a thing allowed to him, and no cause of complaint in her who had acquiesced in that compact. And as the power of enforcing the duties of marriage would thus be lost, so would the remedy for breach of marriage vows be unjust and unfit. For a prominent provision of the Matrimonial Causes Act, 1857, is, that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting

A the man to marry a second woman, that the Act goes further and declares that if the husband is guilty of bigamy as well as adultery it shall be a ground of divorce to the wife.

B A Mormon, therefore, who had according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the application of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration; and all this without any act done with which he might be expected to reproach himself, or of which either woman would have the slightest right to complain. These difficulties may be C pursued further in the reflection that, if a Mormon had married forty women in succession, this court might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial D bond during the first wife's life. Is the court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily pre-suppose duties. There are no conjugal duties but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage laws in this country to assert and enforce, such unions are not within the E reach of that law.

So much for the reason of the thing. There is, I fear, little to be found in our books in the way of direct authority. But there is *Ardaseer Cursetjee v. Perozeboy* (2), in which the Privy Council distinctly held that Parsee marriages were not within the force of a charter extending the jurisdiction of the ecclesiastical courts to Her Majesty's subjects in India, so far as the circumstances F and occasions of the said people shall require. The following passage sufficiently indicates the grounds upon which the court proceeded (10 Moo. P.C.C. at pp. 418, 419):

G "We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws or some customs having the effect of laws which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as H from time out of mind were incident to their own caste, nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages."

I In conformity with these views the court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people, living under the sanction of such unions, may have created for themselves. All that is intended to be here decided is, that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

Petition dismissed.

A

PYM v. GREAT NORTHERN RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Erle, C.J., Pollock, C.B., Williams and Willes, JJ., and Bramwell and Channell, BB.), June 15, 1863]

B

[Reported 4 B. & S. 396; 2 New Rep. 455; 32 L.J.Q.B. 377;
8 L.T. 734; 10 Jur.N.S. 199; 11 W.R. 922; 122 E.R. 508]

Fatal Accident—Damages—Loss of pecuniary advantage—Reasonable probability of advantage—Expectation of children receiving advancement—Duty to consider interest of dependants individually, not as a class.

C

A married man who had nine children was killed through the negligence of the defendants' servants. Prior to his death he had been receiving a substantial income from settled property, and had been living with his family and bringing up his children in the way in which such an income permitted. On his death, his eldest child became entitled to the settled property although some provision was made under the settlement for the widow and younger children. In an action under the Fatal Accidents Act, 1846, brought for the benefit of the widow and the eight younger children,

D

Held: it was no defence that the whole of the deceased's income went to his dependants as a class because the remedy under the Act existed for the benefit of the dependants individually and it was necessary to consider how the interest of each person had been affected by the death; accordingly damages were recoverable by the widow and younger children in respect of the reasonable expectation that the father would have done something to advance the younger children beyond what they had received under the settlement.

E

Notes. The Fatal Accidents Act, 1846, has been amended by the Fatal Accidents Act, 1864, the Fatal Accidents (Damages) Act, 1908 (repealed), the Law Reform (Miscellaneous Provisions) Act, 1934, the Law Reform (Contributory Negligence) Act, 1945, the Law Reform (Personal Injuries) Act, 1948, and the Fatal Accidents Act, 1959.

F

Referred to: *Griffiths v. Earl of Dudley*, [1881-5] All E.R. Rep. 450; *Grand Trunk Rail. Co. of Canada v. Jennings* (1888), 13 App. Cas. 800; *Baker v. Dalgleish Steamship Co.*, [1922] 1 K.B. 361; *Avery v. London and North Eastern Rail. Co.*, [1938] 2 All E.R. 592; *Yelland v. Powell Duffryn Associated Collieries, Ltd. (No. 2)*, [1941] 1 K.B. 519; *Davies v. Powell Duffryn Associated Collieries, Ltd.*, [1942] 1 All E.R. 657; *Bowskill v. Dawson*, [1954] 2 All E.R. 649; *Peacock v. Amusement Equipment Co.*, [1954] 2 All E.R. 689; *Voller v. Dairy Produce Packers, Ltd.*, [1962] 3 All E.R. 938.

G

As to negligence causing death, see 28 HALSBURY'S LAWS (3rd Edn.) 34 et seq.; as to damages under the Fatal Accidents Acts, see *ibid.* 100 et seq.; and for cases see 33 DIGEST (Repl.) 208. For the Fatal Accidents Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4; for the Fatal Accidents Act, 1864, see *ibid.* 9; for the Law Reform (Miscellaneous Provisions) Act, 1934, see *ibid.* 11; for the Law Reform (Contributory Negligence) Act, 1945, see *ibid.* 12; for the Law Reform (Personal Injuries) Act, 1948, see 25 HALSBURY'S STATUTES (2nd Edn.) 364; for the Fatal Accidents Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 941.

Cases referred to :

- H
- I
- (1) *Franklin v. South Eastern Rail. Co.* (1858), 3 H. & N. 211; 31 L.T.O.S. 154; 4 Jur.N.S. 565; 6 W.R. 573; 157 E.R. 448; 36 Digest (Repl.) 213, 1128.
 - (2) *Dalton v. South Eastern Rail. Co.* (1858), 4 C.B.N.S. 296; 27 L.J.C.P. 227; 31 L.T.O.S. 152; 4 Jur.N.S. 711; 6 W.R. 574; 140 E.R. 1098; 36 Digest (Repl.) 214, 1129.

A Also referred to in argument :

Blake v. Midland Rail. Co. (1852), 18 Q.B. 93; 21 L.J.Q.B. 233; 18 L.T.O.S. 330; 16 Jur. 562; 118 E.R. 35; 36 Digest (Repl.) 221, 1176.

Appeal by the defendants, the Great Northern Rail. Co., against a decision of the Court of Queen's Bench, reported 2 B. & S. 759, refusing to make absolute a rule of that court obtained by the defendants calling on the plaintiff to show cause why the verdict in the action awarding her and her eight younger children damages under the Fatal Accidents Act, 1846, should not be set aside, and instead thereof a verdict entered for the defendants, or a nonsuit entered upon a point reserved at the trial.

C This was an action brought under the Fatal Accidents Act, 1846, by the plaintiff, as the widow and administratrix of Francis Leslie Pym, against the defendants, who are carriers of passengers upon a railway, called the Great Northern Railway, for the loss alleged to have been sustained by her and by his children from his death, which was caused by an accident on the defendants' railway, occasioned by the negligence of one of the servants of the defendants.

D The plaintiff, in the declaration, alleged that the defendants were carriers of passengers upon the said railway, and that while the said F. L. Pym was being carried by the defendants as a passenger on the said railway he was, by and through the negligence of the defendants, injured, and afterwards, and within twelve calendar months next before that suit, died; and that the plaintiff sued as such administratrix for the benefit of herself as the widow of the said F. L. Pym, and also for the benefit of the children of the said F. L. Pym, according to the form of the statute in such case made and provided. The defendants pleaded that they were not guilty, and upon that plea the plaintiff took issue.

At the trial before SIR ALEXANDER COCKBURN, C.J., it appeared that the said F. L. Pym was, on April 23, 1860, a passenger by the defendants' railway, and that while he was such passenger an accident occurred upon the said railway, arising from the negligence of one of the defendants' servants, whereby the said F. L. Pym was injured and died the same day. The deceased at the time of his death was forty-one years of his age, and died intestate, leaving a widow, the plaintiff, and nine children, the eldest aged eleven years, and the youngest aged two months. The deceased was tenant for life of certain estates in land under a re-settlement of the family property which had been made at the time of his marriage, and was also seised in fee of other estates, subject to certain charges thereon. The net income arising from the whole of these estates amounted to £3869 a-year. By the provisions of this re-settlement, at his death the plaintiff became entitled to a jointure of £1000 per year for her life charged upon the said re-settled estates, and the eight younger children to a provision of £800 a-year, being the interest, at 4 per cent., of a sum of £20,000 charged also upon the re-settled estates. Subject to the above charges, these estates, upon the death of the said F. L. Pym, passed under the entail created by the re-settlement to his eldest son in fee. The unsettled estates, subject to the existing charges thereon, passed to the eldest son as heir-at-law. The deceased also left personal property to the amount of £3390 of which the plaintiff at his death became entitled to £1130, and the said nine children to the sum of £250 each. He was of no profession or business, and had no income or property other than above mentioned.

I The Lord Chief Justice directed the jury that, to entitle the plaintiff to their verdict, they must be satisfied, not only that the death of the said F. L. Pym was caused by the negligence of the defendants, but also that the plaintiff and her children, or some of them, had sustained some pecuniary loss or damage by such death. And he further directed them that if, after making allowance for what the deceased would naturally have expended on himself, they thought that a portion of his income beyond the £1800 a-year, to which his widow and eight younger

children became entitled at his death, would have been from time to time set aside by him for the benefit of his family, or appropriated to their education and advancement in life, and would thus have secured to them advantages which, by his death, they had lost; that would constitute such pecuniary loss and damage as, coupled with the death of the deceased having been caused by the negligence of the defendants, would enable them to find a verdict for the plaintiff. The jury found a verdict for the plaintiff and assessed the damages at £13,000, and apportioned that sum, £1000 for the widow, and £1500 for each of the eight younger children. At the close of the case, and before the Lord Chief Justice directed the jury, the counsel for the defendants contended that neither the plaintiff nor any of the children had sustained any such loss or damage as was necessary to maintain the action, and that there was no evidence of any such loss or damage which ought to be submitted to the jury; and the Lord Chief Justice thereupon reserved these points, and gave leave to the defendants to move to enter the verdict for them, or to enter a nonsuit. A rule nisi was accordingly obtained in Michaelmas Term, 1861, and afterwards argued and discharged on June 17, 1862, whereupon the defendants appealed to this court.

The question for the decision of the Court of Appeal was whether, under the above circumstances which were set forth in a Case, there was evidence which the Lord Chief Justice ought to have submitted to the jury that the plaintiff or any of the children had sustained any such loss or damage as was necessary to maintain the action.

Hawkins, Q.C. (Holl with him) for the company.

Bovill, Q.C. (Garth with him) for the plaintiff.

POLLOCK, C.B.—We have nothing to do with any misdirection now, and though we might think that some of the directions as to damages were wrong, yet the plaintiff is clearly entitled to recover for the reasonable expectation that the father would have done something to advance the children beyond what they will have under the settlement.

ERLE, C.J.—We are all of opinion that the judgment of the Court of Queen's Bench should be affirmed. The question is whether there was any such evidence in support of the plaintiff's case which the judge was right in leaving to the jury. We think that there was. The governing principle appears to be, whether there was any evidence of a reasonable expectation of pecuniary benefit to the plaintiff from the income of the deceased.

The facts are shortly these. The deceased had a large income, and by a settlement which he had made he had settled £1000 per year upon his wife and a sum of £20,000 among his younger children. The residue of his property went to his eldest son. It was proved that down to the time of his death the deceased was living with his family as the head, and was bringing up his children in the way which such an income as he was possessed of would enable him to do. If so, the jury were bound, in my judgment, to give damages in respect of any sums of money which they might consider would have been expended for those purposes, because the children were deprived of that money by the death of their parent. The decisions in *Franklin v. South Eastern Rail. Co.* (1), and in *Dalton v. South Eastern Rail. Co.* (2), show that a reasonable probability of a pecuniary advantage is a matter which a jury may take into their consideration in estimating the damages. Those were cases in which parents recovered compensation for the loss of the pecuniary benefit which they would probably have derived from the services of their children, but for their death. In the present case the same ordinary circumstances substantially appear as in those cases, with this additional one, a change in the situation in life of the parties. The cause of action is the probability of loss of pecuniary benefit from the income of the

A deceased. Since that income is now transferred to another channel the individuals who would probably have had the benefit from part of it may be deprived of that part. The present case is analogous to *Dalton v. South Eastern Rail. Co.* (2) and *Franklin v. South Eastern Rail. Co.* (1).

B We are also of opinion that counsel for the company's second point fails, viz., that, inasmuch as the whole income is preserved to a particular class, there is no cause of action. The remedy under the Fatal Accidents Act, 1846, is not given to a class, but to the executor or administrator of the deceased for the benefit of the individuals therein named, viz., the wife, husband, parent and child of the person whose death has been wrongfully caused, as the case may be; and the jury must consider how the interest of each of those parties has been affected by the death.

C The third objection, that the damages are too remote, is met by the answer given to the second objection. We limit our judgment in this case to the rule we have laid down. If there was any evidence which formed an item of pecuniary damage, the verdict must stand, and we are of opinion that there was. If it was necessary to decide upon the right to recover in respect of each of the items which the jury were directed to consider, I should require further time for consideration, but as it is not, the judgment below will be affirmed.

Appeal dismissed.

TAYLOR AND OTHERS v. DEWAR

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn and Mellor, JJ.), November 17, February 22, 1864]

[Reported 5 B. & S. 58; 3 New Rep. 640; 33 L.J.Q.B. 141;
10 L.T. 267; 10 Jur.N.S. 361; 12 W.R. 579; 2 Mar. L.C. 5;
122 E.R. 754]

Insurance—Marine insurance—Collision clause—Loss of lives of master and crew of sunk vessel—Payment by assured to personal representatives of deceased—Liability of insurer.

H A policy of marine insurance contained the following clause: "In case the said vessel shall by accident or negligence of the master or crew run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum not exceeding the value of the said vessel the R. and her freight . . . we, the assurers, shall and will bear and pay such proportion of three fourth parts of the sum so paid as aforesaid as the sum of £4,000 hereby assured bears to the value of the said vessel R. and her freight."

I **Held:** the liability of the insurer under this clause did not extend to damages paid by the assured in respect of loss of life or personal injury arising from collision through negligence.

Notes. Considered: *The North Britain*, [1894] P. 77. Referred to: *The Sylph* (1867), L.R. 2 A. & E. 24; *The Guldfare* (1868), L.R. 2 A. & E. 325; *Adelaide Steamship Co. v. A.-G.*, [1925] All E.R. Rep. 65.

As to the collision clause in a marine insurance policy, see 22 HALSBURY'S LAWS (3rd Edn.) 85-86, 452-453; and for cases see 29 DIGEST (Repl.) 248-250.

Cases referred to :

- (1) *De Vaux v. Salvador* (1836), 4 Ad. & El. 420; 1 Har. & W. 751; 6 Nev. & M.K.B. 713; 5 L.J.K.B. 134; 111 E.R. 845; 29 Digest (Repl.) 246, 1844.
- (2) *Coey v. Smith* (1860), 22 Dunl. (Ct. of Sess.) 955; 29 Digest (Repl.) 250, *589.

Also referred to in argument :

- Tonides v. Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur.N.S. 18; 11 W.R. 858; 1 Mar. L.C. 353; 143 E.R. 445; 29 Digest (Repl.) 268, 2029.

Demurrer to the declaration in an action in which the plaintiffs, the owners of the *Rouen* claimed upon a policy effected with the defendant three fourths of a sum paid by them to the personal representatives of the master and crew of the *Magyar* who were drowned as a result of a collision caused by the negligence of the *Rouen*.

The declaration was upon a policy of marine insurance effected with the defendant upon the hull and furniture of a ship called the *Rouen*, which policy contained a clause as follows :

"And we, the assurers, do further covenant and agree that in case the said vessel shall by accident or negligence of the master or crew run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum or sums not exceeding the value of the said vessel the *Rouen*, and her freight, by or in pursuance of any judgment of any court of law or equity, we, the assurers, shall and will bear and pay such proportion of three fourth parts of the sum so paid as aforesaid as the sum of £4000 hereby assured bears to the value of the said vessel *Rouen* and her freight."

The declaration then averred that the *Rouen* ran down the *Magyar* and sunk her with her master and crew, and that the owner had to pay a sum of money to the personal representatives of the deceased master and crew, whereof he now claimed three fourth parts under the terms of the policy. The defendant demurred.

Sir George Honyman for the defendant.

Manisty, Q.C. (*J. Brown* with him) for the plaintiffs.

Cur. adv. vult.

Feb. 22, 1864. **MELLOR, J.**, read the following judgment of the court.—The question in the case turns on the effect to be given to a clause in a policy of marine insurance, of recent introduction into such instruments, and generally known by the name of the "collision clause," the object of which is to secure the shipowner against damages which he may be compelled to pay for injury done to others by his vessel coming into collision with another, either through accident or negligence, such damage not being by the law of England, as settled by *De Vaux v. Salvador* (1), recoverable under a policy of insurance in the ordinary form. In the present case the clause is as follows :

"In case the vessel shall by accident or negligence of the master and crew run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum not exceeding the value of the said vessel and her freight, by or in pursuance of any judgment of any court of law or equity, the assurers shall pay such proportion of three-fourths of the sum so paid, as the £4000 assured bears to the value of the ship and her freight."

The vessel insured under this policy, the *Rouen*, having come into collision with and run down another ship called the *Magyar*, and the master and five

A of the crew of the latter having been drowned, the owners of the *Rouen* have, by the judgment of the Court of Admiralty, been condemned to pay damages to the personal representatives of the deceased, and such damages have been paid accordingly; and the question raised by the demurrer in this case is whether, under the clause in question, the amount thus paid can be recovered back, the controversy being, whether the provision for indemnity B applies to damages paid by the assured in respect of personal injury arising from collision through negligence. We are, after much consideration, of opinion that it does not, and that our judgment should be for the defendants.

C It was contended on the part of the plaintiffs that the death of the deceased having been occasioned by the running down of the *Magyar*, through the negligence of the master and crew of the ship insured, the damages which the plaintiffs had been condemned to pay were within the words of the clause, and must be held to be within the indemnity. But it is to be observed on the other hand, that the language of the clause is altogether silent as to personal injury. It speaks of the vessel insured, "running down or damaging any other ship or vessel," and of "the assured thereby becoming liable to pay damages." D It seems to us that the more reasonable construction is to consider the damages herein referred to as limited to such damages as shall be payable in respect of the loss of or damage done to the ship run down or damaged, or possibly as extending to her freight or cargo, which for this purpose may perhaps be treated as part of herself. This view becomes very materially strengthened when it is considered that the present is a policy of marine insurance, and that hitherto policies of marine insurance have never been applied E to the purpose of insurance against loss of life, or indemnity in respect of personal injury arising from perils of the seas.

F This being so, it appears to us more reasonable, in the absence of express agreement, to limit the general language of the clause to those matters which have alone been the subject of marine insurance. And it is to be observed, that the clause provides not only for damage occasioned by negligence, but also for damages arising from accident; the latter provision being, probably, introduced to meet the possible case of the vessel becoming subject to foreign jurisdiction in a country by the maritime law of which, in case of accident, the damage is to be divided. It is clear, that the shipowners never could be liable for damages for loss of life or personal injury arising from accidental collision; G their liability to such damages depends on the relation of master and servant between them and those whose negligence occasions the death or personal injury; and the running down or damaging the other ship is only material in so far as it may connect the death or personal injury with that negligence. By providing in the same sentence for the case of accident as well as for that of negligence, the parties would appear to have been looking to what might become H payable in respect of damage to the ship, not to those on board of her, who never could have any claim in respect of injury arising from accident.

I There is a further circumstance deserving of notice. By the terms of the policy the liability of the underwriters is limited "to such proportion of three-fourths of the sum paid as the £4000 assured bears to the value of the ship insured and her freight." This must be taken to mean the actual value of the ship and freight. But, by the express provision of s. 504 of the Merchant Shipping Act, 1854, in no case where liability is incurred in respect of loss of life or personal injury to any passenger, shall the value of any ship or freight be taken to be less than £15 per register ton. The absence of any reference to this special provision in the case of damage arising in respect of loss of life or personal injury, tends strongly to show that the parties were contemplating the case of damage paid in respect of loss of, or damage to, the ship and her appurtenances, as to which the statutory enactment as to value would not apply.

We regret that, in coming to this conclusion, we find ourselves in conflict with the decision of the Court of Session in *Coe v. Smith* (2). The words in the policy in that case are not, indeed, identical with those occurring in the present, but we think they are in substance the same; and it is, therefore, with very great reluctance that we find ourselves compelled to differ from a court whose decisions, although not binding on us, are entitled to the highest consideration at our hands. But, after the best consideration we have been able to give to the case, we cannot arrive at any other conclusion than that the view taken by the Lord Ordinary in that case was the right one, namely, that on such a clause as the present, occurring in a policy of marine insurance, the liability of the insurer does not extend to damages paid by the assured in respect of loss of life or personal injury. Our judgment will, therefore, be for the defendant.

Judgment for defendant.

HINDMARSH v. CHARLTON

[HOUSE OF LORDS (Lord Campbell, L.C., Lord Chelmsford and Lord Cranworth),
March 11, 1861]

[Reported 8 H.L.Cas. 160; 4 L.T. 125; 25 J.P. 339; 7 Jur.N.S. 611;
9 W.R. 521; 11 E.R. 388]

Will—Attestation—Witness's signature—Need for name or mark representing name—Acknowledgment by witness of earlier signature—Addition to signature written earlier.

To make a valid subscription of a witness to a will there must either be the name or some mark which is intended to represent the name.

A testator signed his will, and subsequently acknowledged the signature in the presence of X., who signed his name as a witness. When X. signed, he failed to cross a letter "F" which was one of his initials. Later that day the testator again acknowledged his signature, this time in the presence of X. and Y. Thereupon Y. in the presence of the testator signed the will, but X. merely crossed the letter "F" and added the date.

Held: the crossing of the letter "F" might amount to an acknowledgment of the earlier signature of the witness, but a witness was not permitted to acknowledge such a signature; in the present case the adding of the stroke to the "F" was not intended to represent his name; and, therefore, the crossing of the "F" did not constitute a valid subscription by the witness and the will was not validly executed.

Notes. The requirement in s. 9 of the Wills Act, 1837, that no will shall be valid unless it shall be signed "at the foot or end thereof" by the testator, or by some other person in his presence and at his direction, has been amplified by the Wills Act Amendment Act, 1852.

Considered: *In the Goods of Maddock* (1874), L.R. 3 P. & D. 169; *Body v. Halse*, *Hunt v. Halse*, *Fenning v. Halse*, [1892] 1 Q.B. 203; *Wyatt v. Berry*, [1893] P. 5; *In the Goods of Swift* (1900), 17 T.L.R. 16; *Re Chalcraft*, *Chalcraft v. Giles*, [1948] 1 All E.R. 700; *In the Estate of Cook*, *Murison v. Cook*, [1960] 1 All E.R. 690. Referred to: *In the Goods of Blewitt* (1880), 5 P.D. 116; *Brown v. Shirrow*, [1902] P. 3; *In the Estate of Davies*, *Russell v. Delaney*, [1951] 1 All E.R. 920.

As to requisites for formal validity of a will, see 39 HALSBURY'S LAWS (3rd Edn.) 875-883; and for cases, see 44 DIGEST 258-278. For the Wills Act, 1837, s. 9, see 26 HALSBURY'S STATUTES (2nd Edn.) 1332; for the Wills Act Amendment Act, 1852, see *ibid.* 1354.

Case referred to :

(1) *White v. British Museum Trustees* (1829), 6 Bing. 310.

Also referred to in argument :

Hudson v. Parker (1844), 1 Rob. Eccl. 14; 3 Notes of Cases, 236; 8 Jur. 786; 163 E.R. 948; 44 Digest 258, 850.

Roberts v. Phillips (1855), 4 E. & B. 450; 3 C.L.R. 513; 24 L.J.Q.B. 171; 24 L.T.O.S. 337; 1 Jur.N.S. 444; 119 E.R. 162; 44 Digest 267, 963.

In the Goods of Ashmore (1843), 3 Curt. 756; 2 Notes of Cases, 465; 7 Jur. 1045; 163 E.R. 892; 44 Digest 264, 924.

In the Goods of Amiss (1849), 2 Rob. Eccl. 116; 7 Notes of Cases, 274; 163 E.R. 1262; 44 Digest 270, 1011.

In the Goods of Christian (1849), 2 Rob. Eccl. 110; 7 Notes of Cases, 265; 163 E.R. 1260; 44 Digest 272, 1039.

In the Goods of Byrd (1842), 3 Curt. 117; 1 Notes of Cases, 490; 163 E.R. 674; 44 Digest 260, 873.

Moore v. King (1842), 3 Curt. 243; 2 Notes of Cases, 45; 7 Jur. 205; 163 E.R. 716; 44 Digest 261, 884.

In the Goods of Trevanion (1850), 2 Rob. Eccl. 311; 163 E.R. 1328; 44 Digest 272, 1041.

Appeal by the defendant, Bertram Hindmarsh, from a decision of the Court of Probate holding that a will of Joseph Hindmarsh dated Dec. 17, 1857, had not been properly executed according to the formalities prescribed by the Wills Act, 1837, s. 9; the respondent, Margaret Charlton, was the plaintiff in the action and the sole next of kin of Joseph Hindmarsh.

At the trial, which took place before BYLES, J., at Durham, it appeared that the will in question purported to be signed by the deceased, thus :

"October 30, 1856.

JOSEPH HINDMARSH."

Opposite this signature was the attestation of the witnesses, in this form :

"Witness to the above

Will & testament & signature, -

FRED. WM. NAP. WILSON,

DAVID B. WHITE, M.D.

This 17th day of December, 1857."

The dispute was chiefly whether what took place on Dec. 17, 1857, on the part of Mr. Wilson, one of the witnesses, who had previously signed his name amounted to an attestation and subscription within the meaning of the Wills Act, 1837, s. 9, which enacts :

"That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The evidence given at the trial bearing on the subscription and attestation was as follows. In December, 1857, Dr. David White, physician at Newcastle, attended Mr. Hindmarsh. He first saw Mr. Wilson, and conversed with him as to the state of the patient's health. It was mentioned to him that a will was

written, and they were anxious he should witness it, which he agreed to do. He went immediately into the testator's room. The documents (the two wills) were produced to him in the presence of the testator, and brought by the housekeeper. Mr. Wilson was in the testator's room with him; the testator was in his bed. Dr. White thought that he gave the papers into the testator's hands. He asked the testator if that was his signature? The testator asked to be allowed to put on his spectacles, and he put them on. He examined the signature. He said most distinctly, "This is my handwriting, and this is my will," in the presence of Mr. Wilson and Dr. White. The latter took the will from the testator's hand, and to the best of his recollection signed it in that room. Dr. White signed both. He did not remember what occurred after that. He remembered Mr. Wilson signing the date, because he requested him to do so. Further than that he did not remember. He requested Mr. Wilson to put the date, but he said that if he were called on to swear he saw him do it, he would not like to do so.

In December, 1857, Frederick William Napoleon Wilson, surgeon at Gosforth, attended Mr. Hindmarsh. On the forenoon of Dec. 17 he saw Mr. Hindmarsh and was asked by him to sign his will as a witness, and the will was brought out, both parts. The testator looked at it, and said that was his will. Mr. Wilson wrote at the bottom, "Witness to the above will and testament, and signature," and then his name, "Fred. Wm. Nap. Wilson," on both papers. In the afternoon Dr. White came. In the room, Dr. White examined the patient as to his health. The doctor and Mr. Wilson then went into the other room, where they had a consultation. Mr. Wilson had suggested to Hindmarsh, before they left the room, that the testator had better have another witness. Dr. White took the will in his hands, and went back to the room where Mr. Hindmarsh was. He asked Mr. Hindmarsh if that was his will. Mr. Wilson was present. The testator said, "Well, I can't see very well—get me my spectacles." The housekeeper gave him his spectacles, and he sat up in the bed, and looked at the paper and said, "Yes, that is my will, and this is my signature," or something to that effect. At a small table at the head of the bed, close to the bed, Dr. White signed his name. After he had signed Mr. Wilson took the papers and went across towards the window, where there was another table, and sat down in an armchair; Dr. White was there; and then, after some conversation about the date being added, Mr. Wilson distinctly remembered retouching his name, by putting a cross on the "F" on the paper which was uppermost, which was blue; and then he added the date in both wills, after which, he believed, the documents were both given to the housekeeper.

Mr. Wilson said that he very often omitted to put a cross, and where he found it had not been done he always put it. He had noticed the omission of the cross and supplying the omission was merely in pursuance of his habit. He thought it better to do so. He did not know they were duplicates and thought he had done so in both, but he distinctly remembered doing it on the paper that was uppermost. He had not detected the omission in the second paper. He thought it was better to complete the name and thought that adding the date was equal to a repetition of the signature. He had no other intention. It was by the date he intended to repeat his signature. His sole object was to supply the omission to make the name complete. He thought it necessary to have the name complete, to make the name complete to the will. He was attesting the will, and thought it was necessary to have a complete signature. His object was to make the signature of the morning complete.

A verdict was entered for the defendant, the plaintiff by consent having leave to move to set aside such verdict and enter the same for her, the plaintiff; the court, by consent of parties, to have power to draw any inference of fact, if it be necessary to confer any such power on the court, and, if the court see fit, to exercise it. On April 19, 1869, a rule nisi was moved for and

granted, calling on the defendant to show cause before the judge of the Court of Probate why the verdict so found for the defendant should not be set aside, and a verdict entered for the plaintiff in lieu thereof, on the ground that, upon the evidence given at the trial, it appeared that the alleged will of the deceased was not duly attested and subscribed, according to the Wills Act, 1837, s. 9. Cause was shown against such rule in the Court of Probate on May 18, 1859, when the learned judge of that court made the rule absolute, on the ground that the will in question was not, according to the evidence, executed and attested according to the provisions of the statute. The defendant appealed to the House of Lords.

Manisty, Q.C., and *Heath* for the appellant.

Atherton, Q.C., and *Dr. Spinks* for the respondent. —

LORD CAMPBELL, L.C.—These are very distressing cases for judges to determine. I may honestly say, that we have a strong inclination in our minds to support the validity of the will in dispute, which the parties bona fide made, as they believed, according to law, and where there is not the smallest suspicion in the circumstances of the case. But we must obey the directions of the legislature, and we are not at liberty to introduce nice distinctions which may bring about great uncertainty and confusion. Having heard the case very lucidly and ably argued on both sides, I am of opinion that the learned judge of the court below came to a right conclusion in holding that this will was not made in accordance with the requirements of the legislature.

The Wills Act, 1837, s. 9, requires that a will to be valid shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator. It is settled by *White v. British Museum Trustees* (1), and other decisions to the same effect, that after the will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the subscription of those witnesses in the presence of the testator. The question in this case is whether that which took place was a subscription of the witness whose subscription is in question or not. I will lay down this as my notion of the law, that to make a valid subscription of a witness there must either be the name, or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was anything written that was meant to represent the name. The horizontal stroke made by the witness was merely intended to perfect the letter "F" in the same manner as if he had perfected the letter "i" by putting a dot over it, which he had not dotted in the morning. Can that be considered as amounting to a subscription? It was an acknowledgment by him of his former signature written in the morning, but it is not a new subscription. It has been solemnly determined that an acknowledgment by a witness of his signature is not sufficient. When I was at the Bar there was a question whether the acknowledgment of the signature by a witness putting a dry pen over it would be sufficient, but since that time it has been decided that it would not be sufficient. But this does not in my opinion amount to a subscription, because, whether the "i" was dotted, or the horizontal stroke was put to the "F" to perfect the word, it was not intended that either the dot or the horizontal stroke should represent the name. The name was written in the morning, and that would continue as the subscription of the witness. I regret very much that we are compelled to hold this instrument to be an invalid will, but we are restrained by the Act of Parliament, and, therefore, I must advise your Lordships that this appeal be dismissed.

LORD CRANWORTH.—I concur with my noble and learned friend in having a sort of personal feeling of regret that this will cannot be sustained as a valid will. It appears to be a reasonable will, and a will as to which there is not the least suspicion of anything like fraud or imposition. But, for the security of mankind, the legislature has thought fit to prescribe certain forms and rules which are necessary to be complied with, in order to authorise a different distribution of property from that which the law would make if there were no will: the legislature, in truth, on these forms being complied with, putting into the hands of the party who is making a will power to dispose of his property in a way contrary to what, but for the will, would be the provisions of the law. It is reasonable that, under these circumstances, there should be some rules to be acted upon no one can doubt, and those rules being established, this House, as the ultimate court of appeal, would be, I think, ill discharging its duty to the public if it were to listen to suggestions of minute differences, which would not meet the ordinary apprehensions of mankind, and which would necessarily or naturally lead to great discussions and litigation.

It has been determined upon the construction of the Wills Act Amendment Act, 1852, and quite rightly determined, that there must be a subscription by two witnesses after the testator has signed the will in his presence. In this case the testator acknowledged his signature in the presence of two witnesses, but it is certain that there was not here a subscription after the testator had acknowledged the will by Mr. Wilson, one of the witnesses, unless his putting a mark across the letter "F" (or "T" as it would have stood without the cross) amounts to a subscription by him. Upon that subject I entirely concur with my noble and learned friend, for I do not think that you could suppose anything so absurd as that, when he wrote the words "Frederick William Napoleon Wilson" in the morning, he did not mean that to be his signature, but that he intended the mark which he afterwards put to be his signature; but unless you suppose that there was no subscription by Mr. Wilson after the acknowledgment by the testator, that that was his will, his putting the cross to the letter "F" in the afternoon cannot be said to be his subscription. I must observe that the acknowledgment of his signature by the testator is sufficient, but the witness stands in a different position. After the signature of the will by the testator his acknowledgment will do, but by the express terms of the statute that will not do with regard to the witness. If he had said nothing at all, the putting a mark across the "F" might have amounted to an acknowledgment of his signature, but that will not do, and yet it cannot amount to more than that. Upon these short grounds—for the case lies within a very narrow compass—I concur with my noble and learned friend that this instrument cannot be taken to be a will duly executed by this alleged testator.

LORD CHELMSFORD.—I regret to have to agree with my two noble and learned friends that the will was not duly executed as required by the Wills Act, 1837. To render a will valid, the signature or acknowledgment of the testator must be in the presence of two witnesses present at the time, and the witnesses must attest and subscribe the will in the presence of the testator. Upon witnessing the will in the forenoon of the day of its execution, Mr. Wilson subscribed his name, intending that it should be a complete subscription under the Act, because only one witness was present; and if it had been left without anything more having been done by Mr. Wilson, no question of the imperfect attestation and subscription of the will could possibly have existed. The sole question is whether what was done in the afternoon, when a second witness was present, would make a complete attestation and subscription? Mr. Wilson clearly intended to subscribe as a witness in the afternoon; but he thought that adding the date was equivalent to a repetition of the signature. Did this amount to a second subscription?

A Suppose Mr. Wilson had not subscribed his name in the morning, and in the afternoon had merely put the date, could that have been considered to be such a subscription as the Act requires? The subscription must mean such a signature as is descriptive of the witness, whether by a mark, or by initials, or by writing the full name; and if the date alone would not do, of what efficacy can it be towards completing the subscription? If Mr. Wilson in the morning had left his signature incomplete by the omission, for instance, of his surname, which he had added in the afternoon, that would have been a subscription which would have satisfied the requisitions of the Act, for there would really have been one complete subscription; but the omission of the cross to the "F" in his Christian name did not make the signature imperfect, for Mr. Wilson states that he very often omitted to put the cross at all, and he did not add the cross to complete his signature so as virtually to subscribe anew, but merely in pursuance of his habit of supplying the omission when he noticed it. The words of the Act appear to me to be quite clear in prescribing what shall be necessary to render a will valid. But, of course, no equivalent can be substituted for its plain requisitions. However much, therefore, we may regret that the will of the testator should be disappointed by an accidental omission, where all parties intended to comply with the directions of the Act, yet we are bound by the express and clear language of the legislature, and, however reluctantly, we are compelled to pronounce the will to be invalid.

Appeal dismissed.

LEE v. GRIFFIN

[COURT OF QUEEN'S BENCH (Crompton, Hill and Blackburn, JJ.), May 9, 1861]

[Reported 1 B. & S. 272; 30 L.J.Q.B. 252; 4 L.T. 546;
7 Jur.N.S. 1302; 9 W.R. 702; 121 E.R. 716]

Sale of Goods—Goods to be manufactured—Contract of sale distinguished from contract for work and labour—Artificial teeth.

A dentist was engaged to make two sets of artificial teeth.

Held: the agreement was one for the sale of goods, not work and labour, and, therefore, fell within the Statute of Frauds, 1677, s. 17.

Notes. The provisions of the Statute of Frauds Act, 1677, s. 17, re-enacted by the Sale of Goods Act, 1893, s. 4, were repealed by the Law Reform (Enforcement of Contracts) Act, 1954 (34 HALSBURY'S STATUTES (2nd Edn.) 757). As a result, contracts for the sale of goods no longer require a note or memorandum in writing to render them enforceable. The distinction between contracts for the sale of goods and contracts for work and materials is no longer as vital as formerly, but the distinction may still prove important, e.g., different rules apply if a contract for the sale of goods is frustrated from those which apply in other cases.

Applied: *Copland v. Miller* (1903), Times, Nov. 28; *R. v. Wood Green Profiteering Committee, Ex parte Boots Cash Chemists (Southern)* (1919), 89 L.J.K.B. 55. Considered and Applied: *Robinson v. Graves*, [1935] All E.R. Rep. 935. Applied: *Marcel (Furriers), Ltd. v. Tapper*, [1953] 1 All E.R. 15. Referred to: *Dominion Press v. Customs and Excise Minister*, [1928] A.C. 340; *G. H. Myers & Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46; *Samuels v. Davis*, [1943] 2 All E.R. 3.

As to distinction between contracts for sale of goods and for work and labour, see 2 HALSBURY'S LAWS (3rd Edn.) 127; 34 HALSBURY'S LAWS (3rd Edn.) 6-7; and for cases see 39 DIGEST 358-360.

Cases referred to :

- (1) *Ridgway v. Wharton* (1857), 6 H.L.Cas. 238; 27 L.J.Ch. 46; 29 L.T.O.S. 390; 4 Jur.N.S. 173; 5 W.R. 804; 10 E.R. 1287, H.L.; 39 Digest 386, 234.
- (2) *Clay v. Yates* (1856), 1 H. & N. 73; 25 L.J.Ex. 237; 27 L.T.O.S. 126; 2 Jur.N.S. 908; 4 W.R. 557; 156 E.R. 1123; 39 Digest 363, 44.
- (3) *Grafton v. Armitage* (1845), 2 C.B. 336; 15 L.J.C.P. 20; 6 L.T.O.S. 152; 9 Jur. 1039; 135 E.R. 975; 44 Digest 1293, 1.
- (4) *Atkinson v. Bell* (1828), 8 B. & C. 277; Dan. & H. 93; 2 Man. & Ry.K.B. 292; 6 L.J.O.S.K.B. 258; 108 E.R. 1046; 44 Digest 1293, 2.

Also referred to in argument :

Towers v. Osborne (1722), 1 Stra. 506; 93 E.R. 664; 39 Digest 367, 60.

Rule Nisi obtained by the defendant for an order of nonsuit in an action in which the plaintiff, a dentist, claimed the sum of £21 for two sets of artificial teeth made for one Frances Pearson, deceased, from the defendant as her executor. The defendant relied on the absence of a written note or memorandum, in accordance with the Statute of Frauds, 1677, s. 17.

The case was tried before CROMPTON, J. The evidence was, that the plaintiff saw F. Pearson, the deceased, in November, 1857, and that she desired some artificial teeth to be made. The plaintiff accordingly made a model of her mouth, and from it made the two sets of artificial teeth. Early in December, 1857, the plaintiff wrote to F. Pearson, to say, that the teeth were ready, and proposing an interview to have them fitted. In reply he received an answer, in which F. Pearson said, "I regret my health will not permit my taking advantage of your kind efforts to oblige me, and I fear it may be some days at least before I am able to see you." F. Pearson died in the April following, the teeth never having been delivered. A verdict was found for the plaintiff for £21, with leave to the defendant to move to enter a nonsuit.

The defendant obtained a rule nisi accordingly.

By the Statute of Frauds, 1677, s. 17 [repealed] :

"No contract for the sale of any goods, wares and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised."

Patchett for the plaintiff showed cause.

Griffiths for the defendant in support of the rule.

CROMPTON, J.—I am of opinion that this rule must be made absolute. There is no pretence for saying that there was any written contract. *Ridgway v. Wharton* (1) only decided that, if in a letter a written document be referred to in general terms, you may show by parol what written document is meant. But if the letter of the testatrix referred to the previous letter of the plaintiff, there would be no written contract, because neither of the letters show any of its terms. The main point is whether this is a contract which falls under the general description of work, labour and materials, or whether it is one of goods bargained and sold. Sometimes the distinction between these two classes of cases runs rather fine, and perhaps, if the chattel which is supplied be entirely subordinate and ancillary to the work and labour, as in the case of the paper supplied for printing from a manuscript, then a count for work, labour and materials would lie, as in *Clay v. Yates* (2), which has been referred to; but even that case is not altogether free from doubt in my mind. I certainly do not assent to the argument that, wherever it is the

A skill of the plaintiff which makes the article of value, a count for work, labour and materials is sufficient. There may be cases, as that of an attorney who supplies a small quantity of writing materials, or of a surgeon who supplies a few small articles necessary for his patient, where such a count might be supported without resorting to one for goods sold and delivered. But such is not this case, which I think is clearly one of a contract for the supply of goods
B within the meaning of the Statute of Frauds.

HILL, J.—I am of the same opinion. I think *Clay v. Yates* (2) was rightly decided upon the particular facts of that case. That was not the case of one party ordering a chattel of another where the contract is to make a thing and supply it to another, which is always a contract within the Statute of Frauds.
C With the exception of the dictum of *BAYLEY, J.*,—that a person employed to work up his own materials cannot recover for work and labour (which dictum was repudiated by *MAULE, J.*, and *TINDAL, C.J.*, in *Grafton v. Armitage* (3)), *Atkinson v. Bell* (4) was rightly decided. But independently of this I do not see how the plaintiff can maintain this action. According to the plaintiff's own statement he received an order for some artificial teeth which when fitted
D he was to be paid for. They never were fitted and no fault being committed by the deceased, the plaintiff has no right of action.

BLACKBURN, J.—On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the Statute of Frauds.

On the other point, the question is whether the contract was one for the sale
E of goods or for work and labour. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labour done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party
F cannot sue for work and labour; but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a
G book would most probably fall within the same category. In *Atkinson v. Bell* (4) the contract, if carried out, would have resulted in the sale of a chattel. In *Grafton v. Armitage* (3) *TINDAL, C.J.*, lays down this very principle. He draws a distinction between *Atkinson v. Bell* (4) and the case before him. The reason he gives is that, in the former case, "the substance of the contract was goods to be sold and delivered by the one party to the other:" in the
H latter "there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered." I think that distinction reconciles those two cases, and the decision of *Clay v. Yates* (2) is not inconsistent with them.

In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the
I substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.

Rule absolute.

BARWICK v. ENGLISH JOINT STOCK BANK

[COURT OF EXCHEQUER CHAMBER (Willes, Blackburn, Mellor, Montague Smith and Lush, JJ.), February 8, May 18, 1867]

[Reported L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461;
15 W.R. 877]

Master and Servant—Liability of master for act of servant—Fraud—Master innocent of fraud—Servant acting within scope of authority—Manager of bank representing that effect would be given to guarantee.

D., a customer of the defendant bank, being under contract to supply a quantity of oats to the government, applied to the plaintiff to furnish him with them. The plaintiff refused to do so unless he was secured by a satisfactory guarantee from the defendants, and an engagement was thereupon entered into between D. and the defendants' manager that on receipt of the price of the oats from the government the defendants would honour D.'s cheque in favour of the plaintiff in priority to any other payment except one to the defendants' own bank. The plaintiff alleged that in the course of the negotiation for the guarantee the manager stated to him that, whenever the bank received the government cheque, the plaintiff should receive the money. D. was at the time the guarantee was given indebted to the bank in a sum of money equalling in amount the sum to be received from the government as the price of the oats. The defendants' manager, though aware of this fact, did not mention it to the plaintiff at the time of giving the guarantee. The plaintiff supplied the oats to D. on the faith of the guarantee, and the government cheque for the price of them was paid into the defendants' bank. D. gave his cheque for payment of the price of them to the plaintiff, but, on the plaintiff's presenting it to the bank, it was dishonoured. In an action by the plaintiff against the bank,

Held: there was evidence to go to the jury of a fraudulent representation on the part of the defendants' manager that the guarantee would probably be given effect to, while he knew and intended that it would not; if there was such a fraudulent representation, the defendants would be answerable for it since a master was answerable for the wrongful act of his servant committed in the course of the master's business and for the master's benefit, and it was irrelevant that the master had not authorised the particular act, since it was sufficient that he had put his agent in his place as to a particular class of acts; and, therefore, the fraud might be pleaded as the fraud of the defendants themselves.

Notes. In the judgment in this case, it is stated that "the general rule is that the master is answerable for the wrongful act of the servant which is committed in the course of his service and for his master's benefit." The decision of the House of Lords in *Lloyd v. Grace, Smith & Co.* ([1911-13] All E.R. Rep. 51) shows that it is not necessary, in order to render the master liable, that the wrongful act is committed for the master's benefit.

Approved: *The Thetis* (1869), L.R. 2 A. & E. 365. Applied: *Swift v. Winterbotham* (1873), L.R. 8 Q.B. 244. Considered and Distinguished: *Swift v. Jewsbury* (1874), L.R. 9 Q.B. 301. Followed: *Mackay v. Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394. Considered: *Bolingbroke v. Swindon Local Board* (1874), L.R. 9 C.P. 575. Distinguished: *Weir v. Barnett* (1877), 3 Ex.D. 32. Approved: *Swire v. Francis* (1877), 3 App. Cas. 106. Considered: *Weir v. Bell* (1878), 3 Ex.D. 238. Applied: *Chapleo v. Brunswick Benefit Building Society* (1880), 5 C.P.D. 331. Considered: *Houldsworth v. City of Glasgow Bank*, [1874-1880] All E.R. Rep. 333. Distinguished: *Chapleo v. Brunswick Building Society* (1881), 6 Q.B.D. 696. Considered: *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q.B.D. 714. Explained: *Thorne v. Heard*, [1894] 1 Ch.

- A** 599. Applied: *Spooner v. Browning, Todd and Whish* (1897), 77 L.T. 685; *Ormerod v. Rochdale Corpn.* (1898), 62 J.P. 153; *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426. Considered: *Whitechurch v. Cavanagh*, [1902] A.C. 117; *Hambro v. Burnand*, [1903] 2 K.B. 399. Explained: *Hamlyn v. Houston*, [1903] 1 K.B. 81. Applied: *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; *Ruben and Ladenburg v. Great Fingall Consolidated*, [1904-7] All E.R. Rep. 460; *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K.B. 545. Considered: *Malcolm, Brunner & Co. v. Waterhouse*, [1908] 24 T.L.R. 854; *Burdett v. Horne* (1911), 27 T.L.R. 402. Distinguished: *Wake v. Dyer* (1911), 104 L.T. 448. Explained: *Lloyd v. Grace, Smith & Co.*, [1911-13] All E.R. Rep. 51. Considered: *Kleinwort, Sons & Co. v. Associated Automatic Machine Corpn., Ltd.* (1932), 77 Sol. Jo. 12; *Aitchison v. Page Motors, Ltd.*, [1935] All E.R. Rep. 594; *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding U.D.C.*, [1937] 3 All E.R. 335; *Armstrong v. Strain*, [1951] 1 T.L.R. 856. Referred to: *Edward v. London and North Western Rail. Co.* (1870), L.R. 5 C.P. 445; *Burma Trading Corpn., Ltd. v. Mirza Mahomed Ally Sherazee* (1878), L.R. 5 Ind. App. 130; *Re Collie, Ex parte Adamson* (1878), 8 Ch.D. 867; *Baldry v. Bates* (1885), T.L.R. 311; *Marsh v. Joseph* (1896), 66 L.J.Ch. 128;
- D** *Citizens' Life Assurance Co. v. Brown*, [1904-7] All E.R. Rep. 925; *S. Pearson & Son, Ltd. v. Dublin Corpn.*, [1904-7] All E.R. Rep. 255; *Mair v. Rio Grande Rubber Estate* (1908), 24 T.L.R. 692; *Watkins v. Naval Colliery Co.* (1912), 107 L.T. 321; *Dunlop Pneumatic Tyre Co. v. Maison Talbot* (1903), 52 W.R. 254; *Janvier v. Sweeney*, [1918-19] All E.R. Rep. 1056; *Pratt v. British Medical Association*, [1918-19] All E.R. Rep. 104; *Kreditbank Cassel G.m.b.H. v. Schenkens, Ltd.*, [1927] All E.R. Rep. 421; *Reckitt v. Barnett, Pembroke and Slater, Ltd.*, [1928] 2 K.B. 244; *Jewson & Sons, Ltd. v. Arcos, Ltd.* (1933), 39 Com. Cas. 59; *Sun Life Assurance Co. of Canada v. W. H. Smith & Son, Ltd.* (1934), 150 L.T. 211; *London County Freehold and Leasehold Properties, Ltd. v. Berkeley Property and Investment Co.*, [1936] 2 All E.R. 1039; *Uxbridge Permanent Benefit Building Society v. Pickard*, [1939] 2 All E.R. 344; *Briss v. Woolley*, [1954] 1 All E.R. 909.
- F**

As to misrepresentation by agent, see 1 HALSBURY'S LAWS (3rd Edn.) 221, 223; as to fraudulent surety, see 18 HALSBURY'S LAWS (3rd Edn.) 448; as to liability of master for torts of servant, see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq.; as to implied authority to make representation, see 26 HALSBURY'S LAWS (3rd Edn.) 831-832; and for cases see 34 DIGEST (Repl.) 160.

G Cases referred to:

- (1) *Udell v. Atherton* (1861), 7 H. & N. 172; 30 L.J.Ex. 337; 4 L.T. 797; 7 Jur.N.S. 777; 1 Digest (Repl.) 683, 2433.
- (2) *Raphael v. Goodman* (1838), 8 Ad. & El. 565; 3 Nev. & P.K.B. 547; 1 Will. Woll. & H. 363; 7 L.J.Q.B. 220; 112 E.R. 952; 26 Digest (Repl.) 240, 1838.

H Also referred to in argument:

Mocatta v. Murgatroyd (1717), 1 P.Wms. 393; 24 E.R. 440, L.C.; 35 Digest (Repl.) 536, 2163.

Berrisford v. Milward (1740), 2 Atk. 49; 26 E.R. 427; 21 Digest (Repl.) 460, 1590.

Lee v. Jones (1864), 17 C.B.N.S. 482; 34 L.J.C.P. 131; 12 L.T. 122; 11 Jur.N.S. 81; 13 W.R. 318; 144 E.R. 194, Ex. Ch.; 26 Digest (Repl.) 223, 1727.

I *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; 2 New Rep. 521; 32 L.J.Ex. 273; 10 Jur.N.S. 102; 11 W.R. 862; 159 E.R. 73, Ex. Ch.; 21 Digest (Repl.) 370, 1107.

Freeman v. Cooke (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 12 Digest (Repl.) 74, 414.

Cornfoot v. Fowke (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 4 Jur. 919; 151 E.R. 450; 1 Digest (Repl.) 683, 2435.

Wilde v. Gibson (1848), 1 H.L.Cas. 605; 12 Jur. 527; 9 E.R. 897, H.L.; 1 Digest (Repl.) 708, 2586.

Appeal from a decision of MARTIN, B., in an action tried by him in which the plaintiff claimed damages against the defendants for the fraudulent misrepresentation of their manager. MARTIN, B., held there was insufficient evidence to go to the jury and nonsuited the plaintiff, but signed a bill of exceptions setting out the evidence. The plaintiff moved for a re-trial.

The first count of the declaration stated that, in consideration that the plaintiff would sell to one J. Davis 1000 quarters of oats to enable him to carry out a certain contract with the Commissariat of the War Department, the defendants promised that, on receipt of the money from the commissariat, they would honour Davis's cheque in favour of the plaintiff in priority to any other payment except to the defendants' own bank; that the plaintiff accordingly sold the oats to Davis; that the commissariat money was received by the defendants; that Davis gave plaintiff his cheque, and that the money received was more than sufficient to cover it, yet the defendants refused to honour the said cheque. There were also counts for money received to the use of the plaintiff, and on accounts stated, and a count for a false representation to the plaintiff by the defendants that Davis was not indebted to them, whereby they induced the plaintiff to accept the guarantee mentioned in the first count, and to sell the oats to Davis.

The defendants pleaded to the first count the general issue; and secondly, that the money received from the commissariat was not more than sufficient to pay what was due from Davis to the defendants; to the money counts and the count for false representation, the general issue. The plaintiff replied taking issue, and to the second plea, that the money due from Davis to the bank was due before the guarantee was given, but that plaintiff had no notice of the fact, and that defendants fraudulently concealed it, and represented that the only payments to be made to the defendants out of the money to be received would be payments of future advances. The defendants rejoined, taking issue on the second replication.

The facts appeared at the trial to be as follows: The plaintiff had been in the habit of supplying oats to a customer of the bank, named Davis, for the purpose of enabling him to perform a government contract for the supply of forage at Aldershot, on the strength of some guarantee, the exact nature of which did not appear, but with which the plaintiff had become dissatisfied. In December, 1865, the plaintiff refused to supply any more oats unless secured by a more satisfactory guarantee. He applied to the manager of the bank on the subject, and, after some conversation, a guarantee was given by him to the effect set forth in the declaration. The plaintiff's evidence was that the manager told him that at whatever time he received the government cheque, he the plaintiff should receive the money, and that he never communicated to him the fact of the existence of any debt from Davis to the bank. The plaintiff on the faith of this guarantee supplied 1000 quarters of oats, being the monthly quantity to be supplied under the contract, to Davis, and received in payment for them Davis's cheque. The defendants refused to honour it when presented. It was proved by Davis that he had received a government cheque for £1227 in payment for the oats, and paid it into the bank, and that at the time the guarantee was given and the cheque paid in he owed the bank more than £1200. Upon these facts the learned judge ruled that there was no evidence to go to the jury in support of the plaintiff's case, and directed a verdict for the defendants.

Brown, Q.C. (with him *Huddleston, Q.C.*, and *Griffits*) for the plaintiff.

Mellish, Q.C. (with him *Watkin Williams*) for the defendants.

Cur. adv. vult.

May 18, 1867. **WILLES, J.**, read the following judgment of the court.—In this case there was a bill of exceptions to the ruling of my brother MARTIN

A at the trial, that there was no evidence to go to the jury. It was an action brought by Mr. Barwick against the bank for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which was in point of fact alleged to have been committed by the manager of the bank in the course of their business.

B At the trial two witnesses were called; Mr. Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis, and that he had become dissatisfied with the guarantee which was given him by the bank through the manager for the oats supplied to Davis, the precise terms of which guarantee however did not appear. He further stated that he refused to supply more oats without getting a more satisfactory guarantee; that he applied to the manager of the bank, and after some conversation between them a guarantee was given, which guarantee is set out in the bill of exceptions, and is to the effect that if Barwick sold to or purchased for Davis a quantity not exceeding 1000 quarters of oats for the purposes of the contract under which Davis had to supply the government, then, on the receipt of the money on the commissariat warrant for the forage supplied for the then present month, the bank would pay Barwick in priority to any other payment except to the bank, and provided Davis did not become bankrupt or insolvent. Barwick's statement was, that in the course of the conversation about the guarantee the manager told him that, at whatever time he received the government cheque, Barwick should receive the money.

E That being the state of things upon the evidence of Barwick, it is obvious that there was a case for the jury entitling them to conclude, if they had thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably or might probably be paid, and they might then probably have come to the conclusion that Barwick took the guarantee supposing it was of some value, that it would or might probably be paid, and the jury might have so concluded; but if the manager at the time, from his knowledge of the accounts, knew that it was probable in a very high degree that the guarantee would not be paid, and knew and intended that it should not be paid, and kept back from Barwick the facts which made it improbable to the extent of its being a matter of impossibility that the guarantee should be paid, the jury might well have thought that it was in their province to decide that the manager had been guilty of a fraud on Barwick.

G Was there evidence that such knowledge was in the possession of the manager? Barwick had no knowledge of the state of the accounts, nor did the manager make any communication to him with respect to it. The evidence of Davis was given for the purpose of supplying that part of the case, and he stated that immediately before the guarantee had been given he went to the manager, told him that it was impossible for him to go on except he got supplies, that he could not go on unless he got further supplies, and that the government were buying in against him; on which the manager replied that he (Davis) must go and try his friends; but Davis informed the manager that Barwick would go no further except he had a further guarantee. Upon that the manager admitted, Davis added, at the time, "I owe the bank above £1200". The result was, the oats were supplied by Davis, and were delivered, and the commissariat paid him a large sum of money, about £1200, which was thereupon paid into the bank. Davis gave a cheque to Barwick, who presented it to the bank, whereupon, without further explanation, the cheque was dishonoured.

I That is the plain state of the facts; and it was contended on the part of the bank that, inasmuch as the guarantee contained a stipulation that Barwick's debt should only be paid subject to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. We think there was evidence from which the jury might conclude that there had been that which I have already said would constitute a fraud. To speak

sparingly, it was a matter to be tried, and we desire not to anticipate the judgment of the constitutional tribunal. The jury might on these facts justly come to the conclusion that the manager knew and intended that the guarantee should be unavailing, and that he procured the payment to the bank of the government cheque by keeping back from Barwick the state of Davis's account.

If the jury took that view of the facts, they would conclude that it was such a fraud as the plaintiff complained of, and ought to be compensated for; if, therefore, it was a fraud in the manager, then arises the question whether the consequence follows that the bank, the employers, would be answerable for it? It is enough to say, in respect to that, we conceive that we are in no respect overruling the opinion of two of the learned barons, MARTIN and BRAMWELL, BB., in the case which was most relied on to establish the proposition that a principal is not answerable for the fraud of his agent. That case was *Udell v. Atherton* (1). Upon looking to that case it seems very clear that the division of opinion that took place in the Court of Exchequer arose not so much on the question whether the principal is answerable for the act of his agent in the course of his business, as that question was settled as early as LORD HOLT's time, but in the application of that principle to the peculiar facts of the case. The person whose act was relied on there as constituting a liability in the sellers was the defendant's agent, adopted by them under peculiar circumstances, he not being their general agent in the business as the manager of the bank is. But with respect to the question whether a principal is answerable for the acts of his agent in the course of his master's business and for the master's benefit, no sensible distinction can be drawn between the case of fraud and that of any other wrong, as to which the general rule is that the master is answerable for the wrongful act of the servant which is committed in the course of his service and for his master's benefit. That is the principle that is acted on every day in running down cases, and has been applied also to direct trespasses to goods, as, for example, in the cases where it has been held that the owners of ships are liable for the act of the master abroad in improperly selling a cargo. It has also been held applicable to actions of false imprisonment in cases where officers of a railway company are intrusted with the execution of byelaws, and act wrongfully, though intending to act in the course of their duty in imprisoning persons who have been supposed to come within the byelaws. It has been acted on in the case of persons employed by the owners of boats to navigate boats and take fares for the use of them, and in the case of infringing a ferry, and other such cases. In all these cases it may be said, as it was said here, the master had not authorised the act; it is true he had not authorised the particular act, but he had put his agent in his place as to such a class of acts, and he must be answerable for the manner in which the agent conducts himself in doing the business which is the business of the master.

The only other point which was made, and to which our attention has been directed, and which at first had a somewhat plausible aspect, is this: It is said, if it be true that the bank is answerable for this fraud, and if it be established that for the fraud of the manager the bank is liable, yet it ought not to have been described, as it is here, as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in fraud, or whether, under the circumstances, the money having been actually procured for and paid into the bank, the count for money had and received is not applicable to the case in order to get over the difficulty. I do not discuss that, because it should seem that in common law pleading no such difficulty is recognised. If a man is answerable for the wrong of another, whether it be fraud or any other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in *Raphael v. Goodman* (2). The sheriff sued on a bond—plea, that the bond was obtained

A by fraud; proof, it was obtained by the fraud of the sheriff's officers: held, that the plea was sufficiently proved.

Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, especially considering that the whole case may not have been before them, we think that this is a matter which was for the determination of the jury, and there ought, therefore, to be a trial *de novo*.

Judgment for a trial de novo.

Re CRISPIN. Ex parte CRISPIN

[COURT OF APPEAL IN CHANCERY (Lord Selborne, L.C., and Mellish, L.J.), January 17, February 21, March 14, 1873]

[Reported 8 Ch. App. 374; 42 L.J.Bcy. 65; 28 L.T. 483;
37 J.P. 391; 21 W.R. 491]

Bankruptcy—Act of bankruptcy—Foreigner—Temporary stay in England—Adjudication for act committed while in England.

A foreigner, not domiciled in England, and not carrying on trade in England, who comes to England for a temporary purpose and quits England before a petition in bankruptcy is presented against him, can be adjudicated a bankrupt upon an act of bankruptcy committed while he was in England, but not upon an act of bankruptcy committed after he has left England.

Bankruptcy—Act of bankruptcy—Departure out of England—Intent to defeat or delay creditors—Departure after service of writ.

Per Curiam: If a domiciled Englishman, who is being pressed by his creditors and has been served with a writ, were to leave England and so escape being served with a debtor's summons, that would be strong evidence that he intended to defeat or delay his creditors. The same reasoning does not apply to a foreigner who has come to England for a temporary purpose, and leaves England to return to his own home.

Notes. The Bankruptcy Act, 1869, s. 6, has been replaced by the Bankruptcy Act, 1914, s. 1. Section 1 (2) of the latter Act contains a definition of "a debtor" not contained in the former Act.

Considered: *Re Myer, Ex parte Pascal* (1876), 1 Ch.D. 509; *Re Trench, Ex parte Brandon* (1884), 25 Ch.D. 500; *Re A.B.* (1900), 82 L.T. 169. Approved: *Cooke v. Charles A. Vogeler Co.*, [1900-3] All E.R. Rep. 660. Considered: *Re Debtors* (No. 836 of 1935), *Petitioning Creditor v. Debtors*, [1936] 1 All E.R. 875; *Re Debtor* (No. 335 of 1947), *Ex parte R. v. Debtor*, [1948] 2 All E.R. 535; *Theophile v. Solicitor General*, [1850] 1 All E.R. 405; *Re Debtor* (No. 360 of 1951), *Ex parte Debtor v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 519, n. Referred to: *Re Sauvers, Ex parte Blain* (1879), 41 L.T. 46; *Re Gutierrez, Ex parte Gutierrez* (1879), 11 Ch.D. 298.

As to liability of foreigners to bankruptcy proceedings, see 2 HALSBURY'S LAWS (3rd Edn.) 255-256; as to departure or absence from England as an act of bankruptcy, see *ibid.* 268-271; and for cases see 4 DIGEST (Repl.) 24-26, 75-78. For the Bankruptcy Act, 1914, s. 1, see 2 HALSBURY'S STATUTES (2nd Edn.) 324.

Cases referred to in argument:

Whitmore v. Ryan (1846), 4 Hare, 612.

Cookney v. Anderson (1863), 1 De G.J. & Sm. 365; 2 New Rep. 140; 32 L.J.Ch. 427; 8 L.T. 295; 9 Jur.N.S. 736; 11 W.R. 628; 46 E.R. 146, L.C.; 16 Digest (Repl.) 120, 50.

Drummond v. Drummond (1866), 2 Ch.App. 32; 36 L.J.Ch. 153; 15 L.T. 337; 15 W.R. 267, L.C. & L.J.J.; 16 Digest (Repl.) 121, 51.

Davis v. Park (1873), 8 Ch. App. 862, n.; 42 L.J.Ch. 673; 28 L.T. 295; 21 W.R. 301, L.J. & L.J.J.

Re O'Loghlen, Ex parte O'Loghlen (1871), 6 Ch.App. 460; 40 L.J.Bey. 28; 23 L.T. 878; 19 W.R. 459, L.J.J.; 4 Digest (Repl.) 104, 928.

Allen v. Cannon (1821), 4 B. & Ald. 418; 106 E.R. 990; 4 Digest (Repl.) 16, 69.

Re Pearey, Ex parte Sturt & Co. (1871), L.R. 13 Eq. 309; 41 L.J.Bey. 12; 20 W.R. 200; 4 Digest (Repl.) 126, 1129.

Ex parte Smith (1737), cited 1 Cowp. at p. 402; 4 Digest (Repl.) 25, 204.

Williams v. Nunn (1809), 1 Taunt. 270; 127 E.R. 837; 4 Digest (Repl.) 75, 640.

Appeal from an order of MR. REGISTRAR HAZLITT, acting as Chief Judge in Bankruptcy, by which the debtor, Francesco Jose Cortes Crispin, was declared a bankrupt.

The debtor was a Portuguese subject, domiciled in Portugal and not carrying on trade in England. Having a suit in the Court of Chancery, he had often been in England during the last few years for some months at a time, and while in England had borrowed considerable sums of money on security of his expectations. Among other sums he had borrowed from the petitioning creditor £236, most of which had been advanced in this country. On Nov. 29, 1871, the petitioning creditor sued out a writ against the debtor in the Court of Exchequer, with which he was served on Feb. 13, 1872, at an hotel in London where he was staying. The debtor entered an appearance to the writ, but left England the next day, and had never since returned to this country.

The petition for adjudication was presented in March, 1872, the act of bankruptcy relied on being his leaving England in order to defeat and delay his creditors, and his remaining abroad with the same object. The debtor appealed from the order of the registrar adjudicating him bankrupt.

By the Bankruptcy Act, 1869, s. 6 :

"A single creditor, or two or more creditors if the debt due to such single creditor, or the aggregate amount of debts due to such several creditors, from any debtor, amount to a sum of not less than £50, may present a petition to the court, praying that the debtor be adjudged a bankrupt, and alleging as the ground for such adjudication any one or more of the following acts or defaults, hereinafter deemed to be and included under the expression "acts of bankruptcy: (1) That the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally: (2) That the debtor has, in England or elsewhere, made a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof: (3) That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely departed out of England, or being out of England, remained out of England; or being a trader departed from his dwelling house, or otherwise absented himself; or begun to keep house; or suffered himself to be outlawed . . ."

De Gex, Q.C., and *Brough* for the debtor.

Rozburgh, Q.C., and *Bagley* for the trustee in bankruptcy.

Cur. adv. vult.

Mar. 14, 1873. **MELLISH, L.J.**, read the following judgment of the court.—This is an appeal from an order of MR. REGISTRAR HAZLITT by which the

A debtor, Francesco Joze Cortes Crispin, was adjudicated a bankrupt. Three objections were made to the order of adjudication. (i) That the Court of Bankruptcy had no jurisdiction to adjudicate the debtor a bankrupt. (ii) That there was no sufficient proof of an act of bankruptcy. (iii) That there was no sufficient proof of the petitioning creditor's debt.

B The debtor is a Portuguese subject, and has always been domiciled in Portugal. He has for several years had a suit in the Court of Chancery against Dr. Cumano and others, in which he has sought to recover a sum of about £50,000 consols as heir of his father, and he has during those years come from time to time to England, and resided here for months at a time. He has borrowed large sums on the security of his expectations, partly in Portugal and partly in England, and he borrowed a sum of £236 14s. 6d. from the petitioning creditor. C Of this sum £100 was advanced in Lisbon in December, 1867, and the rest in various small sums in London in the year 1868. For all these sums the debtor gave written acknowledgments, by which he promised to repay them as soon as he had obtained the fortune of his father. He returned to England in November, 1871, and brought with him a deed of compromise, which had been entered into in Portugal between himself and Dr. Cumano, and which D had been approved by the Portuguese court at Faro, by which he was to receive the sum of £40,591 10s. 2d. The debtor claimed that this sum should be at once paid to him by Dr. Cumano out of the consols, but Dr. Cumano insisted that a sufficient sum in consols to pay the £40,591 10s. 2d. should be transferred into the Court of Chancery, on the ground that the claims of certain persons in E Portugal had not been got rid of by the compromise, and that creditors of the debtor to the amount of £25,000 had given notice to Dr. Cumano that they had claims on the fund. It was contended by the trustee in bankruptcy that the debtor was purposely delaying applying to the Court of Chancery for the money in order to defeat his creditors, but we do not think this charge is proved by the evidence. On Nov. 29, 1871, the petitioning creditor sued out a writ F against the debtor from the Court of Exchequer to recover the money he had lent to him, which writ was served upon the debtor on Feb. 13, 1872, at an hotel at No. 13 Glasshouse Street, where he was staying. On the next day the debtor left London for the Continent, and went via Madrid to Portugal, and had been approved by the Portuguese court at Faro, by which he was to receive in 1872. Two acts of bankruptcy were relied on: First, that he departed out of G England with intent to defeat and delay his creditors; secondly, that being out of England he remained out of England with the like intent.

The first question to be considered is: Had the court jurisdiction to adjudicate the debtor a bankrupt? This depends upon the question whether a foreigner who is not a trader, and who comes to England for a temporary purpose, and who quits England before a petition in bankruptcy is presented against him, H can be adjudicated a bankrupt, either upon an act of bankruptcy alleged to have been committed while he was in England, or upon an act of bankruptcy alleged to have been committed after he had left England. It is obvious that some limitation must be put upon the general words "creditor" and "debtor" in s. 6 of the Bankruptcy Act, 1869. They cannot apply to every creditor and every debtor throughout the world. It was argued on the part of the debtor that the I word "debtor" must be confined to debtors subject to the laws of England, and that as he was a foreigner, and had left England before a petition was presented against him, he had ceased to be subject to the laws of England, and no petition could be presented against him. We agree that the word "debtor" must be construed to mean "debtor properly subject to the laws of England," but we are of opinion that it is the act of bankruptcy, and not the petition, which gives jurisdiction to the Court of Bankruptcy, and that if a foreigner comes to England, and contracts debts in England, and commits an act of bankruptcy in England, he thereby gives the Court of Bankruptcy

jurisdiction over him. The title of the trustee relates back to the act of bankruptcy, and by the act of bankruptcy the property of the debtor is transferred to the trustee, provided a petition is presented in due time; and we see no good reason why this consequence should not follow in the case of a foreigner who has contracted debts in England, and commits an act of bankruptcy in England, and who is subject to the laws of England while he is here.

We also think that this conclusion is supported by the authorities. These appear to establish that if a foreign trader trades in England, and commits an act of bankruptcy in England, he is subject to the bankrupt laws, and that it makes no difference that he is not a resident trader in England, or that his principal place of business is elsewhere, and that he may be made bankrupt upon an act of bankruptcy which consists in departing from England with intent to defeat and delay his creditors. We are of opinion, however, that a foreigner, not domiciled in England, and not carrying on trade in England, who quits England without having committed an act of bankruptcy, cannot be made a bankrupt upon an alleged act of bankruptcy committed out of England. We think that the legislature cannot have intended to enact that if a foreigner who is not subject to the laws of England does something in his own country which may be perfectly lawful and innocent by the laws of that country, the effect should be that his property should be vested in a trustee in England for the benefit of his creditors.

We think that a consideration of the particular acts which are made acts of bankruptcy when committed out of England will confirm this conclusion. The first is:

“that the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally.”

This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy. The second is:

“that the debtor has, in England or elsewhere, made a fraudulent conveyance . . . of his property, or any part thereof.”

This clearly means, and has always been interpreted as meaning, fraudulent by the law of England, and, therefore, cannot properly apply to a conveyance which is executed in, and is to operate according to the law of, a foreign country. The third is the one now in question.

“That the debtor, with intent to defeat or delay his creditors, has, being out of England, remained out of England.”

We think these words imply that the person who remains out of England has his home or place of business in England, and cannot reasonably be held to apply to the case of a foreigner remaining in his own home.

The next question to be determined is whether there was sufficient evidence that the debtor committed an act of bankruptcy by departing from England with intent to defeat or delay his creditors. There are two witnesses who give evidence of statements by the debtor which may be material to be considered in determining with what intent he left England. [His LORDSHIP referred to the evidence of Mr. Crispin's landlady, who said: “The reason he gave for going away was that he had no money to pay his expenses; the only thing he said was, he feared he could not pay his way,” and to the evidence of the petitioning creditor's brother, who met Mr. Crispin at Madrid on his way to Portugal, and

A he said: "He told me that he had been served with a writ at the suit of my brother, and that in consequence of his being served with the writ he left London." We see no reason to doubt the truth of the statement made by the debtor to his landlady that he was obliged to leave England because he had no funds left to enable him to live in England, and we do not think that the statement he is said to have made to the petitioning creditor's brother is necessarily inconsistent with it, because it may well be that the fact of being served with a writ by one of his creditors convinced him that it was impossible he could go on living in England on borrowed money. The debtor, therefore, had a most justifiable cause for leaving England.

C But it is argued that nevertheless his leaving England must have had the effect of defeating or delaying his creditors, and was, therefore, an act of bankruptcy, and it is desirable to consider in what respect his leaving England had the effect of defeating or delaying his creditors. The petitioning creditor had served him with a writ, and an appearance was entered to that writ, and there is no evidence that the petitioning creditor would be delayed in obtaining judgment and issuing execution in the action in the absence of the appellant. If the debtor had gone away, after he knew a writ was issued, to avoid service, the case might have been different. It was argued, however, that if the debtor had remained in England, he might have been served with a debtor's summons and made a bankrupt, and it is necessary, therefore, to consider whether the debtor was bound to remain in England in order that the petitioning creditor or his other creditors might have an opportunity of making him a bankrupt. If a domiciled Englishman, who is being pressed by his creditors, and has been served with a writ, were to leave England, and so to escape being served with a debtor's summons, that would be strong evidence that he intended to defeat or delay his creditors, because England is the proper, if not the only, place for him to be made a bankrupt in, and if he cannot pay his debts he has no right to avoid being made a bankrupt there. But we do not think the same reasoning applies to a foreigner who has come to England for a temporary purpose, and leaves England to return to his own home. He can be followed to his own country, and his own country may be the most convenient place for the distribution of his property among his creditors. We must assume that there is a proper law in Portugal for distributing a debtor's property among his creditors, and we have no means of knowing whether it is more or less dilatory than the law of England.

G On the whole, we are of opinion that there is no sufficient evidence that the debtor has committed an act of bankruptcy in England, and that he cannot be made a bankrupt for an act of bankruptcy committed out of England. Therefore, the order of adjudication must be reversed, and the debtor must have his costs of resisting the adjudication in the court below from the petitioning creditor.

Appealed allowed.

PICKARD v. SMITH

[COURT OF COMMON BENCH (Williams, Keating and Willes, JJ.), February 12, May 28, 1861]

[Reported 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535]

Negligence—Independent contractor—Contractor employed to do work involving act occasioning injury—Failure to perform duty incumbent on employer.

The defendant, the lessee and occupier of refreshment rooms at a railway station and a cellar underneath, employed a coal dealer to deliver coals into the cellar. For this purpose the coal dealer opened a trap-door in the platform of the station over which passengers had to go on their way out of the station, and left it unguarded. The plaintiff, a passenger leaving the station, fell through this trap-door, and was injured.

Held: the defendant was under a duty, as regards the trap-door, to use reasonable precautions to see that there was no injury to travellers using the platform; it was no defence that the injury was the immediate consequence of the act of an independent contractor, because while an employer was not answerable if an independent contractor was employed to do a lawful act and in the course of the work he or his servants committed some casual act of wrong or negligence, that rule did not apply where the act which occasioned the injury was one which the contractor was employed to do, nor was it applicable where the contractor was entrusted with the performance of a duty incumbent on his employer and neglected its fulfilment, whereby injury was occasioned to a third party; accordingly the defendant was liable to the plaintiff for the injury he had suffered.

Notes. Considered: *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, post. Applied: *John v. Bacon* (1870), L.R. 5 C.P. 437; *Bower v. Peate* (1876), 1 Q.B.D. 321. Considered: *Whiteley v. Pepper* (1876), 2 Q.B.D. 276. Applied: *Hughes v. Percival*, [1881-5] All E.R. Rep. 44; *Penny v. Wimbledon Urban District Council*, [1895-9] All E.R. Rep. 204. Considered: *Rainham Chemical Works v. Belvedere Fish Guano Co.*, [1921] All E.R. Rep. 48; *Daniel v. Rickett Cockerell & Co., Ltd.*, [1938] 2 All E.R. 631; *Wilkinson v. Rea, Ltd.*, [1941] 2 All E.R. 50. Followed: *Woodward v. Hastings Corp.*, [1944] 2 All E.R. 565. Considered: *Green v. Fibreglass, Ltd.*, [1958] 2 All E.R. 521. Referred to: *Clothier v. Webster* (1862), 12 C.B.N.S. 790; *Gray v. Pullen* (1864), 5 B. & S. 970; *Fletcher v. Rylands* (1866), ante, p. 1; *Welfare v. Brighton Rail. Co.* (1869), L.R. 4 Q.B. 693; *Goslin v. Agricultural Hall Co.* (1876), 1 C.P.D. 482; *Dalton v. August*, [1881-5] All E.R. Rep. 1; *Duke v. Courage* (1882), 46 J.P. 453; *Hardaker v. Idle Urban District Council*, [1895-9] All E.R. Rep. 311; *The Snark*, [1900] P. 105; *Cribb v. Kynock*, [1907] 2 K.B. 548; *Wilson v. Hodgson and Kingston Brewery Co. and Burgomaier* (1915), 80 J.P. 39; *Cox v. Coulson*, [1916] 2 K.B. 177; *Honeywill and Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1933] All E.R. Rep. 77; *Flower v. Prechtel*, [1934] All E.R. Rep. 810; *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574; *Thomson v. Cremin*, [1953] 2 All E.R. 1185; *Balfour v. Barty-King*, [1956] 2 All E.R. 555; *Davie v. New Merton Board Mills, Ltd.*, [1958] 1 All E.R. 67; *Walsh v. Holst & Co., Ltd.*, [1958] 3 All E.R. 33; *Norton v. Canadian Pacific Steamships, Ltd.*, [1961] 2 All E.R. 785.

As to liability for negligence of independent contractors, see 28 HALSBURY'S LAWS (3rd Edn.) 23-27; as to duty of occupier of premises adjoining highway or other public place, see *ibid.* 72-73; and for cases see 36 DIGEST (Repl.) 72-74.

Case referred to:

- (1) *Corby v. Hill* (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 4 Jur.N.S. 512; 6 W.R. 575; 140 E.R. 1209; 36 Digest (Repl.) 67, 370.

A Also referred to in argument :

Hole v. Sittingbourne and Sheerness Rail. Co. (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 38 Digest (Repl.) 316, 168.

Reddie v. London and North Western Rail. Co., Hobbit v. Same (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201; 34 Digest (Repl.) 27, 65.

B *Ellis v. Sheffield Gas Consumers Co.* (1853), 2 E. & B. 767; 2 C.L.R. 249; 23 L.J.Q.B. 42; 22 L.T.O.S. 84; 17 J.P. 823; 18 Jur. 146; 2 W.R. 19; 118 E.R. 955; 36 Digest (Repl.) 159, 838.

Hounsell v. Smyth (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 6 Jur.N.S. 897; 8 W.R. 277; 141 E.R. 1003; 36 Digest (Repl.) 65, 356.

C **Rule Nisi** obtained by the defendant for an order of nonsuit in an action in which the plaintiff claimed to recover compensation for injury received by falling through a hole in the arrival platform of the Manchester and Liverpool Railway at Manchester.

The cause was tried before BLACKBURN, J., at Liverpool summer assizes. It was proved that the plaintiff, on the day when the accident happened, was lawfully on the platform of the railway, having arrived as a passenger. On his way out he fell into an opening in the platform, forming an entrance into a cellar belonging to the refreshment-room of which the defendant was lessee under the railway company. The opening was at all times secured by a trap-door, except when coals were taken into the cellar. On the day in question a coal merchant, by the defendant's order, put in a supply of coals, and for this purpose opened the trap-door and negligently left it open and unguarded at the time when plaintiff fell through it and was injured. The way out of the station led over the trap-door, and plaintiff could not by reasonable care have avoided the accident. The learned judge put it to the jury to say whether the trap-door was protected as it reasonably ought to be in such a position, and whether the defendant was guilty of negligence, and whether plaintiff could by reasonable care have avoided the accident, directing them that defendant, as occupant of the cellar and trap-door, was liable if the trap-door was not properly kept when used for him in putting in his coals. The jury found that the defendant was guilty of negligence, and that the plaintiff could not by reasonable care have avoided the accident. A verdict was entered for the plaintiff, leave being reserved to move to enter a nonsuit if the court should be of opinion that the defendant as occupier of the cellar was not liable. The defendant obtained a rule calling on the plaintiff to show cause why he should not be nonsuited.

Overend (Kemplay with him) showed cause.

Edward James (T. Spinks with him) supported the rule.

Cur. adv. vult.

May 28, 1861. **WILLIAMS, J.**, read the following judgment of the court.—This was an action to recover compensation in damages for an injury sustained by the plaintiff by falling down a hole in the arrival platform of the Manchester and Liverpool Railway. The plaintiff, falling into the hole, was lawfully on the platform, leaving the station in the usual way, after having arrived at Manchester as a passenger by the railway. He was not guilty of any negligence contributing to the injury; he could not by reasonable care have avoided it. The hole into which he so fell was an opening in the platform, forming the entrance into a cellar belonging to the refreshment-room attached to the station, although it was at all times secured by a trap-door, except when it was open for the purpose of getting coals into the cellar. The way out of the station led over the trap-door. The defendant was the lessee, under the railway company, and occupied the refreshment-rooms and cellar; and on the day in

question a coal merchant, by his orders, was putting a supply of coals into the cellar, and for that purpose had opened the trap-door, and negligently left it open and unguarded at the time the plaintiff fell, whereby the injury complained of was occasioned.

At the trial before BLACKBURN, J., it was insisted that the action was improperly brought. The learned judge, however, left the case to the jury, asking them to say whether the hole was so protected as it reasonably ought to be in such a place, and if there was negligence. In his opinion the defendant, as occupier of the cellar and hole, was liable if the hole was not properly kept when used for him in putting in his coals. It was also left to the jury to say whether the plaintiff could by reasonable care have avoided the accident. Upon both these questions the jury found for the plaintiff, but the learned judge reserved leave to enter a nonsuit if the defendant, as occupier of the cellar, was not liable.

A rule was obtained accordingly, and argued on Feb. 12 last, before my brothers WILLES, KEATING and myself, when time was taken to consider. For the decision of the case two questions were to be considered: First, whether the defendant would have been liable in case he had, with his own hands, opened the trap, and afterwards negligently left it open and unguarded, whereby a person lawfully on the platform was injured; and if he had, secondly, whether he is, under the circumstances of this case, absolved by reason of the leaving of the trap open and unguarded, being the immediate default of the coal merchant, who in one sense was an independent agent, not being in the relation of servant to the defendant.

With respect to the first question, it must be answered in the affirmative, because the defendant was the occupier of the cellar, and it was subject to the use of the platform overhead by passengers, and he knew it would be so used, and the cellar of which the door was open would be passed over by such passengers. It was his obvious duty, therefore, to use the hole in a way not necessarily to create such danger, but to use reasonable precautions to see that there was no injury to travellers using the platform: sic utere tuo ut alienum non lædas. No sound distinction in this respect can be drawn between this and the case of a public highway which may be, and to the knowledge of a wrong-doer will in fact be, used by persons lawfully entitled so to do. The opening of the trap was an act equally likely to be injurious to passengers as throwing stumbling-blocks in the way. If any authority were wanted for the proposition that such an act was a cause of action, it may be found in a case in this court, *Corby v. Hill* (1). The form of the declaration in that case may have been bad for not alleging knowledge that the avenue was likely to be used, unless there was impliedly an averment of negligence; but upon the facts, the defendant was there held liable in tort for negligently placing and leaving an obstruction in a private avenue known to be used in the ordinary way, whereby a person lawfully using it was injured.

As to the second question, the defendant was not absolved by the fact of a coal merchant being employed, and the injury being the consequence of his immediate act. Unquestionably no one can be made liable for an act or breach of duty unless traceable to himself or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are all the authorities referred to in the argument. That rule is, therefore, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by parity of reasoning, is it applicable to cases in which the contractor is entrusted with the performance of a duty incumbent on his employer, and neglects its fulfilment, whereby injury is occasioned. In the present case, the defendant employed the coal merchant to

open the trap, in order to put in the coals, and he entrusted him to guard it whilst open, and close it when the coaling was over. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant having thereby caused the danger, was bound to take reasonable means to prevent injury when it was kept open for his benefit. The performance of this duty he omitted; and the fact of his having entrusted it to a person who also neglected it, furnishes no excuse either in good sense or law. The ruling of BLACKBURN, J., was, therefore, correct, and the rule for a nonsuit must be discharged.

Rule discharged.

TAUBMAN v. PACIFIC STEAM NAVIGATION CO.

[COURT OF EXCHEQUER (Kelly, C.B., Martin, Bramwell and Cleasby, BB.), April 22, 1872]

[Reported 26 L.T. 704; 1 Asp.M.L.C. 336]

Shipping—Carriage of goods by sea—Negligence—Exclusion of liability—No liability “under any circumstances”—Loss of luggage through negligence of shipowner’s servants.

The plaintiff, a passenger in one of the defendants’ vessels, signed a contract by which the defendants engaged to carry him and his luggage on condition, *inter alia*, that they would not be answerable for loss of or damage to the luggage “under any circumstances.” On the voyage, the plaintiff’s portmanteau was lost through the negligence of the defendants’ servants.

Held: the negligence was a “circumstance” within the meaning of the contract, and, therefore, the defendants were not liable.

Notes. Considered: *Price v. Union Lighterage Co.*, [1904-7] All E.R. Rep. 227; *Travers & Sons, Ltd. v. Cooper*, [1914-15] All E.R. Rep. 104. Referred to: *The Pearlmoor*, [1904] P. 286; *Beaumont-Thomas v. Blue Star Lines, Ltd.*, [1939] 1 All E.R. 174.

As to a shipowner’s liability for the carriage of passengers’ luggage, see 35 HALSBURY’S LAWS (3rd Edn.) 544-546; and for cases see 8 DIGEST (Repl.) 138-140.

Cases referred to:

- (1) *Marlin v. Great Indian Peninsular Rail. Co.* (1867), L.R. 3 Exch. 9; 37 L.J.Ex. 27; 17 L.T. 349; 8 Digest (Repl.) 67, 449.
- (2) *Borradaile v. Hunter* (1843), 5 Man. & G. 639; 5 Scott, N.R. 418; 12 L.J.C.P. 225; 1 L.T.O.S. 170; 7 J.P. 256; 7 Jur. 443; 134 E.R. 715; 17 Digest (Repl.) 281, 888.

Also referred to in argument:

Peek v. North Staffordshire Rail. Co. (1863), 10 H.L.Cas. 473; 3 New Rep. 1; 32 L.J.Q.B. 241; 8 L.T. 768; 9 Jur.N.S. 914; 11 W.R. 1023; 11 E.R. 1109, H.L.; 8 Digest (Repl.) 60, 394.

Action for damages for loss of a portmanteau on the defendants’ vessel.

The plaintiff became a passenger on one of the defendants’ vessels from Rio de Janeiro to England. On taking his passage he signed a contract by which the defendants engaged to carry him and his luggage on condition among other things, that they would not be answerable for loss of or damage to the

luggage "under any circumstances whatsoever." On the voyage, the plaintiff's portmanteau was lost through the negligence of the defendants' servants. The plaintiff averred in the declaration that the loss was occasioned by the wilful act and default of the defendants.

Garth, Q.C. (with him *Morgan Howard*) for the plaintiff.

Cohen for the defendants.

KELLY, C.B.—The defendants are entitled to our judgment. It is only necessary to read the contract in order to decide this case. The defendants are not to be liable for the loss of luggage "under any circumstances." The "gross negligence" of the defendants' servants is a "circumstance"; so is "wilful default." If the act had been actually done by the defendants, the act would have been a trespass, whatever the contract might be. But this is the act of the servants, and the action is really one for breach of contract. *Martin v. Great Indian Peninsular Rail. Co.* (1) is distinguishable, for there the freedom from liability only extended to the time during which the baggage was to be in the charge of the troops.

MARTIN, B.—I am of the same opinion, as far as I can see from the imperfect statement of facts which we have before us. The defendants are not under the liabilities of common carriers, and they are free to make any terms they choose. Probably the words in the special contract were inserted for the very purpose of exempting the defendants from liability for the acts of their servants.

BRAMWELL, B.—I am of the same opinion. *Prima facie* the defendants are not liable, for the contract says that they are not to be liable for the loss of baggage under "any circumstances." A loss has occurred under certain circumstances, and the plaintiff is seeking to recover. Is there any implied exception? I am of opinion that there cannot be, for the parties could easily have expressed it: see the judgment of *MAULE, J.*, in *Borradaile v. Hunter* (2). Then it is urged that, in certain cases, the legislature has interfered. That, as far as it goes, is against the plaintiff's case. The court will not extend the Railway and Canal Traffic Act, 1854, further than they can help, for it has been already the cause of more dishonest transactions than any Act of Parliament.

CLEASBY, B.—What is the meaning of the word "circumstances?" I find in *JOHNSON'S DICTIONARY* that the word "circumstance," in a legal sense, means "one of the adjuncts of a fact, which makes it more or less criminal." Arguing from this definition of "circumstance" by analogy, I should think that the words in the contract will cover the present case.

Judgment for defendants.

IN THE GOODS OF STEEL AND OTHERS

[COURT OF PROBATE (Wilde, J.O.), July 28, 1868]

[Reported L.R. 1 P. & D. 575; 37 L.J.P. & M. 68, 72;
19 L.T. 91; 32 J.P. 791; 17 W.R. 15]

Will—Revocation—Revival—Revival by codicil—Expression of intention to revive—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 22.

The intention to revive a revoked will by means of a codicil under s. 22 of the Wills Act, 1837, must appear on the face of the codicil, either by express words referring to the will as revoked and importing an intention to revive it, by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying with reasonable certainty the existence of the intention.

Notes. Applied: *In the Goods of Law* (1869), 21 L.T. 399; *In the Goods of Anderson* (1870), 39 L.J.P. & M. 55; *Re Lindsay* (1892), 8 T.L.R. 507; *In the Goods of Chilcott*, [1897] P. 223; *Jane v. Jane* (1917), 33 T.L.R. 389; *Deakin v. Garvie* (1919), 35 T.L.R. 680. Considered: *Goldie v. Adam*, [1938] P. 85. Applied: *In the Estate of Davis*, [1952] 2 All E.R. 509.

As to revival of wills, see 39 HALSBURY'S LAWS (3rd Edn.) 901 et seq.; and for cases see 44 DIGEST 365 et seq. For the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1926.

Cases referred to:

- (1) *Lord Walpole v. Earl Cholmondeley* (1797), 7 Term Rep. 138; 101 E.R. 897; 44 Digest 173, 8.
- (2) *In the Goods of Chapman* (1844), 1 Rob. Eccl. 1; 3 Notes of Cases, 198; 8 Jur. 902; 163 E.R. 944; 44 Digest (Repl.) 341, 1713.
- (3) *Hale v. Tokelove* (1850), 2 Rob. Eccl. 318; 16 L.T.O.S. 85; 14 Jur. 817; 163 E.R. 1331; 44 Digest 341, 1714.
- (4) *Newton v. Newton* (1861), 5 L.T. 218; on appeal, 12 I.Ch.R. 118, 128; 44 Digest 353, 1850i.
- (5) *Rogers and Andrews v. Goodenough and Rogers* (1862), 2 Sw. & Tr. 342; 31 L.J.P.M. & A. 49; 5 L.T. 719; 26 J.P. 119; 8 Jur.N.S. 391; 164 E.R. 1028; 44 Digest 365, 1980.
- (6) *Payne and Meredith v. Trappes* (1847), 1 Rob. Eccl. 583; 5 Notes of Cases, 478; 10 L.T.O.S. 36; 11 Jur. 854; 163 E.R. 1143; 44 Digest 367, 2010.
- (7) *Marsh v. Marsh* (1860), 1 Sw. & Tr. 528; 30 L.J.P.M. & A. 77; 1 L.T. 523; 24 J.P. 311; 6 Jur.N.S. 380; 164 E.R. 845; 44 Digest 366, 1994.

Motions for probate of wills in three cases, the question for decision in each case being whether a will which has been revoked and for which another will was substituted has or has not been revived by the operation of a subsequent codicil.

Dr. Deane, Q.C., and *A. Staveley Hill, Q.C.*, appeared in *In the Goods of Steel*.

Tristram in *In the Goods of May*.

Pritchard in *In the Goods of Wilson*.

Cur. adv. vult.

IN THE GOODS OF J. STEEL

July 28, 1868. **WILDE, J.O.**—The broad question in this and the two succeeding cases is whether a will which has been revoked, and for which another will was substituted, has or has not been revived by the operation of

a subsequent codicil. This is a question of construction and one of some difficulty. The occurrence, within in a short period, of no less than three instances in which this question has arisen, makes it desirable to pass in review some of the decisions by which the judgment of the court ought to be guided. A

The following appear to be the propositions established by previous authorities. Unless there be a latent ambiguity in the codicil, evidence of the testator's real meaning must be excluded. This is in obedience to the well known common law doctrine with respect to written instruments as was decided in *Walpole v. Cholmondeley* (1), which was acted upon in *In the Goods of Chapman* (2). It may be proper on some future occasion to consider the doctrine upheld in courts of equity, where mistakes, if proved to demonstration to be so, have been rectified even in written documents. This subject is well discussed in STORY'S EQUITY JURISPRUDENCE, ss. 156, 157. The next proposition is this: that, although evidence of the testator's intention is excluded, the court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it to record the true sense of the words he has used. This is a doctrine constantly acted upon at common law in relation to written documents and notably in cases of written guarantees. It is affirmed in the fifth proposition of SIR JAMES WIGRAM'S excellent book on this subject (RULES OF LAW RESPECTING THE ADMISSION OF EXTRINSIC EVIDENCE IN AID OF THE INTERPRETATION OF WILLS). Thirdly, it has been decided by no less than three very remarkable cases that if the codicil refer to a will with the intention of reviving it, and it turn out that such will had been entirely burnt or destroyed by the testator animo revocandi, the codicil cannot effect its revival. The circumstances of these three cases of course varied, but in all three there were two wills, the later one revoking the former, and a subsequent codicil referring by date to the former will. They all had this further feature that the first will was not only revoked but destroyed. D E F

The earliest case was *Hale v. Tokelove* (3), decided by DR. LUSHINGTON in 1850. He held that the codicil could not in law revive the first will, because the will "was gone, destroyed animo revocandi," but that the second will "was revoked by necessary implication, because a prior will was confirmed." The only paper entitled to probate he held to be the codicil. The next was *Newton v. Newton* (4), determined in Ireland by KEATINGE, J., in 1861. He held, like DR. LUSHINGTON, that the codicil could not revive the first will, but that the second will was entitled to probate, as the intention to revoke the second was dependent upon the establishment of the first. His decision on this last head was reversed by the Court of Appeal, and the testator declared to die intestate. The last case was *Rogers and Andrews v. Goodenough and Rogers* (5), decided by SIR CRESSWELL CRESSWELL in 1862. He held, as in the other cases, that the codicil could not revive a will that had no existence, but that there being no words in the codicil expressing the intention to revoke the second will, and no dispositions of property inconsistent with that will, there was no ground for affirming that in any of the modes pointed out by the Wills Act, 1837, a revocation of the second will had been effected: and he granted probate of the second will and the codicil as together containing the will of the deceased. I

This last case, it will be observed, is an authority for this further proposition, that a codicil which refers by date, and which the testator intended as a codicil, to one will, may be entitled to probate with another will.

Assuming, then, on these authorities, that a codicil may, by referring in adequate terms to a revoked will, revive that will if it be in existence, and that in ascertaining whether the testator intended such revival, the court is precluded, unless there is a latent ambiguity in the codicil, from receiving any evidence except what may suffice to place it in the position of the testator, the next

A question will be, what is the effect of the statute? The words of the Wills Act, 1837, s. 22, are as follows :

"No will which has been in any way revoked shall be revived [by a codicil, unless it be a codicil duly executed, and] showing an intention to revive the same."

B What is the meaning of these last words? To appreciate them it is necessary to bear in mind the law as it stood when they were enacted. The theory of the law is, and always was, that a codicil forms part of a will, and consequently that to make a codicil to your will is, first, to affirm the existence of that will; and, secondly, to republish it, or re-affirm its validity. It was, therefore, before the Act, an inference which the law drew from the making of a codicil that the testator intended to re-affirm his will, and, if the will had been revoked, by re-affirming it to revive it. In brief, it would not be wrong to say that all codicils to wills were held before the Act passed to revive the wills to which they were respectively codicils, if such wills had been previously revoked. As soon, therefore, as it could be ascertained that the codicil in question was a codicil to a particular revoked will, that will was revived. The difficulty with which the courts in the contested cases had to grapple was to ascertain to which or what will the disputed paper was intended as a codicil.

Such being the state of the law before the Act, I hesitate to accept the conclusion that the express words of the section meant to leave the matter in the same state in which it would have stood if they had never been introduced. If the mere declaration that a particular paper was to be taken as a codicil to a particular will was all that the legislature required when it enacted that the codicil should "show an intention to revive" a revoked will, the words "showing an intention to revive the same" were quite needless, for every codicil to a revoked will, by force of being a codicil to such will, so showed it. I, therefore, infer that the legislature meant that the intention of which it speaks should appear on the face of the codicil, either by express words referring to a will as revoked, and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the court with reasonable certainty the existence of the intention in question. In other words, I conceive that it was designed by the statute to do away with the revival of wills by mere implication.

It is proper here to take note of *Payne and Meredith v. Trappes* (6). In that case there would seem to have been but little beyond the reference by date to show the intention to revive a former will. But the court did not lay down the proposition that the date alone was sufficient; on the contrary, the learned judge said he must "gather the intention from the codicil itself;" "that the intention to revive the former will was clearly shown;" and "that the testator had taken great pains to describe the instrument to which the paper was intended as a codicil." The decision proceeded on the ground that the judge was convinced of the testator's intention, not that he felt bound by the language in the face of an opposite conviction. On the other hand, I am much fortified in the view I take of the statute by the remarks of SIR CRESSWELL CRESSWELL in *Marsh v. Marsh* (7). I allude to his statement that the words "last will," etc., prima facie refer to the real last will, and particularly to the opinion he there expressed, that "it appears to have been the object of the legislature to put an end equally to implied revocations and implied revivals." The due result of the documents in each case, and of such external facts as may be admitted in evidence, must, of course, be gathered from the language of the documents themselves read in the light of such facts.

Some general views, however, present themselves—some general probabilities of intention attend all such cases as those now under judgment. It may in the

outset, I think, he doubted whether any testator who bore in mind that he A
 revoked his will and substituted another for it, ever really sat down with the
 purpose of revoking his last will and reviving the former one, and set about
 the execution of that purpose by simply making a codicil referring by date
 to his first will without more. Would any lawyer advise such a course? Or
 would any unskilled testator imagine he could achieve the end by such a B
 method? The leading idea of revoking the one and reviving the other in its
 place would surely find expression by some form of words in a paper designed
 mainly for that object. On the other hand, I conceive that, in the vast majority
 of cases, when a man declares his intention that a particular paper varying
 his previous dispositions shall be taken as a codicil to "his last will and
 testament," he means that which really is his last will and testament—his C
 then existing will and the dispositions of his property then in force. In like
 manner when he goes on to declare, in the common language of codicils, that
 "in all other respects he ratifies and confirms his last will and testament," he
 really means to confirm that which exists, and not to bring to life a paper
 which has ceased to be testamentary or revive dispositions which have no
 existence, and are, therefore, not, properly speaking, capable of being ratified. D
 That these conclusions are just in the main is amply proved by the fact that
 when full light has been cast on the testator's real purpose by means of parol
 evidence, the reference to the earlier will has, in most cases, turned out to be
 nothing but a blunder. If experience had not shown the fact, it would be almost
 incredible that mistakes should occur so constantly as they do in so simple a
 matter as reciting the true date of a will. And yet in many cases errors E
 of this kind, if allowed to be proved, cannot only be proved, but proved to
 demonstration. The excluded evidence in the celebrated case of *Walpole v.*
Cholmondeley (1), proved the error that had been committed, and the cause of it,
 on testimony so clear, and so free from suspicion, as to remove the last trace
 of reasonable doubt. Sometimes the error arises from the attorney or a clerk,
 who has laid his hand on the wrong paper; sometimes from the testator, who F
 has kept his first will in his own possession, and forgotten his second, which he
 has left in the hands of his attorney; oftentimes from the employment of an
 attorney to draw the codicil who has made an earlier will, and who has been
 in ignorance that a subsequent will has been made. I am, therefore, of
 opinion that the court ought to be slow to conclude that a testator has
 manifested in this indirect way a desire to revoke his last will, and that it G
 should scrutinise narrowly the language of a codicil which is said to show
 such an intention, lest, in the desire to follow the testator's wishes too blindly,
 it set them at naught altogether.

I proceed to the facts of the present case. The testator made a will of Jan.
 17, 1866. On Oct. 26, 1866, he made a fresh will revoking the former. On
 Jan. 12, 1868, he made a codicil which was declared to be a codicil "to his last
 will and testament, which will bears date the 16th day of January last past," H
 in other words, Jan. 16, 1867. At the conclusion of the codicil he confirms
 his said last will. Here is a latent ambiguity, and the court may resort, if need
 be, to the affidavits filed. But I am of opinion that on the face of the
 documents themselves there is no intention shown with anything like sufficient
 distinctness to revoke the testator's last will, and revive the former one. It is I
 true that the codicil speaks of the last will as containing a legacy to his
 nephew of £100, and that this legacy is to be found in the will of January,
 1866, whereas in the last will the legacy is reduced to £50. But that the memory
 of the testator, an old man past eighty, was at fault, is clear by his widely
 increased reference to the date of his last will, and I see no reason why it
 should not have failed him in describing the amount of the legacy which he
 wished to revoke, though he bore in mind the object of his bounty. On the
 other hand, the will he speaks of is his "last will," and there is no trace of

A a desire to depart from it to be found on the face of the codicil. I think, therefore, that the will of October, 1866, was never revoked, and that it is entitled to probate, together with the codicil in question.

IN THE GOODS OF JOHN MAY.

B The testator made a will on Jan. 11, 1860. On Aug. 18, 1860, he married. On the same day, Aug. 18, after his marriage, he made a fresh will, and in terms revoked his former one. In September, 1860, he took the trouble to cancel his first will by tearing off the signature. On July 3, 1861, he made a codicil "to the last will and testament of me, John May, of . . . and which will bears date Jan. 11, 1860." If parol evidence is admissible, it is plain that C this reference to the earlier will was nothing but a mistake on the part of the attorney who drew it, but I do not think it is necessary to decide whether it was so or not. For I am unable to perceive any sufficient evidence on the face of the codicil itself that the testator entertained an intention to revive the former will. His marriage itself had revoked it. He had immediately after his marriage substituted another for it in almost the same identical terms, D and to prevent all mistake he had taken the trouble to tear off the signature. It is plain that in September, 1860, when he thus acted, he considered the will of August to be the effective record of his testamentary dispositions, and I can conceive no motive which would render it probable or hardly possible that he should desire to revive the will of January. In a word the codicil, read in the light of the surrounding circumstances of the case, fails to show E the necessary intention. The court grants probate of the will of August, together with the codicil of July, 1861, and a further codicil of Sept. 6, 1865, as to which no question was made.

IN THE GOODS OF T. WILSON.

F In this case the testator made his will on Sept. 24, 1858. On July 16, 1861, he made a fresh will disposing of the whole of his property. The first will was found after his death with the signature torn off, and had been used by him as a draft for the second will. On Dec. 20, 1864, he made a codicil, which he declares to be a codicil to "his last will and testament dated Sept. 24, 1858." Notwithstanding this perfectly distinct reference to the date of his earlier will, it is plain to demonstration from the contents of the codicil G itself that he was really referring to the will of 1861. He speaks of bequests which are to be found only there, and goes on to say that he has altered these bequests in his own hand on the face of "his said will," and for greater certainty has numbered the lines in which those alterations are to be found. These alterations with numbers to the lines are found in the will of 1861, and H the court has no hesitation in affirming that it was to that will he intended the codicil to apply. The court grants probate of the will of 1861 with the codicil of 1864.

Orders accordingly.

Re UNION HILL SILVER CO., LTD.

[VICE-CHANCELLOR'S COURT (Malins, V.-C.), April 22, 1870]

[Reported 22 L.T. 400]

Company—Winding-up—Meeting—Notice of meeting—Shareholders resident out of jurisdiction—Impossibility of receiving prescribed notice—Validity of resolution.

Where resolutions for the voluntary winding-up of a company were passed by the shareholders, there being only one dissentient shareholder, the court refused to entertain a petition by the dissentient shareholder for a compulsory order on the ground that the meetings at which the resolutions were passed were not in all respects regular.

Notice was sent to shareholders of a company of a general meeting for the purpose of passing a resolution for a voluntary winding-up. The resolution was passed and subsequently it was confirmed at another general meeting. Some shareholders were resident in America, and, therefore, they could not in the ordinary course of the post have received the seven days' notice of either of the meetings as required by s. 52 of the Companies Act, 1862,

Held: s. 52 of the Act of 1862 applied only to shareholders within the jurisdiction, and so the resolutions were valid.

Notes. The Companies Act, 1862, has been repealed and the length of notice for calling meetings is now dealt with by s. 193 and resolutions for voluntary winding-up by s. 278 of the Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 563, 675 respectively).

Followed: *Re Newcastle United Football Co.*, [1932] W.N. 109. Considered and Applied: *Re Warden and Hotchkiss, Ltd.*, [1945] 1 All E.R. 507.

As to procedure on resolution for voluntary winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 736; and for cases see 9 DIGEST (Repl.) 600 et seq.

Cases referred to:

(1) *Chester v. Spargo* (1868), 18 L.T. 314; 16 W.R. 576; 10 Digest (Repl.) 1189, 8304.

(2) *Re Beaujola's Wine Co.* (1867), 3 Ch. App. 15; 17 L.T. 399; 32 J.P. 195; 16 W.R. 177; sub nom. *Re Beaujola's Wine Co.*, *Ex parte Wragge*, 37 L.J.Ch. 220, L.J.J.; 10 Digest (Repl.) 1114, 7729.

Also referred to in argument:

Re London and County Coal Co. (1866), L.R. 3 Eq. 355; 15 W.R. 151; 10 Digest (Repl.) 865, 5689.

Re Joint Stock Coal Co. (1869), L.R. 8 Eq. 146; 20 L.T. 966; sub nom. *Re Joint Stock Coal Co.*, *Re Green*, *Re Copeland*, 38 L.J.Ch. 429; 17 W.R. 585; 10 Digest (Repl.) 863, 5676.

Re Suburban Hotel Co. (1867), 2 Ch.App. 737; 36 L.J.Ch. 710; 17 L.T. 22; 15 W.R. 1096, L.J.J.; 10 Digest (Repl.) 856, 5639.

Re Bridport Old Brewery Co. (1867), 2 Ch. App. 191; 15 L.T. 643; 15 W.R. 291, L.J.J.; 10 Digest (Repl.) 917, 6263.

Petition for an order for the compulsory winding-up of the Union Hill Silver Co. Ltd., instead of a voluntary winding-up which had been resolved by the shareholders, the petitioner being the sole dissentient shareholder and the ground of the petition being that, as some of the shareholders were resident in New York, they could not have received the seven days' notice, as required by s. 52 of the Companies Act, 1862, of the meetings on Mar. 24 and April 11, 1870, at which the resolutions for voluntary winding-up had been passed and confirmed and consequently the meetings were irregular and the resolutions void.

A The petitioner, the Rev. Francis Henry Brett, was a shareholder in the Union Hill Silver Co. Ltd., which was registered on Nov. 15, 1866, for the purpose of purchasing and working certain silver mines known as "The Blazing Star," "The Northerner," and "The Morning Glory," near Austin, Nevada, in the United States of America, and also of purchasing and working any other mines in North America; the capital was to be £60,000, divided into 6000 shares of £10 each. Table A of the Companies Act, 1862, was adopted as the regulations of the company, and the directors had power to issue fully paid-up shares in payment for any property purchased by the company, which shares were to be marked "B shares," and were not to be entitled to any dividend until £20 per cent. should have been first paid to the holders of ordinary, or "A shares." Shortly afterwards a prospectus was issued by the directors, stating that previous owners had already opened the mines to an extent sufficient to prove that their value at the depth reached was equal to the average of the celebrated mines in the best part of the very richest district of the state of Nevada, but that such owners had surrendered them to the company in order that they might be more actively worked, and that it had been estimated that by an outlay of £1200 on each mine for machinery, a profit of £240 per day, or at least £200 per day, would be realised from each mine, being at the rate of £250 per cent. per annum upon the total capital of the company; also that the original owners had taken the whole purchase price of the property in paid-up deferred B shares, and that only a limited number of the ordinary, or A shares, remained unallotted. The petitioner was, as he alleged, induced by this prospectus to apply for, and became the holder of five A shares.

E The petitioner stated that it was arranged between Frederick William Howes and Edmund Edwards, two of the promoters of the company, on the one hand, and Henry Joachimsen on the other, that Joachimsen should sell his interest in the mines to the company for £30,000 by an allotment to him of 3000 B shares, which arrangement was carried into effect by an agreement dated Dec. 31, 1866. F That on Feb. 10, 1868, only 473 of the A shares had been allotted, and upon these £4 had been called up, and of that amount the sum of £1099 was in arrear, and its recovery almost hopeless; and that out of the sums actually paid-up, £500 had been paid for promotion money, so that the whole available capital for working the mines was less than £300. On April 8, 1868, the company issued a circular to the shareholders asking them to subscribe for new shares, and with this circular a new prospectus was issued repeating, in substance the statements in the first prospectus. Another prospectus had also been issued to the same effect. The petitioner then applied for and became the registered holder of seven shares of this new issue, and paid-up £5 upon them; and also became the purchaser for £40 of eight of the B shares. On Feb. 7, 1870, when he presented this petition, he was the holder of twelve A shares, with H £7 paid-up, and seven out of the eight B shares which he had purchased. On Dec. 22, 1868, Joachimsen, who had been appointed manager of the mines, wrote to the directors that the "Blazing Star" mine, the only mine then in operation, had turned out to be unprofitable, and proposed to find other mines in the State of Nevada, which could be advantageously worked by the company.

I On Oct. 1, 1869, the directors issued a report to the shareholders, stating the position and prospects of the company, and with the report issued a notice that the second annual general meeting of the shareholders would be held on Nov. 12, 1869. About the same time a notice was sent to the shareholders by one of the directors of his intention to propose at the meeting that the company should be wound-up voluntarily. The meeting was accordingly held and the resolution was submitted to the shareholders, but was not passed, being opposed on the ground that time should be given for obtaining further advices from Joachimsen; it was, however, distinctly understood at the meeting that the opposition to the resolution should be withdrawn if satisfactory advices were not received within

a certain time. No further advices having been received, the directors, on Mar. 15, 1870, issued a notice to the shareholders that an extraordinary general meeting would be held on Mar. 24, 1870, at which a resolution would be proposed that the company should be wound-up voluntarily. The meeting accordingly took place; there were present, either in person or by proxy, twenty-one shareholders, holding 258, out of a total of 335 A shares, and the resolution to wind-up the company voluntarily was carried unanimously, and liquidators were appointed. On Mar. 31, 1870, notices were issued convening a second extraordinary general meeting, to be held on April 11 following, for the purpose of confirming this resolution. At this meeting there were present, in person or by proxy, eighteen shareholders, holding 248 A shares. The petitioner did not himself attend this meeting, but his solicitor, Pulbrook, who had qualified himself by taking one share, was present on his behalf. The resolution for a voluntary winding-up was confirmed by all the shareholders present except Pulbrook, who voted against the resolution.

Glasse, Q.C., and *Brooksbank* for the petitioner.

Cotton, Q.C., and *Graham Hastings* for the company.

MALINS, V.-C.—This is a petition for a compulsory order for winding-up this company. The company was formed on Nov. 15, 1866, for the purpose of purchasing and working certain mines in Nevada, in the United States. Three prospectuses were issued by the directors at different times, which were in the usual form, holding out great promises and the most brilliant prospects, and by them the petitioner was, as he alleged, led to believe that the profits would amount to about 250 per cent. per annum. As might well have been expected, he experienced complete disappointment; no profits whatever were made. Looking at these prospectuses, I am inclined to think the statements they contain are not altogether consistent with good faith and that they are such as honest men ought not to have made; but I am astonished to find that any persons could have been found to embark their money upon such an undertaking. There can be no doubt that these statements are altogether delusive and unfounded, and, therefore, I think that if the petitioner has been misled by them, his proper remedy was to have filed a bill for the return of his money against the parties who made the misrepresentations, and according to the well known principles of this court as laid down in *Chester v. Spargo* (1), there would have been no difficulty in coming to the conclusion that the directors were bound to return all moneys received by them on the faith of these misrepresentations. That would have been the proper course for the petitioner to take. But instead of adopting this course, he presents a petition for a compulsory winding-up stating he is a shareholder, and by so doing he admits his position. It appears he has paid up £124 and is liable to pay £36 more, but the company offered to exonerate him from this sum and to pay him his costs out of pocket, if he would consent to have his petition dismissed; that offer, however, was not acceded to, and I have, therefore, now to decide whether this is a case for a compulsory order.

In all these cases the court must consider what the result of a compulsory order will be. If the result of such an order in this case would be that great expense would be incurred, I ought to refrain from making such an order. This company has substantially no property whatever; the whole of their debts do not amount to £50; it seems perfectly clear that they cannot continue to carry on their business, and, therefore, they ought to be wound-up. The question is whether they ought to be wound-up under a compulsory order. The facts of the case are these. A general meeting of the shareholders was held on Nov. 12, 1869, at which a report was read showing the prospects of the concern. A resolution was then proposed that the company should be wound-up voluntarily, but the resolution was not passed, though it was understood by those present

A that a voluntary winding-up should take place, if more favourable accounts of the company's prospects were not received from Joachimsen, the company's manager. Nothing further having been heard from Joachimsen, an extraordinary general meeting of the shareholders was held on Mar. 24, 1870, at which a resolution was unanimously passed that the company should be wound-up voluntarily. On April 11, 1870, a second meeting was held at which this resolution was confirmed. B The petitioner did not himself attend this meeting, but his solicitor, Pulbrook, who had bought one share to entitle him to be present as a shareholder, attended in order to protect the interests of his client; and, therefore, I must consider the petitioner to have been present by his agent. Pulbrook was the only shareholder who voted against the resolution, which was then passed. It appears, C therefore, that all parties are desirous of a voluntary winding-up except the petitioner. Then this petition is presented.

Looking at the character of the speculation, the petitioner must have been aware that the concern he was embarking in was a mere lottery, and, therefore, open to the greatest peril. No reasonable person could have expected that an investment in such a concern would yield a profit of 250 per cent.; it ought, D therefore, to have been brought to an end in the most expeditious and inexpensive manner. The petitioner was well aware that the general feeling of the shareholders was in favour of a voluntary winding-up, but, notwithstanding this, he presents a petition for a compulsory winding-up which can be of no benefit to any of the parties concerned; and he contends that the resolutions for the voluntary winding-up were invalid because some of the shareholders, who were E in America, did not receive due notice of the meetings at which those resolutions were passed. This objection is founded on s. 52 of the Companies Act, 1862, which provides that seven days' notice of any general meeting must be served upon every shareholder in the manner specified in Table A of the first schedule to the Act. If the petitioner's construction of this section is right, namely, that every shareholder must have notice of a general meeting, no matter in what F part of the world he may happen to be, it is a most inconvenient construction; because a company cannot, without serious injury to itself, delay the transaction of important business until every shareholder in every part of the world has had notice of the meeting at which the business is to be discussed.

I think that such a construction would be entirely opposed to the spirit and intention of the Act. It seems to me that the Act has reference only to share- G holders who can be reached by the ordinary English post, and that, in fact, it was not necessary to serve these absent shareholders. I am, therefore, of opinion that this objection to winding-up the company voluntarily is unfounded. The petitioner, at all events, had due notice of these meetings; and the proceedings, therefore, are binding upon him. If the absent shareholders think they are not bound, they may come here at some future time and raise the question. Counsel H for the petitioner says this case is different from that of *Re Beaujolais Wine Co.* (2); but that case seems to me to be exactly similar to the present. There the meetings which took place, though they were irregular, showed the general feeling of the shareholders, and that all parties were desirous of winding-up voluntarily; and, accordingly, the proceedings at those meetings were upheld. In the present case no one appears in support of the petition, and the interest I of the petitioner is insignificant. Under all the circumstances of this case, and as no reasonable good would arise from the order to the petitioner or anyone else, I think the petition must be dismissed; but, taking into consideration the misrepresentations in the prospectus, without costs.

Petition dismissed.

CORNISH v. STUBBS

[COURT OF COMMON PLEAS (Bovill, C.J., Willes and Montague Smith, JJ.),
February 11, 1870]

[Reported L.R. 5 C.P. 334; 39 L.J.C.P. 202; 22 L.T. 21;
18 W.R. 547]

*Landlord and Tenant—Weekly tenancy—Determination—Week's notice—Con-
dition for further reasonable time to remove goods—Validity.*

The tenant occupied a house under a weekly tenancy granted to him by the landlord's father, with the privilege of storing goods on a wharf and in an adjoining warehouse. Having succeeded to the property on the death of his father, the landlord gave the tenant a week's notice to quit, but refused him a reasonable time in addition in which to remove his goods. As a result the tenant suffered loss by having hurriedly to dispose of his goods. In an action to recover damages therefor,

Held: the tenant had a right to remove his goods from the wharf and ware-
house within a reasonable time after the end of his tenancy of the other
premises; and, therefore, he was entitled to succeed.

Notes. Applied: *Mellor v. Watkins* (1874), L.R. 9 Q.B. 400. Referred to: *Smith v. Egginton* (1874), 30 L.T. 521; *Hurst v. Picture Theatres, Ltd.*, [1914-15] All E.R. Rep. 836; *Canadian Pacific Rail. Co. v. R.*, [1931] All E.R. Rep. 113; *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238; *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1947] 2 All E.R. 331.

As to revocation of parol licence, see 23 HALSBURY'S LAWS (3rd Edn.) 430 et seq.; and for cases see 31 DIGEST (Repl.) 481 et seq.

Cases referred to:

- (1) *Stansfeld v. Portsmouth Corpn.* (1858), 4 C.B.N.S. 120; 27 L.J.C.P. 124; 30 L.T.O.S. 317; 22 J.P. 355; 4 Jur.N.S. 440; 6 W.R. 296; 140 E.R. 1027; 31 Digest (Repl.) 223, 3603.
- (2) *Buckworth v. Simpson* (1835), 1 Cr. M. & R. 834; 1 Gale, 38; 5 Tyr. 344; 4 L.J.Ex. 104; 149 E.R. 1317; 30 Digest (Repl.) 469, 1107.
- (3) *Wood v. Leatbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 30 Digest (Repl.) 542, 1771.
- (4) *Wood v. Manley* (1839), 11 Ad. & El. 34; 3 Per. & Dav. 5; 9 L.J.Q.B. 27; 3 Jur. 1028; 113 E.R. 325; 18 Digest (Repl.) 342, 904.
- (5) *Lord Bolton v. Tomlin* (1836), 5 Ad. & El. 856; 2 Har. & W. 369; 1 Nev. & P.K.B. 247; 6 L.J.K.B. 45; 111 E.R. 1391; 31 Digest (Repl.) 46, 2049.

Also referred to in argument:

- Knight v. Benett* (1826), 3 Bing. 361; 11 Moore C.P. 222; 4 L.J.O.S.C.P. 94; 130 E.R. 552; 30 Digest (Repl.) 413, 564.
- Beaty v. Gibbons* (1812), 16 East, 116; 104 E.R. 1032; 2 Digest (Repl.) 29, 131.
- Griffiths v. Puleston* (1844), 13 M. & W. 358; 14 L.J.Ex. 33; 153 E.R. 148; 2 Digest (Repl.) 25, 119.
- Strickland v. Maxwell* (1834), 2 Cr. & M. 539; 4 Tyr. 346; 3 L.J.Ex. 161; 149 E.R. 875; 2 Digest (Repl.) 23, 106.
- Wigglesworth v. Dallison* (1779), 1 Doug. K.B. 201; 99 E.R. 132; 2 Digest (Repl.) 24, 114.
- Beavan v. Delahay* (1788), 1 Hy. Bl. 5; 126 E.R. 3; 2 Digest (Repl.) 25, 120.
- White v. Sayer* (1621), Palm. 211; 81 E.R. 1047; 13 Digest (Repl.) 24, 256.

Rule Nisi obtained by the defendant for a new trial or for a reduction of damages in an action tried by **CLEASBY, B.**, and a jury at Warwick Assizes, and brought by the plaintiff to recover damages for loss suffered by the defendant's prevention of a sale by auction of the plaintiff's stock and goods on premises occupied by him as tenant of the defendant, on the ground of misdirection by the judge in not directing the jury that a tenancy to be determined by notice to quit of an indefinite duration was unknown at law; also on the ground that the verdict was against the evidence. The jury found a verdict of £100 for the plaintiff.

The plaintiff was a builder and furniture dealer at Birmingham and the defendant was the executor of his deceased father, who had held on lease a canal wharf and some dwelling houses abutting thereon. Howell was sub-lessee of these premises, and on May 20, 1861, the plaintiff became a yearly tenant under him of one of these houses, at the annual rent of £35 including taxes. The plaintiff was also given the right to the joint use of some offices, a right of way over the wharf to them, and the privilege of laying timber or other materials on any part of the wharf and in a warehouse thereon. On Mar. 25, 1864, Howell gave the plaintiff a quarter's notice to quit to determine his tenancy at the expiration of the lease from the testator. At the conclusion of the period of this notice the plaintiff became a weekly tenant, under an agreement in writing, the tenancy to be determinable at a week's notice by either Howell or the plaintiff. There was also a verbal arrangement at the same time that Howell should not determine the tenancy without giving the plaintiff a sufficient opportunity to remove his stock and obtain other premises. On Sept. 29, 1864, Howell's lease expired, and, according to the plaintiff's evidence, he became tenant on the same terms to the testator, the defendant's father, who died in June, 1868. The plaintiff continued to pay rent to the defendant, and, as he alleged, continued his tenancy on the same terms as before. On Jan. 16, 1869, the defendant served on the plaintiff notice to quit on Jan. 25. The plaintiff desiring to make fresh terms with the defendant, took no steps to move, and on Jan. 27, he received a letter requiring him to give up possession to the defendant forthwith, requesting him at once to remove all materials from the wharf and warehouse he had been using, demanding compensation for the use of the warehouse, and threatening ejection. The plaintiff made proposals for a continuation of his tenancy, which, however, the defendant refused, and the plaintiff advertised a sale by auction of all his goods and materials for Feb. 11 and 12, 1869. On Feb. 8, the plaintiff received a letter, in which the defendant stated that he would not allow the sale to take place unless compensation were first paid for the use of the warehouse in which the defendant alleged the plaintiff had been a trespasser. The plaintiff declined to pay the compensation claimed, and the defendant prevented the sale by auction from taking place as advertised. On Feb. 15, the defendant entered a plaint in the Birmingham County Court for the recovery of possession of the premises, and obtained an order for delivery of possession in a month. The plaintiff then sold his stock by private treaty, at a great sacrifice, and on Apr. 8, 1869, gave up possession of the premises, and paid defendant £2 14s. rent for four weeks to that date. The plaintiff brought this action to recover compensation for the loss he had suffered in consequence of the defendant's interruption of the sale by auction.

Serjeant O'Brien and Beasley for the plaintiff.

Wills for the defendant.

BOVILL, C.J.—I think there is no objection, as a matter of law, to a weekly tenancy, determinable by a week's notice, with a condition attached that, in the event of the landlord giving notice, the tenant shall have a further

reasonable time to remove his goods from the premises. Evidence was adduced on the plaintiff's part that such an arrangement had been entered into, and the jury have found in accordance with that evidence. It has been contended that the plaintiff's privilege to store materials on the wharf and in the warehouse was a mere licence at any time revocable, but it seems to me rather to have been an interest in the nature of an incorporeal hereditament annexed to the tenancy.

The right to remove goods or fixtures from premises leased by a tenant after the expiration of his tenancy is well known to the law, as appears from the passage from Co. LIT. 56A cited by WILLES, J., in argument. Why, then, should not such a right exist by agreement in the present case? LORD COKE speaks of a tenancy purely at will, and says the fixtures may be removed after the lapse of a reasonable time. It was held in *Stansfeld v. Portsmouth Corpn.* (1) that a reasonable time for the removal of fixtures was impliedly allowed under a lease which made no express provision to that effect. The action in that case was by assignees in bankruptcy of a shipwright who had leased premises from the defendants; he had erected during his term certain machinery for the purposes of his trade, which by the lease became at the end of the term the property of the defendants. The lease also provided that this last-mentioned stipulation should not apply to machinery or other articles erected or set up for any other purpose than that of a shipwright's trade, but that it should be lawful for the lessee at any time during the term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, etc., from the said demised premises. The lease further provided that in the event of the lessee becoming bankrupt, the lessors might re-enter and take possession of all machinery, etc., used or employed in the business of a ship-builder. Upon the bankruptcy of the lessee the lessors re-entered, but it was held that the assignees of the lessee were entitled to enter for the purpose of removing the fixtures other than those set up for the ship-building business, and to a reasonable time for that purpose. The law with regard to farming leases stands on the same principle. It is difficult to distinguish between the application of this principle to premises demised and to a privilege annexed to a tenancy.

If, then, the agreement alleged by the plaintiff in the present case was made, he had a right to remove his goods from the wharf and warehouse within a reasonable time after the conclusion of his tenancy of the other premises, and if the defendant obstructed him in the exercise of that right, he must be liable for the injury he so caused; the fact of the privilege or licence being affixed to the tenancy at one entire rent places the defendant in the same position as his predecessor in title who entered into the arrangement. The defendant received rent from the plaintiff after the testator's death, and acquiesced in the tenancy. There is nothing to show that he did not acquiesce in the whole of the terms, the verdict was in his favour, and he had a right of action for the breach of the agreement.

WILLES, J.—I am of the same opinion. The tenant was originally to have a reasonable time for the removal of his goods after the termination of his tenancy, and there was evidence of a new contract between the plaintiff and defendant by which this stipulation was revived. The payment of rent by the plaintiff was continued after the death of the defendant's father; the defendant was at law the devisee of his father, and the statute 32 Hen. 8, c. 34 [Grantees of Reversions, 1540: repealed by Law of Property Act, 1925], gave to lessees the like remedy against the grantees of reversions, which they might have had against their grantors. The executors of a lessee, on the other hand, if they continue to occupy, are certainly bound by the terms of the original agreement: *Buckworth v. Simpson* (2). As to the goods in the house rented by the

plaintiff, such a stipulation as that reasonable time for removal should be allowed after the conclusion of the term may doubtless be entered into by contract. No authority has been cited against such an arrangement, and provided it is not claimed for any other purpose but that for which it was intended, it seems to me that we ought to recognise it. As to the goods on the wharf and in the warehouse, which were stored there, as is alleged, merely by the licence of the defendant's father, there may be somewhat greater difficulty. The right must be merely an incorporeal hereditament, which could ordinarily only be conveyed by deed; but if, as it seems here, it was annexed to the tenancy, I think we can hold that it might have been created by parol agreement.

This seems to have been the view taken by LORD CRANWORTH [as ROLFE, B.] in *Wood v. Leadbitter* (3), when he directed the jury, that assuming the ticket for admission to the land of Lord Eglintoun had been sold by him to the plaintiff, it was lawful for Lord Eglintoun to remove him from the land without returning the money or assigning a cause, after giving him reasonable notice to quit. In the judgment upon that case ALDERSON, B., reviewed with approval the decision of the Queen's Bench in *Wood v. Manley* (4). That was an action of trespass for coming on plaintiff's land to remove hay which defendant had purchased, and for the removal of which plaintiff had given defendant leave to enter as often as he should see fit. The jury were directed that the licence to come from time to time to remove the hay was irrevocable; the court refused a rule on the ground of misdirection, because they said this was a case not of a mere licence, but of a licence coupled with an interest: see also *Lord Bolton v. Tomlin* (5).

I have no doubt that the acquiescence of the defendant in the terms upon which the plaintiff had been occupying under the testator involved the licence as well as the tenancy, and the rent was clearly paid for both; it is by no means clear that under the circumstances the defendant could have revoked the licence by itself, at all events without the consent of the plaintiff.

MONTAGUE SMITH, J., concurred.

Rule discharged.

FROST v. KNIGHT

[COURT OF EXCHEQUER CHAMBER (Sir Alexander Cockburn, C.J., Byles, Keating and Lush, JJ.), June 20, 21, 1871, February 7, 1872]

[Reported L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77;
20 W.R. 471]

Contract—Repudiation—Performance of contract dependent on contingency—Refusal by promisor, before contingency, to perform contract—Right of promisee to bring action at once—Breach of promise.

The defendant promised the plaintiff that he would marry her on the death of his father, but before the father's death he announced his absolute determination never to fulfil the promise. The plaintiff sued for breach of promise while the defendant's father was still alive.

Held: the principle of *Hochster v. De la Tour* (1) (1853), 2 E. & B. 678, that where a contract was to be performed at a future time and the promisor, prior to that time, announced his intention not to perform it the promisee might treat that repudiation as a wrongful putting an end to the contract and at once bring an action for the breach applied equally to a case where the performance of the contract was made to depend on a contingency and before the happening of the contingency the promisor declared his intention not to perform the promise, and, therefore, the contract in the present case was to be treated as repudiated by the defendant and the plaintiff was entitled to bring an action for its breach.

Notes. Considered: *Cherry v. Thompson* (1872), L.R. 7 Q.B. 573; *Roper v. Johnson* (1873), L.R. 8 C.P. 167; *Wilson v. Carnley*, [1908-10] All E.R. Rep. 120; *Credito Italiano v. Swiss Bankverein* (1916), 85 L.J.K.B. 1477; *Payzu, Ltd. v. Saunders*, [1919] 2 K.B. 581; *Guy-Pell v. Foster*, [1930] All E.R. Rep. 790; *Scammell v. Ouston*, [1941] 1 All E.R. 14; *White and Carter (Councils), Ltd. v. McGregor*, [1961] 3 All E.R. 1178; *Yeoman Credit, Ltd. v. Odgers*, [1962] 1 All E.R. 789. Referred to: *Brown v. Muller* (1872), L.R. 7 Exch. 319; *Dunkirk Colliery Co. v. Lever* (1879), 41 L.T. 633; *Société Générale de Paris v. Milders* (1883), 49 L.T. 55; *Johnstone v. Milling* (1886), 16 Q.B.D. 460; *Synge v. Synge*, [1891-4] All E.R. Rep. 1164; *Brace v. Calder* (1895), 64 L.J.Q.B. 582; *Roth v. Taysen, Townsend and Grant* (1895), 73 L.T. 628; *Michael v. Hart*, [1902] 1 K.B. 482; *Curtus v. B.U.R.T. Co.* (1912), 28 T.L.R. 353; *Veithardt and Hall v. Rylands* (1917), 86 L.J.Ch. 604; *Spettabile Consorzio Veneziano Di Armamento E Navigazione v. Northumberland Shipbuilding Co.*, [1918-19] All E.R. Rep. 963; *Millet v. Van Heek & Co.*, [1921] All E.R. Rep. 519; *Ellis & Co.'s Trustee v. Dixon-Johnson* (1924), 131 L.T. 652; *Berners v. Fleming*, [1925] All E.R. Rep. 557; *Martin v. Stout*, [1925] A.C. 359; *Never-Stop Rail. Co. (Wembley) v. British Empire Exhibition (1924) Incorporated*, [1926] Ch. 877.

As to repudiation of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 202-205; and for cases see 12 DIGEST (Repl.) 377 et seq.

Cases referred to :

- (1) *Hochster v. De la Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, 2960.
- (2) *Lovelock v. Franklyn* (1846), 8 Q.B. 371; 15 L.J.Q.B. 146; 10 Jur. 246; 115 E.R. 916; sub nom. *Frankland v. Lovelocke*, 6 L.T.O.S. 345; 12 Digest (Repl.) 387, 3009.
- (3) *Short v. Stone* (1846), 8 Q.B. 358; 3 Dow. & L. 580; 15 L.J.Q.B. 143; 6 L.T.O.S. 316; 10 Jur. 245; 115 E.R. 911; 12 Digest (Repl.) 388, 3015.
- (4) *Danube and Black Sea Railway and Kustentje Harbour Co., Ltd. v. Xenos* (1863), 13 C.B.N.S. 825; 31 L.J.C.P. 284; 5 L.T. 527; 8 Jur.N.S. 439; 10 W.R. 320; 143 E.R. 325, Ex. Ch.; 12 Digest (Repl.) 382, 2981.
- (5) *Avery v. Bowden* (1856), 6 E. & B. 953, 962; 26 L.J.Q.B. 3; 5 W.R. 45; 119 E.R. 1119, Ex. Ch.; 12 Digest (Repl.) 381, 2978.
- (6) *Reid v. Hoskins* (1856), 6 E. & B. 953; 26 L.J.Q.B. 5; 28 L.T.O.S. 145; 3 Jur.N.S. 238; 5 W.R. 45; 119 E.R. 1119, Ex. Ch.; 12 Digest (Repl.) 381, 2979.
- (7) *Phillpotts v. Evans* (1839), 5 M. & W. 475; 9 L.J.Ex. 33; 151 E.R. 200; 12 Digest (Repl.) 371, 2930.
- (8) *Ripley v. M'Clure* (1849), 4 Exch. 345; 18 L.J.Ex. 419; 14 L.T.O.S. 180; affirmed sub nom. *M'Clure v. Ripley* (1850), 5 Exch. 140, Ex. Ch.; 12 Digest (Repl.) 380, 2974.
- (9) *Wilkinson v. Verity* (1871), L.R. 6 C.P. 206; 40 L.J.C.P. 141; 19 W.R. 604; sub nom. *Williamson v. Verity*, 24 L.T. 32; 1 Digest (Repl.) 68, 513.

Also referred to in argument :

Cutter v. Powell (1795), 6 Term Rep. 320; 101 E.R. 573; 12 Digest (Repl.) 130, 810.
Hall v. Wright (1859), E.B. & E. 765; 29 L.J.Q.B. 43; 1 L.T. 230; 6 Jur.N.S. 193;
 8 W.R. 160; 120 E.R. 695, Ex. Ch.; 12 Digest (Repl.) 426, 3281.

Smith v. Woodfine (1857), 1 C.B.N.S. 660; 140 E.R. 272; 17 Digest (Repl.) 104, 182.

Cort v. Ambergate, etc. Rail. Co. (1851), 17 Q.B. 127; 20 L.J.Q.B. 460; 17 L.T.O.S. 179; 15 Jur. 877; 117 E.R. 1229; 12 Digest (Repl.) 490, 3682.

Burtis v. Thompson, 42 New York Reports (3 Hand) at pp. 246, 248.

Thorn v. Knapp, 42 New York Reports (3 Hand), p. 474.

Thomas v. Howell (1692), 1 Salk. 170; 2 Eq. Cas. Abr. 360; Holt, K.B. 225; 4 Mod. Rep. 66; Skin. 301; 91 E.R. 157; 44 Digest 477, 2949.

Atchinson v. Baker (1796), Peake, Add. Cas. 103, N.P.; 12 Digest (Repl.) 426, 3280.

Box v. Day (1744), 1 Wils. 59; 95 E.R. 491; 7 Digest (Repl.) 213, 497.

Leigh v. Paterson (1818), 8 Taunt. 540; 2 Moore, C.P. 588; 129 E.R. 493; 39 Digest 675, 2613.

Appeal from a decision of the Court of Exchequer.

In an action for breach of promise of marriage evidence was given to show that the defendant promised to marry the plaintiff on the death of his father, and also that he refused to perform the promise. It was proved that the defendant's father was still alive. A verdict having been obtained for the plaintiff with £200 damages, counsel obtained a rule, which was afterwards made absolute, for a new trial on the ground that the judge, MARTIN, B., ought to have nonsuited the plaintiff. The plaintiff having appealed, the case was re-argued in the Exchequer Chamber before SIR ALEXANDER COCKBURN, C.J., BYLES, KEATING, LUSH, and SMITH, JJ.

A. J. Staveley Hill, Q.C., and *C. Dodd* for the plaintiff.

Powell, Q.C. (Streeten with him) for the defendant.

Cur. adv. vult.

Feb. 8, 1872. **SIR ALEXANDER COCKBURN, C.J.**, read the following judgment in which **KEATING** and **LUSH, JJ.**, concurred.—This case comes before us on error brought on a judgment of the Court of Exchequer, arresting the judgment in the action on a verdict given for the plaintiff. The action was for breach of promise of marriage. The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule nisi was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, until which event no claim for performance could be made and consequently, no action for breach of the contract could be maintained. A rule nisi having been granted, a majority of the Court of Exchequer concurred in making it absolute, MARTIN, B., dissenting. The question for us is whether the judgment of the majority was right?

Lovelock v. Franklyn (2) and *Short v. Stone* (3), which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil the contract, an action will at once lie. *Hochster v. De la Tour* (1), upheld in this court in the *Danube and Black Sea Railway and Kustentje Harbour Co., Ltd. v. Xenos* (4), went further, and established that notice of an intended breach of a contract to be performed in future had a like effect. The law with reference to a contract to be performed at a future time where the party bound to performance announced prior to the time

his intention not to perform it, as established by *Hochster v. De la Tour* (1) A and the *Danube and Black Sea Railway and Kustenje Harbour Co., Ltd. v. Xenos* (4) on the one hand, and *Avery v. Bowden* (5), and *Reid v. Hoskins* (6), on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations under it, and enables the other party not only to complete the contract if so advised, notwithstanding his previous renunciation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand the promisee may, if he thinks fit, treat the repudiation of the other party as a wrongful putting B an end to the contract, and may at once bring his action on the breach of it; in which action he will be entitled to such damages as would have arisen from the non-performance of the contract at the prescribed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss. C

Considering this to be now settled law, notwithstanding anything that may have been held or said in *Phillpotts v. Evans* (7) and *Ripley v. M'Clure* (8) we should have had no difficulty in applying the principle of the decision in *Hochster v. De la Tour* (1) to the present case, were it not for the difference which undoubtedly exists between that case and the present, namely, that whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, D namely, the death of the defendant's father during the life of both the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself before the time of performance arises; but here we have a further contingency, depending on the life of a third person, during which neither party can claim performance of the promise. E This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise. After full consideration, we are of opinion that, notwithstanding the distinguishing circumstances to which I have referred, this case falls within the principle of *Hochster v. De la Tour* (1) and that consequently the present action is well brought. F

The considerations on which the decision in *Hochster v. De la Tour* (1) is founded are that by the announcement of the contracting party of his intention not to fulfil it, the contract is broken; and that it is to the common benefit of both parties that the contract shall be taken to be broken G as to all its incidents, including non-performance at the appointed time, and that an action may be at once brought, and the damages consequent on non-performance be assessed at the earliest moment, as thereby many of the injurious effects of such non-performance may possibly be averted or mitigated. It is true, as is pointed out by KELLY, C.B., in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. On the other hand, however, there is—and the decision in *Hochster v. De la Tour* (1) proceeds on that assumption—a breach of a contract when the promisor repudiates it, and declares he will no longer be bound by it. The promisee has an inchoate right H to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His right acquired under I

it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party and the announcement that it never will be fulfilled must of course deprive him. It is, therefore, quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee if so minded may at once treat it as a breach of the entire contract, and bring his action accordingly.

The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may, therefore, by anticipation be treated as a cause of action, and damages be assessed and recovered in respect of it, although the time for performance may yet be remote. It is obvious that such a course must tend to the convenience of both parties; and although we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in such cases avert, or at all events materially mitigate, the injurious effects that would otherwise flow from the non-fulfilment of the contract; and, in assessing the damage for breach of performance, a jury will, of course, take into account whatever the plaintiff has done or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been or should have been diminished. It appears to us that the foregoing considerations apply to a contract, the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time, and we are, therefore, of opinion that the principle of the decision in *Hochster v. De la Tour* (1) is equally applicable to such a case as the present.

It is next to be observed that the law, as settled by *Hochster v. De la Tour* (1) and the *Danube and Black Sea Railway and Kustentje Harbour Co., Ltd. v. Xenos* (4), is obviously quite as applicable to a contract in which personal status or personal rights are involved, as to one relating to commerce or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed in future. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to social status accruing on marriage, but a new status, that of betrothment, arises between the parties. This relation, it is true, has not by the law of England the same important consequences which attached to it by the canon law and the law of many other countries, nevertheless it carries with it consequences of the greatest importance to the parties; each becomes bound to the other and neither can, consistently with such a relation, enter into a similar engagement with another person. Each has an implied right to have this relation continued till the contract is finally accomplished by the marriage. To the woman more especially it is all important that the relation shall not be put an end to. Independently of the mental pain occasioned to the feelings by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions, nor could she admit of such approaches if made; while the breaking off of the engagement is too apt to cast a slur on one who has been thus treated. We see, therefore, every reason for applying the principle of *Hochster v. De la Tour* (1) to such a case, and for holding that the contract is broken on repudiation not only in its present

but in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less.

It has been suggested, indeed, that as the desire for marriage and the happiness to be expected from it diminish with advancing years, where by the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished, and that consequently an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We cannot but think that in estimating the amount of injury, and the compensation to be made for it, the wasted years, if the contract were broken when the time for marrying had come and the impossibility of forming any other engagement during the intermediate time, should be taken into account and not merely the age of the parties and the then existing value of the marriage. It appears, therefore, manifest that it is better for both parties—for the party intending to break the contract as well as for the party wronged by the breach of it—that an express repudiation of the contract should be treated as a violation of it in all its incidents, and give a right to the party wronged to bring an action at once and have the damages assessed at the earliest moment. No one can doubt that, morally speaking, a party who has determined to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise is come. The reason is, that giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates the injury to the other party.

It has been urged that there must be great difficulty in thus assessing damages prospectively; but this must always be more or less the case whenever the principle of *Hochster v. De la Tour* (1) comes to be applied. It would equally exist where one of the parties by marrying another person gave rise to an immediate right of action. It cannot be said that the difficulty is by any means insuperable, and the advantage resulting from the application of the principle of *Hochster v. De la Tour* (1) is quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages. We are struck by the fact that the majority of the Court of Exchequer, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. However, the rights and obligations of the parties arising here entirely out of contract, we are at a loss to see how such an action could be maintained. Be that as it may; as in such an action the damages would have to be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simplest course—the case being, as it seems to us for the reasons we have given, clearly within the decision in *Hochster v. De la Tour* (1)—to hold that the present action for breach of contract may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the non-fulfilment of the promise, as though the death of the defendant's father—the event on which the fulfilment was to depend—had actually occurred. We are, therefore, of opinion that the judgment of the Court of Exchequer must be reversed.

BYLES, J.—I think that the plaintiff below is entitled to recover both on principle and on authority; but as my judgment was prepared before I had

the advantage of seeing that of SIR ALEXANDER COCKBURN, C.J., and as this is a case of great importance, I think I ought to deliver it.

An express pre-contract of marriage, as already suggested by the Lord Chief Justice, places the man and woman in the condition or status of betrothment. In this state there are certain mutual duties. The woman, for example, may not, without a breach, marry another man, although it is possible that he may die before the future day appointed for the first intended marriage, whether already fixed or dependent on a future event. So I conceive the man cannot, during the stipulated period of betrothment, without a breach of contract marry another woman, though that woman may die in the mean time. So for one of the parties to break off the mutual engagement by an express refusal to perform it, though before the day, seems to me equally a breach of the contract, for it puts an end to the condition of betrothment, which according to the contract was to continue. In each of these three cases there is a repudiation of the duties springing from the new relation involved in the contract. But independently of the peculiarities attending a pre-contract of marriage, the decision in *Hochster v. De la Tour* (1) shows that in the analogous case of a pre-contract for future service the refusal of one of the parties to perform the contract, although before the time appointed for its fulfilment, is a breach. The decision in that case goes further than is necessary for our decision in this case, for there no status had been established like that involved in a pre-contract of marriage. Indeed, the Court of Common Pleas, in *Wilkinson v. Verity* (9), and the court of error in *Danube and Black Sea Railway and Kustenje Harbour Co., Ltd. v. Xenos* (4), have laid it down that an absolute unconditional renunciation of a contract before the time of performance amounts to a breach at the election of the promisee.

Appeal allowed.

WILLIAMS AND ANOTHER v. BAYLEY

[HOUSE OF LORDS (Lord Cranworth, L.C., Lord Chelmsford and Lord Westbury),
June 14, 15, 18, 19, 21, 1866]

[Reported L.R. 1 H.L. 200; 35 L.J.Ch. 717; 14 L.T. 802;
12 Jur.N.S. 875]

Contract—Illegality—Public policy—Agreement to stifle prosecution for criminal offence—Duress—Undue influence—Representation to party that his son would be prosecuted if agreement not made.

An agreement to stifle a prosecution for a criminal offence is against public policy and illegal, and, therefore, unenforceable.

An agreement obtained by duress or undue influence (as where one party represented to the other that the latter's son would be prosecuted for a criminal offence if he did not consent to the agreement) is unenforceable and may be set aside.

Notes. Applied: *Fisher v. Appollinaris Co.* (1875), 10 Ch. App. 299, n.; *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch.D. 469. Considered: *Whitmore v. Farley*, [1881-5] All E.R. Rep. 711. Considered and Applied: *Seear v. Cohen* (1881), 45 L.T. 589. Considered: *Flower v. Sadler* (1882), 10 Q.B.D. 572. Distinguished: *Haywood v. Whitaker* (1887), 3 T.L.R. 537. Explained: *McClatchie v. Haslan* (1891), 65 L.T. 691. Considered: *Jones v. Merionethshire Permanent*

Benefit Building Society, [1892] 1 Ch. 173. Distinguished: *Hardie and Lane, Ltd. v. Chilton*, [1928] All E.R. Rep. 36. Applied: *Mutual Finance, Ltd. v. Wetton & Sons, Ltd.*, [1937] 2 All E.R. 657. Considered: *Sykes v. D.P.P.*, [1961] 3 All E.R. 33. Referred to: *Rourke v. Mealy* (1879), 41 L.T. 168; *Allen v. Flood*, [1898] A.C. 1; *Barnes v. Richards* (1902), 71 L.J.K.B. 341; *Howard v. Odhams Press, Ltd.*, [1937] 2 All E.R. 509.

As to agreements made under duress and undue influence and agreements tending to pervert the course of justice, see 8 HALSBURY'S LAWS (3rd Edn.) 84-86, 136-138; and for cases see 12 DIGEST (Repl.) 104 et seq., 286-294.

Case referred to:

(1) *Wallace v. Hardacre* (1807), 1 Camp. 45, N.P.; 12 Digest (Repl.) 287, 2199.

Also referred to in argument:

Sprye v. Porter (1856), 7 E. & B. 58; 26 L.J.Q.B. 64; 28 L.T.O.S. 229; 21 J.P. 55; 3 Jur.N.S. 330; 5 W.R. 81; 1 Digest (Repl.) 86, 654.

Waite v. Jones (1835), 1 Bing. N.C. 656; 1 Hodg. 166; 1 Scott, 730; 4 L.J.C.P. 184; 131 E.R. 1270; affirmed sub nom. *Jones v. Waite* (1839), 5 Bing. N.C. 341; 7 Scott, 31, Ex. Ch.; on appeal (1842), 9 Cl. & Fin. 101; 4 Man. & G. 1104; 5 Scott, N.R. 951; 6 Jur. 653; 8 E.R. 353, H.L.; 12 Digest (Repl.) 326, 2519.

Chowne v. Baylis (1862), 31 Beav. 351; 31 L.J.Ch. 757; 6 L.T. 739; 26 J.P. 579; 8 Jur.N.S. 1028; 11 W.R. 5; 54 E.R. 1174; 12 Digest (Repl.) 240, 1809.

Mare v. Sandford (1859), 1 Giff. 288; 1 L.T. 183; 5 Jur.N.S. 1339; 65 E.R. 923; 5 Digest (Repl.) 1221, 9817.

Reynell v. Sprye, *Sprye v. Reynell* (1852), 1 De G.M. & G. 660; 21 L.J.Ch. 633; 42 E.R. 710, L.J.J.; 12 Digest (Repl.) 320, 2472.

Wade v. Simeon (1846), 2 C.B. 548; 3 Dow. & L. 587; 15 L.J.C.P. 114; 6 L.T.O.S. 346; 10 Jur. 412; 135 E.R. 1061; 12 Digest (Repl.) 221, 1633.

Ward v. Lloyd (1843), 6 Man. & G. 785; 1 Dow. & L. 763; 7 Scott, N.R. 499; 13 L.J.C.P. 5; 2 L.T.O.S. 170; 134 E.R. 1109; 12 Digest (Repl.) 287, 2202.

Wickham v. Gatrill (*Gattrell*) (1854), 2 Sm. & G. 353; 2 Eq. Rep. 805; 23 L.J.Ch. 783; 23 L.T.O.S. 252; 18 J.P. 677; 18 Jur. 768; 2 W.R. 673; 65 E.R. 433; 1 Digest (Repl.) 78, 587.

Appeal by the defendants from a decree of STUART, V.-C., reported 4 Giff. 638, in a suit to set aside certain agreements made by them with the respondent to secure £7203, alleged to be obtained by the appellants from the respondent under pressure.

The appellants were bankers at Wednesbury, and also magistrates in the county of Stafford. The respondent, James Bayley, was a farmer and coal proprietor seised of certain mines in fee-simple in possession, and kept a banking account with the appellants. The respondent was uneducated; he could write his own name, but was unable to keep accounts or write letters. He was sixty-seven years old, and had nine children. One of the adult sons was William Bayley, who had a wife and seven children. William Bayley was in business at West Bromwich, about three miles from the respondent's colliery. He used to purchase coals from his father, and there was an account current between them. In 1862 William Bayley was largely indebted to his father, who had often received bills of exchange and promissory notes in payment, which were endorsed and paid into the respondent's account at the appellants' bank. William Bayley also kept a banking account with the appellants, which was separate from the respondent's account. In 1863 the respondent received notice from the appellants of a dishonoured bill or note of William Bayley, which notice was sent on to William Bayley. Similar notices were received afterwards, which were treated in like manner. On April 17, 1863, the respondent was asked by the appellants' manager if a signature to a bill purporting to be the respondent's was his, which

signature was declared not to be the respondent's. Soon afterwards the respondent called at the appellants' bank, and was told that there were notes and bills lying there to the amount of £6000 and upwards bearing his (the respondent's) signature. The respondent stated his astonishment, and said that he had never authorised such signatures. One of the appellants said, "it was one of those unfortunate affairs that was to be looked upon in a business light," whereupon the respondent said he should be sorry to see the appellants lose anything, and would do anything he could to avoid it.

On April 18, 1863, Mr. Deakin, the manager of the appellants' bank, requested the respondent and his son to call at the bank. On the same day William Bayley called on his solicitor, Mr. Duignan, admitted he had forged his father's name to the notes and bills, and said he feared that the appellants would take him into custody. Mr. Duignan told the respondent that he expected the appellants would ask him (the respondent) to guarantee the money, but hoped he would not think of doing so, which the respondent said he certainly would not. The respondent and his son William kept the appointment with the appellants, and William told the appellants he had written his father's name. One of the appellants then said, "Young man, do you know this is transportation?" to which William Bayley replied, "if he was transported twenty times he would not deny his handwriting." Afterwards, according to the respondent's account, he saw the appellants, and was induced by the pressure of their statements, and in order to save his son from transportation, to agree to become security to the appellants for the bills on condition of their being delivered up to him, and that no criminal proceedings would be taken against his son. The respondent signed the following agreement accordingly :

"To Messrs. Philip and Henry Williams, Bankers, Wednesbury. In consideration of your consenting to give up to me the several under-mentioned bills and promissory notes, I hereby charge all that my colliery situate at Tipton in the county of Stafford, and known as the Tipton Meadow Colliery, with the engines, fixtures, and apparatus thereto belonging, and all other the hereditaments and premises described, in the title-deeds hereinafter mentioned, with the payment to you of £7203 14s. 6d., being the amount advanced by you on the said bills and notes. And I hereby agree to pay to you the said sum of £7203 14s. 6d., and I agree to deposit with you the several title-deeds and writings relating to the said Tipton Meadow Colliery by way of equitable mortgage for securing payment to you of the said sum of £7203 14s. 6d."

Next day the respondent took the title-deeds relating to the colliery to the appellants, and also signed documents placed before him charging the colliery with the sum of £7203 14s. 6d. The respondent, after executing such agreements, received from the appellants the promissory notes mentioned in the schedule. On May 16, 1863, the respondent filed his bill to set aside the above agreements. On May 19, 1863, the appellants commenced an action on such agreements to recover £7203 from the respondent. This action was stopped by injunction, and the appellants filed their answer to the bill, in which they set forth that they believed the respondent was a party to the bills and notes. By decree of Mar. 7, 1865, STUART, V.-C., ordered the agreements to be delivered up to be cancelled. The defendants appealed to the House of Lords.

Sir Hugh Cairns, Q.C., and *Karslake* (with them *Kingdon*) for the appellants.
Sir Roundell Palmer, Q.C., and *Everitt* for the respondent.

LORD CRANWORTH, L.C., stated the facts, and continued: I have no doubt at all in coming to the conclusion (there is not a tittle of evidence to the contrary) that all these signatures [of William Bayley] were in fact

forgeries. That they were not the signatures of the father is clear, and I do not think there is the smallest reason to suppose that he ever gave his son any express or implied authority to sign the bills in his name. It is obvious that the bankers must have seen that they were in great jeopardy as to the notes, and that they would probably lose their money unless the father came in and assisted the son. I cannot but come to the conclusion from the evidence that they strongly suspected, indeed they must be said to have known, that these signatures were forgeries. If the signatures were forgeries, then the bankers had the means of prosecuting the son. That was clear.

The question is: What was the sort of influence which they exercised on the mind of the father to induce him to take on himself the responsibility of paying these debts? Was it merely: "We do not know these to be forgeries; we do not believe them to be so, but your son is responsible for them, and if you do not help him, we must sue him for the amount?" Or was it, "If you do not pay these bills we shall be in a position to prosecute him for forgery, and we will prosecute him for forgery?" What is the fair inference from what took place? I do not know what may be the opinion of the rest of your Lordships, but I very much agree with the argument of counsel for the appellants that it is not pressure in the sense in which a court of equity sets aside transactions on account of pressure, if the pressure is merely this: "If you do not do such and such an act, I shall reserve all my legal rights whether against yourself or against your son." If it had only been: "If you do not take on yourself the debt of your son, we must sue your son for it," I cannot think that that amounts to pressure, when parties are at arms length; and particularly when, as in this case, the party supposed to be influenced by pressure, had the assistance of his solicitor, not, indeed, on the first occasion, but afterwards, before anything is done. But if what really takes place is this: "If you do not assist your son by taking on yourself the payment of these bills and notes, on which there are signatures which are said to be forgeries, you must not be surprised at any course we shall take," meaning to insinuate, if not to say: "We shall hold in our hands the means, and shall exercise our discretion as to using those means, of criminally prosecuting him for forgery," I say that, if it amounts to that, it is a very different thing.

When the parties met, there was a very significant expression made use of by Mr. Deakin, the manager, in the presence of one of the bankers, Henry Williams: "We do not wish to exercise pressure on you if it can be satisfactorily arranged." What is the meaning of that? Does the "pressure" mean a pressure arising from our exercising the power, or keeping in our hands the means of exercising the power, of instituting a criminal prosecution? or does it mean the "pressure" of getting you to make yourself responsible for your son's debt? It must have meant the former, because the context shows that the other was alternatively provided for when it was said: "We do not wish to exercise pressure if it can be satisfactorily arranged." That could not mean: "If you take on yourself the debt without pressure we don't mean to press you." That would be nonsensical; but, on the other interpretation of the words, the sense is very plain. "If you can satisfactorily arrange this, and if you choose," according to another expression that was used, "to treat it as a matter of business, that is, to take upon yourself the debt, we will not exercise pressure." Of course not. The "pressure" there referred to must be something different from merely obtaining the security of the father. It amounts to this: "Take your choice; give us security for your son's debt. If you take that on yourself, then it will all go smoothly; if you do not, we shall be bound to exercise pressure," which could only mean to "exercise those rights which remain to us by reason of our holding signatures forged by your son." It was then arranged that there should be another meeting. It was urged in the argument that the bankers could not have contemplated a prosecution because they allowed two

days to elapse, during which the son might have escaped. But all parties supposed that the father could prevent the prosecution by giving what the bank required. Two days later the father, the son, and other members of the family, with the father's solicitor, all met at the bank office. On that occasion further conversation takes place. There had been some negotiations going on to see how the debts of the son could be met or satisfied, what assets he had, and so forth. The father said something about the son paying the bankers by instalments of £1000 a-year; to which one of the bankers replied, "We shall have nothing to do with any £1000 a-year. If the bills are yours [addressing the respondent] we are all right. If they are not, we have only one course to pursue, we cannot be parties to compounding a felony."

According to my interpretation of the law, this did not amount to compounding a felony. But one sees clearly what the parties meant. It was this. If you choose to take on yourself the responsibility of these bills all will be right; but, if not, we cannot be parties to what they call "compounding a felony," but what LORD ELLENBOROUGH, in *Wallace v. Hardacre* (1), more correctly called "stifling a prosecution." I think that is the only interpretation that can possibly be put on what passed. In the course of this conversation, Mr. Thursfield, the solicitor of the bankers, said: "Yes, it is a serious matter; it is a case of transportation for life." That was said in the hearing of the bankers. They must have heard it. They must have known while all these negotiations were going on that all the parties to them understood that this was a case of transportation for life. The father, then, was acting in this matter under the notion that, if he did not interfere to save his son, he would be liable to be prosecuted, and probably would be prosecuted for forgery, and so be transported for life.

That being the clear inference from all the evidence, the question arises: What is the law applicable to such a case? These bankers held a number of acceptances which one can hardly suppose they did not believe to be forged acceptances. I say that because they never suggest any doubt on the subject. Although the bill of the respondent was amended and re-amended, and in the last re-amended bill there is a special charge that the bankers never suggested that the notes, which certainly were not in the respondent's handwriting, were signed with the privity of the respondent, the bankers, in answering that bill, never deny that; but, on the other hand, one of the witnesses, Thomas Bayley, I think, says that during the whole meeting no such suggestion was ever made. I asked counsel for the appellants if he could point out any suggestion of that kind as having been made; but the only approach to such a suggestion that he could refer to was a question addressed to the father as to the notes, to this effect: "Why did you not answer the letter informing you that it was dishonoured?" It is very true that lawyers might fully understand what that might mean, but I cannot think that that could possibly be understood by the parties as amounting to this, that we do not admit that these endorsements, though not in your handwriting, were not signed by your authority. I think that that is an inference which, under all the circumstances of this case, never could be dreamt of as deducible from what so passed. That being so, I think the case, in point of fact, is this. There are a quantity of forged notes. The bankers, in the presence of the father, and of the person who forged them, both being persons of apparent respectability in the country, carrying on business as tradesmen, and the father having the presence and assistance of his solicitor, say to him what amounts to this: "Give us security to the amount of these notes, and they shall all be delivered up to you." Or "Do not give us security, and then we tell you we do not mean to compound a felony; in other words, we mean to prosecute." That is the fair inference from what passed.

Is that a transaction which a court of equity will tolerate, or is it not? I agree very much with a good deal of the argument of counsel for the appellants

as to this doctrine of pressure. Many grounds on which a court of equity has acted in such cases do not apply in this case. The parties were not standing in any fiduciary relation to one another; and if this had been a legal transaction, I do not know that we should have thought that there was any pressure that would have warranted the decree made by the vice-chancellor. But there was a pressure of this nature: "We have the means of prosecuting and so transporting your son. Do you choose to come in to his help, and take on yourself the amount of his debts—the amount of his forgeries? If you do, we will not prosecute; if you do not, we will." That is the plain interpretation of what passed. Is that, or is it not, legal? I am bound to go the length of saying that I do not think it is legal. I do not think that a transaction of that sort would have been legal even if, instead of being forced on the father, it had been proposed by him and adopted by the bankers; and I come to that conclusion upon this short ground, that in *Wallace v. Hardacre* (1), tried before LORD ELLENBOROUGH, being a *nisi prius* case, although his decision there, founded upon the facts of that particular case, was against the view I am taking, yet in that case LORD ELLENBOROUGH pointedly states that which has always been understood to be the correct view of the law upon this subject, namely, that although in that case there was no reason for treating the agreement as invalid, yet it would have been otherwise if the agreement had been substantially an agreement to stifle a criminal prosecution. Although that was merely a dictum in a *nisi prius* case, yet on all occasions I have found, on looking at the reports by the late LORD CAMPBELL of LORD ELLENBOROUGH's decisions, that they really do in the fewest possible words often lay down the law even more distinctly and accurately than it is to be found in many lengthened reports, and what is so laid down has been subsequently recognised as giving a true view of the law as applied to the facts of the case.

Is the agreement in question, or is it not, one the object of which is to stifle a criminal prosecution? If there be any case in which that character can be properly given to an agreement, I confess that I think that this is such a case. Therefore, in my opinion, the decree is perfectly right, and I move your Lordships that this appeal be dismissed.

LORD CHELMSFORD.—I agree with my noble and learned friend on the Woolsack that the object of the arrangement between the parties was to save William Bayley from a prosecution for forgery; and I make that the foundation of the opinion which I have formed with regard to the agreement having been extorted from the father by undue pressure. It appears to me to be quite clear that the negotiations between the parties proceeded upon the footing of forgery having been committed by William Bayley, and of his being liable to a criminal prosecution; and that the bankers, both personally and by means of their agents, Mr. Thursfield, their solicitor, and Mr. Deakin, their manager, availed themselves of the fears of the father for the safety of the son to press the arrangement upon him. It is unnecessary to refer to various passages of the evidence to establish this point. It is sufficient to take the expression of Philip Williams, so often adverted to in the argument, and also by my noble and learned friend. In the affidavit of Mr. Deakin it is stated that he said: "If the bills are yours [addressing the respondent] we are all right. If they are not, we have only one course to pursue. We cannot be parties to compounding a felony." I think the interpretation which my noble and learned friend has put upon those expressions is perfectly correct. Again, in the answer of the bankers, there is this paragraph. They, Henry Williams and Philip Williams, say that they

"believe that the said Mr. Thursfield did once, in the course of the discussion, say, 'It is a serious matter,' and that Mr. Duignan immediately

said, 'It is a case of transportation for life'; but Mr. Thursfield had not said for whom, and in what respect, it was a serious matter, and no remark was made upon the succeeding observation of the said Mr. Duignan, namely, that it was a case of transportation for life."

But it is quite clear that Mr. Duignan understood the meaning of the expression of Mr. Thursfield that it was a serious matter, and Mr. Thursfield accepted the interpretation of Mr. Duignan, that "it was a case of transportation for life." I must also advert to the suspicious expression (which has been referred to be my noble and learned friend) of Mr. Deakin, that "the Messrs. Williams did not wish to exercise any pressure on the respondent if it could be satisfactorily arranged," which evidently shows what was passing, at least in Mr. Deakin's mind, upon this subject. It was never suggested throughout the whole negotiation that there was any civil liability on the part of the father. It was asked by counsel for the appellants whether there was anything that could be used against the bankers to prevent their insisting on the liability of the father? Probably not; but the question is in this case: What was the ground of their defence—whether they have insisted at any time that there was any civil liability on the part of the father?

Let us look at the way in which they put their case in their answer. They say:

"The [respondent] rests his case mainly on two grounds: first, that the transactions which led to the said agreements were equivalent to compounding a felony; secondly, that he was induced, by force, to execute them. But we say, first, that if any felony was committed (which we do not admit, but which is, as we insist, immaterial as regards the question in this suit), we never compounded it; that is to say, we never forbore, or agreed to forbear, an intended prosecution for it, or even threatened or contemplated a prosecution. And secondly we say that no force whatever was used against the [respondent]. He had the advice of his solicitor throughout the negotiations which led to his signing the agreements."

Therefore, they place their defence entirely upon these two grounds—that there was no compounding of felony, even if felony were committed; and that there was no force used, no undue influence exerted on the respondent, who acted, throughout, on the advice of his solicitor. The defence of the bankers being rested entirely on these two grounds, in my opinion, this negotiation proceeded upon an understanding between the parties that the agreement of James Bayley to give security for the bills would relieve William Bayley from the consequences of his criminal act; and the fears of the father were stimulated and operated on to an extent to deprive him of free agency, and to extort an agreement from him for the benefit of the bankers. It appears to me, therefore, that the case comes within the principles on which a court of equity proceeds in setting aside an agreement where there is inequality between the parties, and one of them takes unfair advantage of the situation of the other, and uses undue influence to force an agreement from him. I agree in thinking that this appeal ought to be dismissed.

LORD WESTBURY.—There are two aspects of this case, or rather two points of view in which it may be regarded. One of them is: Was the respondent a free and voluntary agent, or did he give the security in question under undue pressure exerted by the appellants? That regards the case with reference to the respondent alone. The second question regards the case with reference to the appellants alone: Was the transaction, taken independently of the question of pressure, an illegal one, as being contrary to the settled rules and principles of law?

With regard to the first point, namely, whether this was the voluntary act of the respondent, I would put two questions. First, what was the basis of the transactions or negotiations between the appellants and the respondent that led to the security in question? And, secondly, what was the motive or inducement that was brought to bear on the respondent in order to induce him to give the security? It was skilfully contended on the part of the appellants, by their learned counsel, that the basis of the transaction was either the actual or possible liability of the father for the debt. But that is an argument wholly unsupported by the evidence; and, on the contrary, it is in every way contradicted by the evidence. There is no ground for concluding from anything that had been said, that the bankers treated the father as a person who was civilly responsible. There was no attempt on the part of the son, William Bayley, notwithstanding his distress, to assert at any time that he had the authority of his father. In point of fact, the father's aid is invoked throughout upon the basis that the son alone was liable, and that, in addition to civil liability, he had contracted a criminal liability. That is apparent, not only from the passages which have been read by my two noble and learned friends, but from the whole conduct of the appellants. It must be remembered throughout that the appellants did not speak out distinctly, for the reason that is given by one of them in a passage that has been referred to, namely, that they could not, in any manner, be implicated in compounding a felony. Again, there is a small incident that brings home—at least to my mind—in a satisfactory manner, the truth of the conclusion that the criminal liability of William Bayley was the basis of the whole transaction, and that is the circumstance that Henry Williams wrote on a slip of paper and communicated to his brother Philip during the discussion his own doubt whether the father might not be civilly liable. It is quite plain that, if the discussion had proceeded, either wholly or partially, upon the notion that there might have been civil liability on the part of the father, the necessity for making such a suggestion by Henry to his brother Philip never could have arisen; and it is perfectly clear also, from the fact of the slip of paper not being either read out or acted upon, but, on the contrary, being thrown into the fire by Philip, that he was willing that the transaction should go on on the basis on which it had been started, namely, that there was a constat of all parties the forgeries had been committed, and that William Bayley, therefore, stood in the liability of a felon.

So much in regard to the basis of the transaction. What was the motive or inducement which was brought to bear on the respondent? It is necessary to examine a little what was the history of the proceedings, and the interviews that took place. It is perfectly clear that, in the outset, there was a desire on the part of the bankers, and certainly a very great desire on the part of the solicitors for the respondent, Mr. James Bayley, that security should be given for the amount of the debt by means of the property of William Bayley himself and by means of the property of his wife. There was an attempt made to carry out that mode of securing the debt, and that mode undoubtedly might not have been attended with any objectionable character, so far as the father was concerned. The mode suggested was that the property of William should be valued; that his brother Thomas should enter into partnership with him; that Thomas should be responsible for one half of the amount of the valuation, and that the father should add to Thomas's liability his own liability, and that the amount of the debt thus incurred by Thomas and the father should be made available for the partial payment of the bankers. In addition to that, it was proposed that the residue of the debt should be secured by the property of the wife. I desire your Lordships to remark particularly that when that failed, upon the fact being ascertained that the property of the wife could not be made the subject of a security, there remained only the application to the father, and the inducing the father to at once take on himself the whole debt of the dishonoured bills of

the son. It is very distinctly stated by several witnesses, and though it is partially denied, yet it is but imperfectly denied (for it is denied only to the extent of recollection and belief, and the facts speak for themselves), that after the attempt to get a good and unobjectionable security failed, the discussion did not terminate, but it was renewed on the basis of the plaintiff's coming forward to relieve his son from the situation of peril in which he was placed.

The bankers admit most clearly and distinctly that they all knew that it was a case of transportation for life. It is perfectly clear that they did not pretend that the father was liable. What remained, then, as a motive for the father? The only motive to induce him to adopt the debt was the hope that by so doing he would relieve his son from the inevitable consequences of his crime. The question, therefore, my Lords, is whether a father, appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that unless he does so, his son will be exposed to a criminal prosecution, with the certainty of a conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing and leaving his son in that perilous condition or of taking on himself the amount of that civil obligation. I have, therefore, my Lords, in that view of the case, no difficulty in saying that, as far as my opinion is concerned, the security given for the debt of the son by the father, under such circumstances, was not the security of a man who acted with that freedom and power of deliberation that must undoubtedly be considered as necessary to validate a transaction of such a description. I would add to that the great folly, nay, impropriety of the bankers proceeding to take this security from the defenceless old man after his solicitor had left him, protesting against the proceedings which he knew they were about to enter upon. The solicitor remained so long as a valid contract, namely, that touching the property of William Bayley, was regarded as possible. When that was impossible, and the bankers then began to exert pressure on the father, the solicitor left, remonstrating with all parties against the impropriety of what they were about to do.

There remains the other aspect of the case, which is this. Was the transaction, regarded independently of pressure, an illegal one, as being contrary to the settled rules and principles of law? I concur in a good deal that was said by the learned counsel for the appellants, namely, that if there be an existing debt, to which is superadded an independent security, or if there be a valid legal document in existence, and then a transaction which is open to the charge of forgery, the contract touching the existing debt is not affected by the superadded engagement, which may be invalid on the ground of forgery. For example, if I have lent a man £10,000 on the security of an insufficient estate and he some time afterwards brings me a bill of exchange with a forged acceptance to induce me to forego exercising my right with respect to the mortgage, that mortgage will not be affected by the forgery, and I may abstain from dealing with the forgery and nevertheless pursue my remedy on the original contract. But this is not a case where the bankers are proceeding as against the persons liable to them on a contract, independent of the forgery. We must take the nature of the contract from the agreement which was entered into, the original agreement written at the moment, which no doubt clearly expresses what was in the mind of the father. The liability of the father is created and embodied in this memorandum, in which, addressing the bankers, he further says :

"In consideration of your consenting to give up to me the several undermentioned bills and promissory notes, I hereby charge my colliery . . ."

It is impossible, therefore, to have any hesitation as to the fact that the liability of the father is obtained entirely by the consideration of the bankers delivering up the acceptances. That is a wholly different case from the one to which I have referred as put in the argument at the Bar.

Such being the nature of this transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest consideration of policy and morality—that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. That is the principle of the law, and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon their knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt, a great legal offence and a great moral offence would be committed. That is what I apprehend the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, "misprision of felony." That was a case where a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and further converted it into a source of emolument to himself. It is impossible, therefore, if you look at this matter wholly independently of the question of pressure, and confine your attention to the act of the bankers alone, not to come to the conclusion that a great delictum was committed, when the transaction is viewed simply with reference to the course which they took. I ask, in the first place, were you not well aware that those bills were forgeries? That is perfectly true. Did you not obtain an additional advantage and benefit—in fact, the payment of your debt, by trading with these bills? That is undoubtedly true. Were you not very well aware that when you so traded with these bills you would either prevent the possibility of a prosecution, or render the possibility of a prosecution so remote that it could hardly be expected to succeed? That was the inevitable consequence. But if a man does an act which is attended necessarily with an inevitable consequence he must be taken in law to have foreseen that consequence, and to have deliberately intended that it should be the result of his action. Here you have these bankers violating that rule of policy, and that rule of justice and morality, by issuing these forged bills to extort from the father a security for which he was not liable, they giving up the bills, and thereby violating their duty and placing the parties in a situation in which the demands of public justice could not by any possibility be complied with.

I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man; and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community. I think, therefore, that the decree which has been made in this case is a perfectly correct decree. I do not mean for one single moment by anything I have said to cast any imputation on the character of these gentlemen. I am only dealing with abstract principles of law. They might, perhaps, fairly have thought that they were doing the best for the family of Mr. William Bayley, and for the father. I have used those words as necessary to vindicate the policy and justice of the rule of law, and to show how highly requisite it is that a court of equity should undo a transaction such as this,

whether it is regarded as proceeding from a father who cannot be considered as a voluntary agent, or, taking the other aspect of it, as violating the rules of law which prescribe the duties of individuals under such circumstances. On both of these grounds, I think that this is a transaction which ought to be set aside.

Decree affirmed.

HOLLAND AND ANOTHER v. HODGSON AND ANOTHER

[COURT OF EXCHEQUER CHAMBER (Kelly, C.B., Blackburn, Mellor and Hannen, JJ., Channell and Cleasby, BB.), December 1, 1871, February 9, May 23, 1872]

[Reported L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709;
20 W.R. 990]

Fixtures—Articles annexed to land—Articles attached to land by own weight—Articles slightly fixed to land—Burden of proof—Looms nailed to wooden plugs in stone floor—Jacquard engines screwed to looms—Shuttles attached to looms—Drill bolted to stone floor.

The general maxim of law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. That question must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, namely, the degree of annexation and the object of the annexation. Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances show that they were intended to be part of the land, e.g., blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a wall. The onus of showing that such articles are intended to be part of the land lies on those who assert that they have ceased to be chattels. On the other hand, an article which is fixed to the land, even slightly, is to be considered as part of the land unless the circumstances are such as to show that it was intended that it should continue to be a chattel, e.g., a carpet nailed to the floor of a room, the onus then lying on those who contend that it is a chattel.

Notes. Considered: *Hawtry v. Butlin* (1873), L.R. 8 Q.B. 290. Applied: *Chidley v. West Ham* (1874), 32 L.T. 486; *Cross v. Barnes* (1877), 46 L.J.Q.B. 479; *Re Rose, Ex parte Linnell* (1888), 4 T.L.R. 255. Considered: *Gough v. Wood & Co.*, [1894] 1 Q.B. 713; *Huddersfield Banking Co. v. Lister* (1895), 72 L.T. 703; *Hobson v. Gorringe*, [1895-9] All E.R. Rep. 1231. Applied: *Monti v. Barnes*, [1901] 1 K.B. 205. Approved: *Reynolds v. Ashby & Son*, [1904-7] All E.R. Rep. 401. Considered: *Vaudeville Electric Cinema v. Muriset*, [1923] 2 Ch. 74; *Spyer v. Phillipson*, [1930] All E.R. Rep. 457; *Jordan v. May*, [1947] 1 All E.R. 231. Applied: *Bradshaw v. Davey*, [1952] 1 All E.R. 350. Considered: *L.C.C. v. Wilkins*, [1956] 3 All E.R. 38. Referred to: *Re Armytage, Ex parte Moore and Robinson's Banking Co.* (1880), 14 Ch.D. 379; *Southport and West Lancashire Banking Co. v. Thompson* (1887), 37 Ch.D. 64; *Re Yates, Batcheldor v. Yates* (1888), 59 L.T. 47; *Bulkeley v. Lyne Stephens, Re Lyne Stephens, Lyne Stephens v. Lubbock* (1895), 11 T.L.R. 564; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523;

Crossley Bros., Ltd. v. Lee, [1904-7] All E.R. Rep. 1042; *Re Chesterfield's Settled Estates*, [1911] 1 Ch. 237; *Golden Horseshoes (New), Ltd. v. Thurgood* (1934), 150 L.T. 427; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1935] 1 K.B. 585; *Hulme v. Brigham*, [1943] 1 All E.R. 204; *Billing v. Pill*, [1953] 2 All E.R. 1061.

As to fixtures comprised in a mortgage, see 27 HALSBURY'S LAWS (3rd Edn.) 193, 194; and for cases see 35 DIGEST (Repl.) 345 et seq.

Cases referred to :

- (1) *Climie v. Wood* (1868), L.R. 3 Exch. 257; 37 L.J.Ex. 158; 18 L.T. 609; affirmed (1869), L.R. 4 Exch. 328; 38 L.J.Ex. 223; 20 L.T. 1012, Ex. Ch.; 35 Digest (Repl.) 348, 557.
- (2) *Boyd v. Shorrocks* (1867), L.R. 5 Eq. 72; 37 L.J.Ch. 144; 17 L.T. 197; 32 J.P. 211; 16 W.R. 102; 35 Digest (Repl.) 350, 567.
- (3) *Longbottom v. Berry* (1869), L.R. 5 Q.B. 123; 10 B. & S. 852; 39 L.J.Q.B. 37; 22 L.T. 385; 35 Digest (Repl.) 351, 574.
- (4) *Wiltshier v. Cottrell* (1853), 1 E. & B. 674; 22 L.J.Q.B. 177; 20 L.T.O.S. 259; 17 Jur. 758; 118 E.R. 589; 31 Digest (Repl.) 202, 3333.
- (5) *D'Eyncourt v. Gregory* (1866), L.R. 3 Eq. 332; 36 L.J.Ch. 107; 15 W.R. 186; 31 Digest (Repl.) 201, 3322.
- (6) *Wilde v. Waters* (1855), 16 C.B. 637; 24 L.J.C.P. 193; 1 Jur.N.S. 1021; 3 W.R. 570; 139 E.R. 909; 31 Digest (Repl.) 218, 3528.
- (7) *Hellawell v. Eastwood* (1851), 6 Exch. 295; Cox, M. & H. 452; 20 L.J.Ex. 154; 15 J.P. 724; 155 E.R. 554; sub nom. *Halliwel v. Eastwood*, 17 L.T.O.S. 96; 31 Digest (Repl.) 205, 3361.
- (8) *Turner v. Cameron* (1870), L.R. 5 Q.B. 306; 10 B. & S. 931; 39 L.J.Q.B. 125; 22 L.T. 525; 18 W.R. 544; 31 Digest (Repl.) 212, 3448.
- (9) *Mather v. Fraser* (1856), 2 K. & J. 536; 25 L.J.Ch. 361; 27 L.T.O.S. 41; 2 Jur.N.S. 900; 4 W.R. 387; 69 E.R. 895; 35 Digest (Repl.) 349, 563.
- (10) *Walmsley v. Milne* (1859), 7 C.B.N.S. 115; 29 L.J.C.P. 97; 1 L.T. 62; 6 Jur.N.S. 125; 8 W.R. 138; 141 E.R. 759; 35 Digest (Repl.) 347, 555.
- (11) *Longbottom v. Berry* (1869), L.R. 5 Q.B. 123; 10 B. & S. 852; 39 L.J.Q.B. 37; 22 L.T. 385; 31 Digest (Repl.) 209, 3410.
- (12) *Re Dawson, Tate & Co.* (1868), 2 I.R.Eq. 218; 5 Digest (Repl.) 957, *4174.

Also referred to in argument :

- Parsons v. Hind* (1866), 14 W.R. 860; 31 Digest (Repl.) 208, 3391.
- Waterfall v. Penistone* (1856), 6 E. & B. 876; 26 L.J.Q.B. 100; 27 L.T.O.S. 252; 3 Jur.N.S. 15; 4 W.R. 726; 119 E.R. 1090; 31 Digest (Repl.) 208, 3395.
- Trappes v. Harter* (1833), 2 Cr. & M. 153; 3 Tyr. 603; 3 L.J.Ex. 24; 149 E.R. 712; 35 Digest (Repl.) 348, 560.
- Lancaster v. Eve* (1859), 5 C.B.N.S. 717; 28 L.J.C.P. 235; 32 L.T.O.S. 278; 5 Jur.N.S. 683; 7 W.R. 260; 141 E.R. 288; 31 Digest (Repl.) 205, 3369.
- R. v. Lee (Inhabitants)* (1866), L.R. 1 Q.B. 241; 7 B. & S. 188; 35 L.J.M.C. 105; 13 L.T. 704; 30 J.P. 132; 12 Jur.N.S. 225; 14 W.R. 311; 31 Digest (Repl.) 207, 3383.
- Wood v. Hewett* (1846), 8 Q.B. 913; 15 L.J.Q.B. 247; 7 L.T.O.S. 109; 10 J.P. 664; 10 Jur. 390; 115 E.R. 1118; 31 Digest (Repl.) 203, 3337.
- Fisher v. Dixon* (1845), 12 Cl. & Fin. 312; 9 Jur. 883; 8 E.R. 1426, H.L.; 38 Digest (Repl.) 789, 70.
- Gibson v. Hammersmith and City Rail. Co.* (1863), 2 Drew. & Sm. 603, 1 New Rep. 305; 32 L.J.Ch. 337; 8 L.T. 43; 27 J.P. 132; 9 Jur.N.S. 221; 11 W.R. 299; 62 E.R. 748; 31 Digest (Repl.) 213, 3455.
- Cullwick v. Swindell* (1866), L.R. 3 Eq. 249; 36 L.J.Ch. 173; 31 J.P. 228; 15 W.R. 216; 35 Digest (Repl.) 348, 556.
- Haley v. Hammersley* (1861), 3 De G.F. & J. 587; 30 L.J.Ch. 771; 4 L.T. 269; 7 Jur.N.S. 765; 9 W.R. 562; 45 E.R. 1006, L.C.; 35 Digest (Repl.) 350, 566.

Hallen v. Runder (1834), 1 Cr.M. & R. 266; 3 Tyr. 959; 3 L.J.Ex. 260; 149 E.R. 1080; 31 Digest (Repl.) 199, 3311.

Lee v. Risdon (1816), 7 Taunt. 188; 2 Marsh. 495; 129 E.R. 76; 31 Digest (Repl.) 220, 3566.

Re Gawan, Ex parte Barclay (1855), 5 De G.M. & G. 403; 25 L.J.Bey. 1; 26 L.T.O.S. 97; 19 J.P. 804; 1 Jur.N.S. 1145; 43 E.R. 926; sub nom. *Gawan v. Barclay, Ex parte Barclay*, 4 W.R. 80, L.C. & L.J.J.; 31 Digest (Repl.) 199, 3312.

Appeal by the defendants against a decision of the Court of Common Pleas (WILLES, KEATING and MONTAGUE SMITH, JJ.) in an action in trover in which the plaintiffs, mortgagees, sought to recover from the defendants, trustees under a deed of assignment for the benefit of creditors, certain fixtures in the mortgaged property, a mill, which the defendants had seized.

In 1869 George Mason carried on the business of a worsted spinner and stuff manufacturer at Bank Top Mill, at Horton, Yorkshire, of which mill he was the owner. By a mortgage dated April 7, 1869, Mason conveyed to the plaintiffs in fee the mill with several closes of land, cottages, and other hereditaments and premises therein described, the parcels thereof so far as they relate to the said mill, being as follows :

"All that worsted mill lately occupied by the firm of Messrs. Thomas Ackroyd and Sons, situate at Horton Bank Top, in the parish of Bradford in the county of York, with the warehouse, counting house, engine house, boiler house, weaving shed, warehouse, gas works, and reservoirs belonging, adjoining, or near thereto, and also the steam engine, shafting, going gear, machinery, and all the fixtures whatever, which now or at any time hereafter during the continuance of this security, shall be set up and affixed to the said hereditaments and premises hereby granted and assured, or intended so to be, or any part thereof."

This deed was not registered under the Bills of Sale Act, 1854 [repealed by Bills of Sale Act, 1878]. By a deed, dated July 3, 1869, Mason assigned to the defendants all his estate and effects to be administered as if under a bankruptcy. The deed was duly registered, and everything happened to make it a valid deed under s. 192 of the Bankruptcy Act, 1861, and the clauses of the Bankruptcy Amendment Act, 1868, relating to such deeds. Under the last mentioned deed, the defendants took possession of, and sold, among other things in the mill, the property claimed by the plaintiffs as passing by the words of the deed of April 7, 1869, namely, 436 looms, sold at £1038 4s., 14 Jacquard engines, sold at £9 2s., 660 shuttles, sold at £19 3s. 4d. and a drill, sold at £32.

The looms, which were machines for weaving worsted stuffs and other fabrics, were placed in various rooms in Bank Top Mill, some on the ground floor and some on the first floor. In all cases they were driven by steam power, which was applied to them in the following manner. The steam engine worked or gave motion to the shafting and going gear, which consisted of long shafts passing from one end to the other of each room, and having fixed upon them at proper intervals large concentric wheels called drums, from which the required motion was communicated to the looms by means of leather bands, which could be applied to or disconnected from the looms at pleasure. The steam engine and the shafting and going gear were unquestionably fixtures, and passed as such to the plaintiffs under their said mortgage. The looms slightly varied in size, but each was about 7ft. long by 3ft. wide, and from 3ft. to 4ft. high, and weighed about 7cwt. or 8cwt. Each loom stood upon four feet, one at each corner, each foot being a flat piece of iron about 3in. long by 1½ in. broad, with a hole drilled through it, about ¾ in. in diameter. It

was essential to the proper working of a loom that it should stand on a level and be steady, and keep its true direction perpendicular to the line of the shafting. If it merely rested by its own weight upon the floor it would be liable in working to be shaken and drawn sideways from the true line. In order to keep the looms in question steady and in their proper position for working, the following methods were adopted. In the case of the looms which were in rooms on the ground floor (the floors of which rooms were formed throughout of stone flags), holes about half an inch or three-quarters in diameter were drilled or cut in the stone floor in the places where two of the four feet of each loom, at opposite corners, would stand. Into each of the holes was driven a plug of wood, so as to fill it up completely, and make it a tight fit. Then the loom was placed in position and brought to a proper level by thin pieces of wood, packed where necessary under the loom feet, and then a nail about 4in. long, in some cases with a flat head, and in others with a square bolted head, was driven through the hole in the loom foot into the wooden plug. The other two feet of each loom were left free. In the case of the looms which were in rooms on the upper floors, the method adopted for keeping the looms steady, and in their proper position for working, was somewhat different. The floors of these rooms, like the others, were principally formed of stone flags, but beams of wood about 4in. wide and 3in. thick, were built into the floor, along the lines upon which the loom feet stand, and the nails used for keeping the looms in these rooms steady, and in their proper position for working were driven at once into these beams instead of into wooden plugs, as in case of the looms in the ground floor rooms. The rooms in the upper floors were built and arranged specially to receive the looms, and the purpose for which the beams were introduced was to supersede the necessity of drilling or cutting holes for the wooden plugs. After the nails had been driven into the wooden plugs or beams, as described, the looms could not be moved without drawing the nails from the wooden plugs and beams; but this could easily be done without any serious injury to the floors. It was not necessary for the purpose of keeping the looms in their proper position for working that the nails driven into the wooden plugs or beams should have heads. Spikes without heads would equally have answered the purpose, and if such spikes had been used the looms could have been lifted up and removed, and again placed in their proper position for working, without disturbing or removing the spikes.

The Jacquard engines were machines used in conjunction with the looms when it was required to use the looms for weaving worsted stuffs or other fabrics with patterns. When so used, they were simply screwed on the top part of the looms, and were not otherwise attached to the mill than were the looms themselves. The shuttles were wooden instruments about eight inches long, so shaped as to carry the bobbins or reels on which the yarn or thread to be used for weaving worsted stuffs or other fabrics in the loom was wound. They were used in the process of weaving, and when used were shot backwards and forwards horizontally by the action of the loom, carrying the yarn or thread at each throw between the warp. The shuttles were of no use without the loom, and the loom could not be used for weaving without the shuttles, but the shuttles had an entirely distinct and separate existence from the looms, and formed no part of the looms, and, by breaking the yarn or thread, could be removed from them at any time. Some of the shuttles were actually in the looms at the time of their being taken possession of. The remainder were spare shuttles provided for use when wanted. Those which were so actually in the looms were sold by the defendants for £10, and the remainder for £9 3s. 4d. The drill was a large machine for drilling holes in iron and other metals. It was about eight feet high, and stood on a three-cornered base or foot about five feet long on two sides and three feet long

A on the third. It was worked, like the looms, by means of a leather belt which ran upon the permanent shafting, and was capable of being applied to and disconnected from the drill at pleasure. It was so heavy that it was capable of being worked without being fixed or attached to any part of the mill, but when it was removed by the defendants it was bolted to the floor at one corner by an iron bolt, about five inches long, passing through a hole in its base or foot. This bolt was secured by a flat head at the top, and at the bottom was screwed into a nut which was let into the under side of one of the flagstones of the room in which it was placed. By unscrewing the bolt the drill could be removed. Its weight was about two tons.

C The Court of Common Pleas gave judgment for the plaintiffs, except as to the shuttles and Jacquard engines, and awarded the plaintiffs the sum of £1070 4s., and costs. The defendants appealed.

Field, Q.C., and Kemplay for the defendants.

Cave for the plaintiffs.

Cur. adv. vult.

D May 23, 1872. **BLACKBURN, J.**, read the following judgment of the court. —In this case George Mason, who was owner in fee of a mill occupied by him as a worsted mill, mortgaged the mill and all fixtures which then were or at any time thereafter should be set up and affixed to the premises in fee to the plaintiffs. The mortgage deed was not registered as a bill of sale, and E Mason, who continued in possession, assigned all his estate and effects to the defendants, as trustees, for the benefit of his creditors. The defendants, under this last deed, took possession of everything. The plaintiffs brought trover. The defendants paid money into court, and there was a replication of damages ultra. A Case was stated showing the nature of the articles, and how and in what manner they were affixed to the mill.

F As the deed was not registered under the Bills of Sale Act, 1854 [rep. Bills of Sale Act, 1878] it was, by s. 1 of that Act [see now s. 8 of the Bills of Sale Act (1878) Amendment Act, 1882], void as against the defendants, as assignees for the benefit of creditors, so far as it was a transfer of "personal chattels" within the meaning of that Act. And as by s. 7 the phrase "personal chattels" is declared in that Act to mean, inter alia, "fixtures" [see now s. 4 of the Bills of Sale Act, G 1878], it was void (as against these defendants); so far as it was a transfer of fixtures as such. Since the decision of this court in *Climie v. Wood* (1), it must be considered as settled law (except, perhaps, in the House of Lords) that what are commonly known as trade or tenant fixtures form part of the land and pass by a conveyance of it, and that though, if the person who erected those fixtures was a tenant, with a limited interest in the land, he has a right as H against the freeholder to sever the fixtures from the land, yet, if he be a mortgagor in fee, he has no such right as against his mortgagee. Trade and tenant fixtures are, in the judgment in that case, accurately defined as

I "things which are annexed to the land for the purpose of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration."

It was not disputed at the Bar that such was the law, and it was admitted, and we think properly admitted, that where there is a conveyance of the land, the fixtures are transferred, not as fixtures, but as part of the land, and the deed of transfer does not require registration as a bill of sale. But we wish to guard ourselves by stating that our decision, so far as regards the registration, is confined to the case before us, where the mortgagor was owner

to the same extent of the fixtures and of the land. If a tenant, having only a limited interest in the land and an absolute interest in the fixtures, were to convey not only his limited interest in the land and his right to enjoy the fixtures during the term so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of PAGE-WOOD, V.-C., in *Boyd v. Shorrocks* (2), but merely as guarding against being supposed to confirm it.

In *Climie v. Wood* (1) the jury had found as a fact that the articles there in question were tenant's fixtures, and that finding was not questioned. Neither the Court of Exchequer nor the Court of Exchequer Chamber had occasion there to consider what would constitute a fixture. In the present case there is no such finding. The controversy was confined to the looms, the nature of which, and the mode of their annexation, are described in the Case. In the court below it was properly admitted that there was no real distinction between those looms and the articles which the Court of Queen's Bench in *Longbottom v. Berry* (3) decided to be so annexed as to form part of the land. Judgment was accordingly given for the plaintiffs without argument, leaving the defendants to question *Longbottom v. Berry* (3) in a court of error. The present is, therefore, really, though not in form, an appeal against the decision of the Court of Queen's Bench in *Longbottom v. Berry* (3), and was so argued.

There is no doubt that the general maxim of law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, viz., the degree of annexation and the object of the annexation. Where the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel: see *Wiltshire v. Cottrell* (4), and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt v. Gregory* (5). Thus blocks of stone, placed one on the top of another, without any mortar or cement, for the purpose of forming a dry stone wall, would become part of the land, though the same stones, if deposited in a builder's yard, and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly affixed to the land, and yet the circumstances may be such as to show that it never was intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land.

Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they are so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by MAULE, J., in *Wilde v. Waters* (6). This, however, only removes the difficulty one step, for it still remains a question

A in each case whether the circumstances are sufficient to satisfy this **onus**. In some cases, such as the anchor of the ship, or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures which are put up with the intention that they should be removed by the tenant (and so are put up
B for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord), have always been considered as part of the land, though severable by the tenant. In most, if not all of such cases, the reason why the articles are considered fixtures is probably that indicated by PAGE-WOOD, V.-C., in *Boyd v. Shorrocks* (2), that the tenant indicates by the mode he puts them up that he regards them as
C attached to the property during his interest in the property.

What we have now to decide is as to the application of these rules to
looms put up by the owner of the fee in the manner described in the Case. In *Hellawell v. Eastwood* (7), decided in 1851, the facts, as stated in the report, are that the plaintiff held the premises in question as tenant of the
D defendants, and that a distress for rent had been put in by the defendants under which a seizure was made of cotton spinning machinery, called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk in the stone floor and secured by molten lead poured round them. It may be inferred that the plaintiff, being the tenant only, had put up those mules, and from the large sum for which the distress appears
E to have been levied (£2000) it seems probable that he was the tenant of the whole mill. It does not appear what admissions, if any, were made at the trial, nor whether the court had or had not by the reservation power to draw inferences of fact, though it seems assumed in the judgment that they had such a power. PARKE, B., in delivering the judgment of the court says (6 Exch. at p. 312):

F "This is a question of fact depending on the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly,
G on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law *perpetui usus causa*, or in that of the YEAR BOOK (20 Hen. 7, 13), *pour un profit del inheritance*, or merely for a temporary purpose or the more complete enjoyment and use of it as a chattel."

It was contended for the defendants that the decision in *Hellawell v.*
H *Eastwood* (7) had been approved in the Queen's Bench in *Turner v. Cameron* (8). It is quite true that the court in that case said that it afforded a true exposition of the law as applicable to the particular facts upon which that judgment proceeded; but the court expressly guarded their approval by citing from the judgment delivered by PARKE, B., the facts upon which they considered it to have proceeded:

I "They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or themselves, and the object of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels."

As we have already observed, trade or tenant fixtures might, in one sense, be said to be fixed merely for a temporary purpose; but we cannot suppose that the Court of Exchequer meant to decide that they were not part of the

land, though liable to be severed by the tenant. The words "merely for a temporary purpose" must be understood as applying to such a case as we have supposed—of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by PARKE, B., of a carpet tacked to the floor for the purpose of keeping it stretched while it was there used, and not to a case such as that of a tenant who, for example, affixes a shop counter for the purpose (in one sense temporary) of more effectually enjoying the shop while he continued to sell his wares there. A
B

Subject to this observation, we think that the passage in the judgment in *Hellawell v. Eastwood* (7) (6 Exch. at p. 312) does state the true principles, though it may be questioned if they were in that case correctly applied to the facts. The court, in their judgment, determine what they have just declared to be a question of fact, thus: C

"The object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels."

Counsel for the defendants was justified in saying, as he did in his argument, that, as far as the facts are stated in the report, they are very like those in the present case except that the tenant who put up the mules cannot have been supposed to have intended to improve the inheritance, if by that is meant his landlord's reversion, but only at most to improve the property while he continued tenant thereof; and he urged with great force that we ought not to act on a surmise that there were any special facts or findings not stated in the report, but to meet the case as showing that the judges who decided *Hellawell v. Eastwood* (7) thought that articles fixed in a manner very like those in the case before us remained chattels. D
E

This is felt, by some of us at least, to be a very weighty argument. But that case was decided in 1851. In 1853 the Court of Queen's Bench had, in *Wiltshier v. Cottrell* (4) to consider what articles passed by the conveyance in fee of a farm. Among the articles in dispute was a threshing machine, which is described in the report thus (1 E. & B. at p. 689): F

"The threshing machine was placed inside one of the barns (the machinery for the horse being on the outside), and there fixed by screws and bolts to four posts which were let into the earth." G

Hellawell v. Eastwood (7) was cited in the argument. The court (without however, noticing that case) decided that the threshing machine, being so annexed to the land, passed by the conveyance. It seems difficult to point out how the threshing machine was more for the improvement of the inheritance of the farm than the present looms were for the improvement of the manufactory. And in *Mather v. Fraser* (9) PAGE-WOOD, V.-C., who was there judge of both the facts and the law, came to the conclusion that machinery affixed not more firmly than the articles in question by the owner of the fee to land for the purpose of carrying on a trade there became part of the land. This was decided in 1856. H

In *Walmsley v. Milne* (10), the Court of Common Pleas, after having their attention called to a slight misapprehension by PAGE-WOOD, V.-C., of the effect of *Hellawell v. Eastwood* (7), came to the conclusion, as is stated by them, 7 C.B.N.S. at p. 131: I

"that we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose."

The bankrupt was the real owner of the premises, subject only to a mortgage which vested the legal title in the mortgagee until the repayment of the money

A borrowed. The mortgagee first erected baths, stables, and a coachhouse and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable as an important adjunct to it, and to improve its usefulness as a stable. The malt mill and grinding stone were also permanent erections, B intended by the owner to add to the value of the premises. They, therefore, resemble in no particular (except being fixed to the building by screws) the mules put up by the tenant in *Hellawell v. Eastwood* (7). It is stated in a note to the report of the case that on a subsequent day it was intimated by the court that WILLES, J., entertained serious doubts whether the articles in question were not chattels. The reason of his doubts is not stated, but C probably it was from a doubt whether the Exchequer had not, in *Hellawell v. Eastwood* (7), shown that they would have thought that the articles were not put up for the purpose of improving the inheritance, and from deference to that authority. The doubt of this learned judge in one view weakens the authority of *Walmsley v. Milne* (10), but in another view it strengthens it, as it shows that the opinion of the majority that as a matter of fact the hay-cutter, which was not more firmly fixed than the mules in *Hellawell v. Eastwood* (7), must be taken to form part of the land, because it was "put up as an adjunct to the stable, and to improve its usefulness as a stable," was deliberately adopted as the basis of the judgment. It is also observed that WILLES, J., though doubting, did not dissent.

E *Walmsley v. Milne* (10) was decided in 1859. This case and that of *Wiltshier v. Cottrell* (4) seem authorities for this principle, that where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land—at all events, where the object of setting up the article is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied. The threshing machine in F *Wiltshier v. Cottrell* (4) was affixed by the owner of the fee to the barn as an adjunct to the barn and to improve its usefulness as a barn, in much the same sense as the hay-cutter in *Walmsley v. Milne* (10) was affixed to the stable as an adjunct to it and to improve its usefulness as a stable. It seems difficult to say that the machinery in *Mather v. Fraser* (9) was not as much affixed to the mill as an adjunct to it, and to improve the usefulness of the mill as such, as either the threshing machine or the hay-cutter.

G If, therefore, the matter were now to be decided on principle, without reference to what has been done on the faith of the decisions, we should be much inclined, notwithstanding the profound respect we feel for everything that was decided by PARKE, B., to hold that the looms now in question were, as a matter of fact, part of the land. But there is another view of the matter which weighs strongly with us. *Hellawell v. Eastwood* (7) was a decision H between landlord and tenant, not so likely to influence those who advance money on mortgage as *Mather v. Fraser* (9), which was a decision directly between mortgagor and mortgagee. We find that *Mather v. Fraser* (9), which was decided in 1856, has been acted upon in *Boyd v. Shorrocks* (2), by the Court of Queen's Bench in *Longbottom v. Berry* (11), and in Ireland in *Re Dawson, Tate and Co.* (12). These cases are too recent to have been I themselves much acted upon, but they show that *Mather v. Fraser* (9) has been generally adopted as the ruling case. We cannot, therefore, doubt that much money has, during the last sixteen years, been advanced on the faith of the decision in *Mather v. Fraser* (9). It is of great importance that the law as to what is the security of a mortgagee should be settled; and without going so far as to say that the decision, only eleven years old, should be upheld, right or wrong, on the principle that *communis error facit jus*, we feel that it should not be reversed unless we clearly see that it is wrong.

As already said, we are rather inclined to think that if it were *res integra* A we should find the same way. We think, therefore, that the judgment below should be affirmed.

Appeal dismissed.

SCOTT v. LONDON AND ST. KATHERINE DOCKS CO.

[COURT OF EXCHEQUER CHAMBER (Erle, C.J., Crompton, Byles, Blackburn, Keating and Mellor, JJ.), February 7, 1865]

[Reported 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 11 Jur.N.S. 204; 13 W.R. 410; 159 E.R. 665]

Negligence—Res ipsa loquitur—Article causing accident under management of defendant—Improbability of accident if proper care used—Goods falling from crane.

Where, in an action for negligence, the thing causing injury to the plaintiff is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, that affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Notes. Followed: *Briggs v. Oliver* (1866), 4 H. & C. 403. Considered: *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265. Distinguished: *Higgs v. Maynard* (1866), Har. & Ruth. 581; *Smith v. Great Eastern Rail. Co.* (1866), L.R. 2 C.P. 4; *Moffatt v. Bateman* (1869), L.R. 3 P.C. 115. Applied: *Burke v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1870), 22 L.T. 442. Considered: *Bridges v. North London Rail. Co.* (1871), L.R. 6 Q.B. 377; *Manzoni v. Douglas* (1880), 6 Q.B.D. 145. Distinguished: *Snook v. Grand Junction Waterworks Co.* (1886), 2 T.L.R. 308; *Crisp v. Thomas* (1890), 63 L.T. 756. Applied: *McGowan v. Stott* (1923), 99 L.J.K.B. 353. Considered: *Ellor v. Selfridge & Co.* (1930), 46 T.L.R. 236; *Halliwel v. Venables*, [1930] All E.R. Rep. 284. Distinguished: *Langham v. Wellingborough School Governors and Fryer* (1932), 147 L.T. 91. Considered: *The Kite*, [1933] All E.R. Rep. 234; *Mahon v. Osborne*, [1939] 1 All E.R. 535; *Barkway v. South Wales Transport Co.*, [1950] 1 All E.R. 392; *Moore v. R. Fox & Sons*, [1956] 1 All E.R. 182; *Walsh v. Holst & Co., Ltd.*, [1958] 3 All E.R. 33. Referred to: *Coleman v. South Eastern Rail. Co.* (1866), 31 J.P. 23; *Czech v. General Steam Navigation Co.* (1867), 17 L.T. 246; *Scholfield v. Londesborough*, [1895] 1 Q.B. 536; *Hurlstone v. London Electric Rail. Co.* (1913), 29 T.L.R. 514; *Joseph Travers & Sons, Ltd. v. Cooper*, [1914-15] All E.R. Rep. 104; *Berg v. Rotterdamsche Lloyd* (1918), 34 T.L.R. 272; *The Santa Catharina* (1919), 88 L.J.P. 170; *Gosse Millard v. Canadian Government Merchant Marine, American Canadian Co. v. Same*, [1927] 2 K.B. 432; *Cunard v. Antifyre, Ltd.*, [1932] All E.R. Rep. 558; *Samuel Williams & Sons, Ltd. v. Port of London Authority* (1933), 39 Com. Cas. 77; *Hunter v. Wright*, [1938] 2 All E.R. 621; *Imperial Smelting Corp., Ltd. v. Joseph Constantine S.S. Line, Ltd.*, [1940] 3 All E.R. 211; *Easson v. London and North Eastern Rail. Co.*, [1944] 2 All E.R. 425; *Woods v. Duncan v. Hambrook, Duncan v. Cammell Laird & Co.*, [1946] A.C. 401; *Cassidy v. Minister of Health*, [1951] 1 All E.R. 574; *Southport Corp. v. Esso Petroleum Co.*, [1954] 2 All E.R. 561.

As to *res ipsa loquitur*, see 28 HALSBURY'S LAWS (3rd Edn.) 77-80; and for cases see 36 DIGEST (Repl.) 143-149.

A Cases referred to :

- (1) *Byrne v. Boodle* (1863), 2 H. & C. 722; 3 New Rep. 162; 33 L.J.Ex. 13; 9 L.T. 450; 10 Jur.N.S. 1107; 12 W.R. 279; 159 E.R. 299; 36 Digest (Repl.) 73, 387.
- (2) *Hammack v. White* (1862), 11 C.B.N.S. 588; 31 L.J.C.P. 129; 5 L.T. 676; 8 Jur.N.S. 796; 10 W.R. 230; 142 E.R. 926; 36 Digest (Repl.) 143, 754.

B Also referred to in argument :

- Cotton v. Wood* (1860), 8 C.B.N.S. 568; 29 L.J.C.P. 333; 7 Jur.N.S. 168; 141 E.R. 1288; 36 Digest (Repl.) 130, 662.
- Toomey v. London, Brighton and South Coast Rail. Co.* (1857), 3 C.B.N.S. 146; 6 W.R. 44; 140 E.R. 694; sub nom. *Toomey v. London, Brighton and South Coast Rail Co.*, 27 L.J.C.P. 39; 30 L.T.O.S. 135; 36 Digest (Repl.) 133, 682.
- Cornman v. Eastern Counties Rail. Co.* (1859), 4 H. & N. 781; 20 L.J.Ex. 94; 33 L.T.O.S. 302; 5 Jur.N.S. 657; 157 E.R. 1050; 36 Digest (Repl.) 127, 639.
- Carpue v. London and Brighton Rail. Co.* (1844), 5 Q.B. 747; 1 Dav. & Mer. 608; 3 Ry. & Can. Cas. 692; 13 L.J.Q.B. 133; 2 L.T.O.S. 401; 8 Jur. 464; 114 E.R. 1431; 8 Digest (Repl.) 100, 661.

D *Cooke v. Waring* (1863), 2 H. & C. 332; 32 L.J.Ex. 262; 9 L.T. 257; 159 E.R. 138; 36 Digest (Repl.) 130, 663.

Wilkinson v. Fairrie (1862), 1 H. & C. 633; 32 L.J.Ex. 73; 7 L.T. 599; 9 Jur.N.S. 280; 158 E.R. 1038; 36 Digest (Repl.) 12, 39.

Bolch v. Smith (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 8 Jur.N.S. 197; 10 W.R. 387; 158 E.R. 666; sub nom. *Bolett v. Smith*, 6 L.T. 158; 36 Digest (Repl.) 66, 358.

Gallagher v. Humphrey (1862), 6 L.T. 684; 27 J.P. 5; 10 W.R. 664; 36 Digest (Repl.) 66, 357.

Christie v. Griggs (1809), 2 Camp. 79, N.P.; 8 Digest (Repl.) 79, 531.

Skinner v. London, Brighton and South Coast Rail. Co. (1850), 5 Exch. 787; 15 Jur. 299; 155 E.R. 345; 8 Digest (Repl.) 103, 673.

F **Appeal** by the defendants against a decision of the Court of Exchequer (POLLOCK, C.B., MARTIN, CHANNELL and PIGOTT, B.B.), reported 5 New Rep. 59, making absolute a rule granted to the plaintiff to set aside a verdict for the defendants returned on the trial of an action brought against them by the plaintiffs for negligence, and for a new trial.

G The plaintiff by his declaration alleged that the defendants were possessed of certain docks, and warehouses therein, that the plaintiff was lawfully therein, that the defendants by their servants were lowering bags of sugar by means of a crane or hoist, and that by the negligence of the defendants' servants a bag of sugar fell upon the plaintiff and injured him. The defendants denied liability. At the trial before MARTIN, B., and a special jury, the plaintiff, who was the only witness called, gave evidence relative to the accident, and stated that he was a Custom House officer of twenty-six years' standing; that on Jan. 19, 1864, the occasion in question, he was at the defendants' docks, and had performed his duty at the East Quay there as superintendent of the weighing of goods; that he was directed by Mr. Lilley, his superior officer, to go from the East Quay to the Spirit Quay, which he proceeded to do, having to pass the warehouses in his way. Not being able to find Lilley, he inquired of a workman where he was, and was told he was in a warehouse, which was pointed out to him, and, in passing from the doorway of one warehouse to the other, he was felled to the ground by the falling upon him of six bags of sugar which were being lowered to the ground from the upper part of the warehouse by means of a crane or jigger hoist. The plaintiff said that he had no warning, and there was no fence or barrier to show persons that the place was dangerous, and nobody called out to him to stop him from going through the door or under the hoist. He also said that instantly before the bags fell he "heard the rattling of a chain

overhead." No other evidence being given, the learned judge proposed to nonsuit the plaintiff for want of evidence showing negligence in defendants, but on the plaintiff's resisting that course, with a view to a bill of exceptions, his Lordship directed the jury to find a verdict for the defendants. A rule was subsequently obtained to set that verdict aside, and for a new trial, on the ground that there was evidence of negligence by the defendants' servants, which rule after argument was made absolute by the Court of Exchequer, on the authority of *Byrne v. Boadle* (1) (dubitante POLLOCK, C.B., and dissentiente MARTIN, B., on the authority of *Hammack v. White* (2)), and against that decision the defendants now appealed.

Field, Q.C. (with him *Murphy*) for the defendants.

Sir Robert Collier, Q.C., and *T. Jones* for the plaintiff.

ERLE, C.J.—The majority of the court have come to the following conclusion. There must be reasonable evidence of negligence, but, where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. We all assent to the principle laid down in the cases cited for the defendants; but the judgment turns upon the construction to be put on the judge's notes. As my brother MELLOR and myself read those notes, we cannot find that reasonable evidence in the present case of the want of care which seems apparent to the rest of the court. The judgment of the court below is, therefore, affirmed, and the case must go down to a new trial, when the real effect of the evidence will, in all probability, be more correctly ascertained.

Appeal dismissed.

R. v. SLEEP

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Sir Alexander Cockburn, C.J., Pollock, C.B., Martin, B., Crompton and Willes, JJ.), June 1, 1861]

[Reported Le. & Ca. 44; 30 L.J.M.C. 170; 4 L.T. 525; 25 J.P. 532;
7 Jur.N.S. 979; 9 W.R. 709; 8 Cox, C.C. 472]

Criminal Law—Mens rea—Statutory offence—Possession of government stores—Need to prove guilty knowledge.

Under the statute 9 Will. 3, c. 41, s. 2 [repealed] it was provided that any unauthorised person "in whose custody, possession or keeping" certain goods or stores marked with the King's mark should be found was guilty of an offence. The statute did not expressly make knowledge of the mark an element in the offence.

The accused delivered a cask containing marked property to the captain of a vessel for shipment, and the cask was seized by the police before the vessel sailed. The jury found that the accused was in possession of the marked property, that he had reasonable means of knowing it bore the King's mark, but that they had not sufficient evidence to show that the accused knew it to bear this mark.

Held: the ordinary principle that there must be a guilty mind to constitute

a guilty act applied, and a person in possession of stores but ignorant of the fact they bore such a mark ought not to be convicted; the accused was therefore entitled on that finding to be acquitted.

Per MARTIN, B., and tentatively per CROMPTON, J., but contra per SIR ALEXANDER COCKBURN, C.J., and tentatively per WILLES, J. The statute required the goods to be found in the possession of the individual who was charged, and the possession of the captain of the ship was not the possession of the accused.

Notes. The statute 9 Will. 3, c. 41, has been repealed; see now the Public Stores Act, 1875, s. 7.

Considered: *Towers & Co., Ltd. v. Gray*, [1961] 2 All E.R. 68. Referred to: *R. v. Prince* (1875), L.R. 2 C.C.R. 154; *R. v. Tolson*, [1886-90] All E.R. Rep. 26; *Blaker v. Tillstone* (1894), 63 L.J.M.C. 72; *Harding v. Price*, [1948] 1 All E.R. 283.

As to proof of mens rea, see 10 HALSBURY'S LAWS (3rd Edn.) 282; as to government marks, see *ibid.* 640; as to possession, see *ibid.* 810; and for cases see 14 DIGEST (Repl.) 31 et seq.; 15 DIGEST (Repl.) 863; For the Public Stores Act, 1875, s. 7, see 5 HALSBURY'S STATUTES (2nd Edn.) 881.

Cases referred to:

- (1) *R. v. Cohen* (1858), 8 Cox, C.C. 41; 15 Digest (Repl.) 863, 8294.
- (2) *R. v. Willmott* (1848), 11 L.T.O.S. 495; 3 Cox, C.C. 281; 15 Digest (Repl.) 863, 8293.
- (3) *Hearne v. Garton* (1859), 2 E. & E. 66; 28 L.J.M.C. 216; 33 L.T.O.S. 256; 23 J.P. 693; 5 Jur.N.S. 648; 7 W.R. 566; 121 E.R. 26; 15 Digest (Repl.) 37, 76.

Also referred to in argument:

R. v. Banks (1794), 1 Esp. 143.

Morden v. Porter (1860), 7 C.B.N.S. 641; 29 L.J.M.C. 213; 1 L.T. 403; 25 J.P. 263; 8 W.R. 262; 141 E.R. 967; 25 Digest (Repl.) 387, 145.

Case Stated for the opinion of the court.

At the general quarter sessions of the peace for the borough of Plymouth, holden on April 4, 1861, before Charles Saunders Esq., the recorder, William Sleep was tried and convicted on an indictment charging him under s. 2 of the statute 9 Will. 3, c. 41, with having been found in possession of naval stores marked with the broad arrow. The indictment was in the usual form.

The prisoner was an ironmonger and brazier at Plymouth. On Mar. 9 he delivered upon the quay to the captain of a coasting vessel, the *Active*, a cask to be carried from Plymouth to Helston, in Cornwall. The cask was marked "R.P." in chalk; but on being asked for better directions, the prisoner gave to the captain a piece of paper on which was written "Richard Pascoe, Helston, Cornwall." Before the vessel sailed, two of the metropolitan police employed at the dockyard, Devonport, seized the cask, which, on being opened, was found to contain 324 lbs. weight of copper bolts in 150 pieces. The cask was packed with straw and shavings, and each piece or bolt was packed with straw and shavings separately, so that the pieces could not rub together or make any noise. The whole of the metal had the appearance of government stores, and of such stores as are not allowed to be sold in the dockyard. The greatest portion of it had been passed through the fire, and round bolts had been very nearly beaten square. On some of the pieces the mark of the broad arrow was visible in the state in which they were found; from others it was necessary to clear off the rust before it could be seen. A little over 50 lbs. weight of the copper was marked with the broad arrow. After the seizure the prisoner was charged by the police with delivering a cask containing government stores to the captain of the *Active*. The prisoner said: "Well, I did deliver a cask of metal, but I do not think it was marked." The prisoner was also told that the cask of

metal was wrapped in shavings and straw, and he said, "Yes it is. I packed it myself. I do that to keep it from knocking the head of the cask out, as I have had complaints before, as some of the casks on their arrival had their heads out." After this the cask of metal was shown by the police to the prisoner, who was asked whether that was the cask he delivered to the captain. "Yes," he said, "I have no doubt of it." The prisoner was then shown the mark of the broad arrow on some of the pieces, and asked how he became possessed of the copper, and he said, "No, he did not know of whom he bought it." There was no evidence given to justify or account for the prisoner's possession of the copper.

The recorder asked the jury: First, whether the prisoner was found in possession of copper marked with the broad arrow? To which the foreman answered "Yes." Secondly, whether the prisoner knew that the copper, or any part of it, was so marked? To which the jury said, "We have not sufficient evidence before us to show that he knew it." Thirdly, whether the prisoner had reasonable means of knowing that it was so marked? To which they answered, "He had." Upon this finding of the jury, a verdict of Guilty was recorded; and the question was respectfully submitted to the Court for the Consideration of Crown Cases Reserved, whether the verdict was right.

By 9 Will. 3, c. 41:

"Section 1 . . . It shall not be lawful to or for any person or persons whatsoever, other than persons authorized by contracting with his Majesty's principal officers or commissioners of the navy, ordnance, or victualling office for his Majesty's use, to make any stores of war or naval stores whatsoever, with the marks usually used to and marked upon his Majesty's said warlike and naval or ordnance stores; that is to say, any cordage of three inches and upwards, wrought with a white thread laid the contrary way, or any smaller cordage, to wit, from three inches downwards, with a twine in lieu of a white thread, laid to the contrary way as aforesaid, or any canvas wrought or unwrought, with a blue streak in the middle, or any other stores with the broad arrow, by stamp, brand or otherwise . . ." Section 2: "Such person or persons, in whose custody, possession, or keeping such goods or stores marked as aforesaid shall be found, not being employed as aforesaid, and such person or persons who shall conceal such goods or stores, marked as aforesaid, being indicted and convicted of such concealment, or of the having such goods found in his custody, possession or keeping, shall forfeit such goods, and [be liable to certain penalties] unless such person shall, upon his trial, produce a certificate under the hand of three or more of his Majesty's principal officers or commissioners of the navy, ordnance or victuallers, expressing the numbers, quantities or weights of such goods, as he or she shall then be indicted for, and the occasion and reason of such goods coming to his or her hands or possession."

Carter for the prisoner.

Collier (*Holdsworth* and *E. W. Cox* with him) for the prosecution.

SIR ALEXANDER COCKBURN, C.J.—I am of opinion, on the Case as submitted to us, that we must say that the prisoner was wrongly convicted. I certainly feel bound to say that there was evidence upon which the jury might well and reasonably have been called upon to conclude that the prisoner knew that the copper bolts were marked with the broad arrow while in his possession. But the jury have not so found. We must consider the case now as if it had been proved that the defendant was ignorant of that fact. It has been contended that the mere possession of stores marked with the broad arrow is sufficient to constitute the offence within the statute of 9 Will. 3, c. 41. I cannot adopt that view. The ordinary principle that there must be a guilty mind to constitute a guilty act

applies to this case, and must be imported into that statute, as it was held in *R. v. Cohen* (1), where this conclusion of the law was stated by HILL, J., with his usual clearness and power. It is true that the statute says nothing about knowledge, but that must be imported into the statute. Many cases may be put in which persons might have possession of stores, and in which it is clear to demonstration that they might be ignorant of the fact of their having the mark of the broad arrow upon them, and yet the argument of the prosecution would lead to their being found guilty. The authorities which have been cited may be reconciled in this way, viz. that it is a fair presumption, where a man is found in possession of marked articles, that he knew them to be marked; but that presumption may be rebutted by the circumstances of the case.

I quite agree that the jury might well have come to another result in this case; but they did not, and they chose to act upon the prisoner's statement, and to find a sort of special verdict, to which we must apply the law, and say that the jury, having negatived the fact of knowledge, the case comes within the decision of *R. v. Cohen* (1). We must, therefore, come to the conclusion that, on the finding of the jury the prisoner ought not to have been convicted.

POLLOCK, C.B.—I agree with my Lord Chief Justice that on this finding of this jury there ought to be no judgment against the prisoner. There is abundant evidence on which the jury might have found him guilty generally, and I own that I think the jury ought to have done so. But the jury say in answer to the question, whether the prisoner knew that the copper or any part of it was marked with the broad arrow, "We have not sufficient evidence before us to show that he knew it." I entirely agree that knowledge is to a certain extent essential to the crime. I must again call attention to the practice of courts leaving certain questions of fact to a jury in a criminal case, and then entering the verdict according to the finding of the facts. The word "guilty" must, in my judgment, be pronounced by the jury, and upon no set of facts sent up to us, except in the shape of a special verdict, ought this court to act. In this case the finding of the jury makes it quite consistent with the prisoner's having an innocent possession of these stores.

MARTIN, B.—The question submitted to this court is, whether the verdict was right. I think it was wrong in two particulars.

First, I think the goods were not found in the prisoner's possession at all. In my judgment the 9 Will 3, c. 41, s. 2, means that the goods must be found in the possession of the individual on his trial. If he has parted with the possession of them, and they are found, as in this case, in the custody of the captain of a vessel, I do not think he could be found guilty upon this enactment. I should have directed the jury to acquit him.

On the other ground of knowledge of the mark I have no doubt. There are three decisions upon the point: the first in *FOSTER'S CROWN LAW*, 449; then *R. v. Willmett* (2); and *R. v. Cohen* (1), all in favour of the view we adopt. I entirely concur in the judgment of HILL, J., in *R. v. Cohen* (1).

CROMPTON, J.—I am of the same opinion. I also think the point taken by MARTIN, B., that the goods must be found in the possession of the individual on his trial, a very serious one. Here there was plenty of evidence that the copper had once been in the possession of the prisoner, but still to constitute the offence they must be found while in his possession. It is not necessary to give any opinion whether the possession of a bailee, like a ship's captain, is the possession of the prisoner. That case is not before us. The other point of knowledge is the one that was really reserved for our opinion. It is sufficient for me to say that I share in the doubt of MARTIN, B., on the first point.

On the other point I agree with the rest of the court. The authorities are strong in support of our view, and I think it is right in principle. The findings are consistent with the prisoner's innocence. The only difficulty in the case arises on the second finding. The statute seems to suppose that a man should have the means of judging from the mark of the broad arrow being upon the stores, that he ought to make proper inquiries, and not take it without so doing. In this case there is nothing inconsistent with the prisoner's having been imposed upon by another party. This case falls within the principle of the case decided in the Court of Queen's Bench, *Hearne v. Garton* (3), where guilty knowledge was held to be necessary to constitute the offence of sending dangerous goods for carriage by railway.

WILLES, J.—I am of the same opinion. The jury have not found, either that the prisoner knew that these goods were Government stores, or that he wilfully shut his eyes to the fact. I own I regret the opinion that has been expressed on another part of the case, viz., whether these stores were found in the possession of the prisoner. The court is not called upon to express any opinion on that point, and I am unable to concur, as at present advised, in that opinion. Possession means, not merely manual possession, but a property in the thing, though in the custody of another person. That definition applies to the construction of this statute, and I do not think that a thing has ceased to be in the possession of A. because he has taken his hands off it, and those of B. may happen to be upon it. However, I desire not to be understood as giving that as my final opinion upon the point. My judgment proceeds on the other point, and I agree with the rest of the court.

SIR ALEXANDER COCKBURN, C.J.—I certainly understood that the question whether the possession was sufficiently proved to be in the prisoner in this case was not part of the matter submitted or to be adjudicated upon by us. Lest I should be considered as sharing in the opinion of *MARTIN, B.*, I must say that I hold a diametrically opposite opinion upon it.

Conviction quashed.

LAMBERT v. THWAITES

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), February 28, March 8, 1866]

[Reported L.R. 2 Eq. 151; 35 L.J.Ch. 406; 14 L.T. 159;
14 W.R. 532]

Power of Appointment—Exercise—Failure to exercise—Vesting of fund pending exercise of power—No gift over in default of exercise—Trust in favour of objects of power.

Real estate was settled upon trust for the settlor for life, with remainder to his wife for life, with remainder after the death of the survivor upon trust for sale and division among all and every the children of the settlor lawfully begotten, or to be begotten, in such shares and proportions, manner, and form, as should be directed and declared by any will or codicil then already, or at any time thereafter to be, duly executed by the settlor. At the date of the settlement the settlor had seven children, one of whom subsequently died in his lifetime. The settlor died without having exercised the power of appointment.

Held: immediately on the execution of the settlement all the settlor's existing children took vested shares liable to be divested upon the execution of the power, and, therefore, all such children, including the one who died in the settlor's lifetime, took in equal shares in default of appointment.

Per Curiam: If other children had been born after the settlement, they would have taken in equal shares with the others.

Woodcock v. Renneck (1) (1841), 4 Beav. 190, and *Winn v. Fenwick* (2) (1849), 11 Beav. 438, considered.

Notes. Applied: *Wilson v. Duguid* (1883), 24 Ch.D. 244. Considered: *Re Master's Settlement*, *Master v. Master*, [1911] 1 Ch. 321. Applied: *Re Llewellyn's Settlement*, *Official Solicitor v. Evans*, [1921] 2 Ch. 281. Considered: *Re Arnold's Trusts*, *Wainwright v. Howlett*, [1946] 2 All E.R. 579. Referred to: *Re Clarke*, *Bracey v. Royal National Lifeboat Institution*, [1923] 2 Ch. 407; *Re Scarisbrick's Will Trusts*, *Cockshott v. Public Trustee*, [1951] 1 All E.R. 822.

As to powers in the nature of trusts, see 30 HALSBURY'S LAWS (3rd Edn.) 210 et seq.; as to divesting of vested interest, see *ibid.* 240; and for cases see 37 DIGEST (Repl.) 342 et seq.

Cases referred to:

- (1) *Woodcock v. Renneck* (1841), 4 Beav. 190; 11 L.J.Ch. 110; affirmed (1842), 1 Ph. 72; 11 L.J.Ch. 110; 6 Jur. 138; 41 E.R. 558, L.C.; 37 Digest (Repl.) 285, 399.
- (2) *Winn v. Fenwick* (1849), 11 Beav. 438; 18 L.J.Ch. 337; 13 L.T.O.S. 155; 13 Jur. 996; 50 E.R. 886; 37 Digest (Repl.) 393, 1252.
- (3) *Doe d. Willis v. Martin* (1790), 4 Term Rep. 39; 100 E.R. 882; 37 Digest (Repl.) 342, 859.
- (4) *Walsh v. Wallinger* (1830), 2 Russ. & M. 78; Taml. 425; 9 L.J.O.S.Ch. 7; 39 E.R. 324; 37 Digest (Repl.) 252, 150.
- (5) *Kennedy v. Kingston* (1821), 2 Jac. & W. 431; 37 E.R. 692; 37 Digest (Repl.) 252, 143.
- (6) *Casterton v. Sutherland* (1804), 9 Ves. 445; 32 E.R. 674; 37 Digest (Repl.) 410, 1388.
- (7) *Brown v. Pocock* (1833), 6 Sim. 257; 58 E.R. 590; 37 Digest (Repl.) 393, 1251.

Also referred to in argument:

- Boyle v. Bishop of Peterborough* (1791), 1 Ves. 299; 3 Bro. C.C. 243; 30 E.R. 353, L.C.; 37 Digest (Repl.) 285, 402.
- Re Caplin's Will* (1865), 2 Drew. & Sm. 527; 6 New Rep. 17; 34 L.J.Ch. 578; 12 L.T. 526; 11 Jur.N.S. 383; 13 W.R. 646; 62 E.R. 720; 37 Digest (Repl.) 409, 1374.
- Brown v. Higgs* (1799), 4 Ves. 708; 31 E.R. 366; re-heard (1800), 5 Ves. 495; affirmed (1801), 8 Ves. 561, L.C.; (1813), 18 Ves. 192, H.L.; 37 Digest (Repl.) 406, 1349.
- Bonser v. Kinnear* (1860), 2 Giff. 195; 2 L.T. 345; 6 Jur.N.S. 882; 66 E.R. 82; 43 Digest 585, 335.
- Re Theed's Settlement* (1857), 3 K. & J. 375; 26 L.J.Ch. 514; 69 E.R. 1154; 40 Digest (Repl.) 676, 1723.
- Grieverson v. Kirsopp* (1837), 2 Keen, 653; 6 L.J.Ch. 261; 48 E.R. 780; 37 Digest (Repl.) 411, 1403.

Demurrer to a bill filed by the trustees of the will of Alfred Williams, deceased, praying for a declaration that his estate was entitled to a share of property settled by his late father Roger Williams.

By indenture dated in 1841, being a voluntary settlement made by Roger Williams, certain real estate in the county of Middlesex was conveyed and limited to the use of trustees upon trust to receive the rents, and pay the same to Roger Williams during his life; and, after his decease, to Jane Williams his

wife during her life; and from and immediately after the decease of the survivor of Roger Williams and Jane Williams, upon trust to make sale of the estate, and divide the same amongst all and every the children of Roger Williams lawfully begotten, or to be begotten, in such shares and proportions, manner, and form, as should be directed and declared by any will or codicil then already, or at any time thereafter to be, duly executed by Roger Williams, and to, for and upon no other use trust and intent or purpose whatsoever.

Roger Williams had seven children, all of whom attained the age of twenty-one years; Alfred Williams, one of these children, died in 1856, having by his will, dated in 1855, given his real and residuary personal estate to trustees for the benefit of his wife and children; Jane Williams, the wife of Roger Williams, died in 1856; Roger Williams died in 1862 without having executed the power of appointment by will or codicil, reserved to him by the indenture of 1841. The question to be determined was whether, in default of the execution of the power, the estate was to be divided among the six children who survived their father, excluding Alfred Williams, or among the seven, including him. The suit was instituted by the trustees of Alfred Williams's will for a declaration that he was so entitled, and that the trusts of the deed of 1841 might be carried into effect under the direction of the court. The defendants, who were the six children of Roger Williams, who survived him, or their representatives, alleged that the death of Alfred Williams in the lifetime of his father prevented his taking any interest in the property. The defendants demurred to the bill.

Glasse, Q.C., and *Lewin* for the defendants, in support of the demurrer.
Baily, Q.C., and *Ellis* for the plaintiffs.

KINDERSLEY, V.-C., after stating the facts: To determine the question it is necessary to bear in mind what has become an elementary principle of the court—though at one time it was disputed and denied—that the existence of a power of appointment does not prevent the vesting of the estate in default of the appointment. It is now well settled that an estate may be vested notwithstanding the pendency of such a power; and ever since *Doe d. Willis v. Martin* (3), in 1790, that has been the law. In some cases, however, the power is so created as that in terms nothing is given to a person or class of persons except through the execution of the power; and then the general principle is, that if you can only ascertain from the terms of the power itself those who are intended to be benefited, you must hold that the persons who are to take in default of appointment are those who may take under the appointment. That principle is well established, but, of course, does not apply where by the terms of the instrument itself the settlor or testator himself declares whom he means to take in default of appointment.

Take *Walsh v. Wallinger* (4). There the testator bequeathed the residue of his estate to his wife for her own use and benefit. So far it was an absolute gift to her. Then he added,

"trusting that she will at her decease give and bequeath the same to our children in such manner as she shall appoint."

There, in terms, there is no gift by the testator to the children, nor any direction that they are to take in default of appointment, and, therefore, we have to infer from the power itself who are to take in default; and, inasmuch as the power could only be exercised by will, and, therefore, could only be exercised in favour of those children who should be living at the wife's death, we are obliged to conclude that the intention of the testator was that those only who survived the wife should take in default of appointment. That is, you give them an estate by implication; you imply from the terms of the power who are to take; but, as I have said, that is in the absence of any gift to any particular class or members

of a class, and in the absence of any direction by the testator who is to take in default of appointment. That case is an instance of one kind of power, where there is nothing but the power given, and no gift by the testator to the class whom he intends to benefit.

Take another instance, viz., *Kennedy v. Kingston* (5). That was a bequest of £500 to Ann Rawlins for life, and at her death to divide it in portions as she should choose among her children. She had four children, one of whom died, and by her will she gave the fund in certain portions to the three survivors. One of these survivors died before their mother, and it was held that the appointment of two-thirds to the two who had survived her was good, and that there was a lapsed share which would go equally to those two, and for the reason that, first of all, there was only a power to Mrs. Rawlins; there was no express gift to the children, or any of them. It was a gift to her for her life, with a power to divide it in portions as she should choose for her children after her decease. She might have bequeathed it to the two who survived her only, but she bequeathed it to the three who were living when she made her will, and one having died, the question was, who was to take the whole fund. It was the same as if she had made no appointment at all, because, as you have no means of knowing what class the testator intended to benefit except by the terms of the power, you must imply from the terms of the power that the persons to be benefited by the execution of the power were in default of appointment to be the persons to take.

I will now take *Casterton v. Sutherland* (6), which was a devise to the testator's wife for her life, and after her decease

"unto and among all and every our children in such manner and in such proportions as my said wife shall either in her lifetime or by her last will appoint."

This is a specimen of a totally different form of power. In the two former we had no specification by the testator, except by implication, to whom he meant to give the property, but here it is given after the decease of his wife to all their children in such proportions as his wife should appoint. It is different in this respect also, that the wife was not limited to the execution of the power by will, but was to be at liberty to execute it in any way she chose, by deed inter vivos, or by testamentary document. There were five children, and they all died before the wife, and there was not an execution of the power. SIR WILLIAM GRANT determined that by the terms of the gift, coupled with the power, it was a tenancy in common among the children in fifths, subject to the power of appointment. Of course we have here an element which did not occur in the other cases, viz., that the power might be exercised by instrument inter vivos, and, therefore, it might be said that the power would imply a gift to all the children from that circumstance alone. But I refer to this case for the purpose of showing that, so long as the power is not exercised, its non-exercise, by whatever instrument it is capable of being exercised, does not prevent the estate vesting. It vests in the children, and of course, if the donee of the power has exercised it in any way, the effect would be to divest the estates which were thus vested. If she had exercised it by deed, that would have divested it. If she had never exercised it in her lifetime, but by her will had exercised it in favour of those who survived her, that would have divested it.

I now refer to *Brown v. Pocock* (7), decided by SHADWELL, V.-C. Leaving out the unnecessary parts, and taking only the simple facts, it was a bequest of £2 a-week to A. for life, but to cease on alienation. A sum was to be set apart to answer those weekly payments, and after the death of A. there was power to A. to leave the sum to and for the benefit of his wife and children in such manner as he should by will appoint. Here we have a specimen of there being no gift to the wife and children by the testator himself, but a power to A. to

appoint it among his wife and children, and he had power to appoint it only by will. The wife, who was one of the persons in whose favour the appointment might be made, died before her husband, A., the donee of the power; so there remained only the three children. There was no valid appointment under the power; and the question, therefore, was, to whom was the fund to go in default of appointment? Inasmuch as the testator had given it to the wife and children as the husband should by will appoint, it was held that it was a gift by the testator to the wife and children as joint tenants by implication, they being the persons who were to benefit by the appointment, if the appointment had been made. Notwithstanding that the wife could not take by appointment, inasmuch as she did not survive the donee of the power, and, therefore, could not take under his will, she was still to take as in default of appointment by implication, and it was held that it was a vested interest in the wife and children, subject to be divested by the execution of the power; and, as the donee did not exercise the power, the property remained vested in the wife and children.

The question, then, in the present case, really is whether it is a case in which the settlor has himself stated whom it is that he means to benefit in case the power is not exercised. I think it is impossible to express in more definite and precise terms his intention that every one of his children should be the persons to take, subject only to the exercise of the power by will. There is no doubt that, supposing half of the children had predeceased him, and he exercised the power in favour of the survivors, it would have been perfectly good; but if he does not exercise the power the question is: In whom is the estate vested until the power is exercised? Is it vested in anybody? I apprehend that it must clearly vest in all the children, and if other children were born after the settlement they would take in equal shares with the others. It so happened there were no others. All of them, including Alfred, took, immediately on the execution of the instrument, vested shares liable to be divested upon the execution of the power. There was no doubt, although the power was not an exclusive one, that it did not authorise an exclusive appointment, it being to be exercised by will only, and as a will can only be made in favour of persons who survive the testator, it was of necessity a power to those only who survived, and the power could only be exercised in favour of the survivors of the donee of the power; but until execution and in default of execution of the power the estate remained vested in the persons to whom it was given.

There are two cases to which I ought to refer, both of which were decided by LORD LANGDALE, M.R., and were cited by counsel in the course of the argument. One of them in particular, I think, seems to militate against this view, and that is *Woodcock v. Renneck* (1). It was a bequest of £1700 stock in trust to pay the dividends to A. and his wife B. for their lives and the life of the survivor of them, and after the decease of the survivor to transfer and pay over (and some stress was laid by the Master of the Rolls upon these words), the stock to their children in such shares and proportions as the survivor of A. and B. should by will appoint. There was a gift to the children of A. and B. subject to the exercise of a power which was to be exercised by will by the survivor of the two. The husband was the survivor; there were three children, but only one of them survived the husband. The husband made his will, and appointed the whole to that one child. Now nobody can question that, as LORD LANGDALE, M.R., decided, that was a good appointment. The power was to appoint by will, and could only, therefore, be exercised in favour of the survivor. But the Master of the Rolls unnecessarily, certainly, thought fit to look into another question, viz., who was to have taken in default of appointment, though, as there was an appointment, it was hardly necessary to have done so. Having regard to the words being only "their children," which, the Master of the Rolls said, although they *prima facie* meant "all children," still were a flexible term, and might mean "all the children living at the death"; and having regard to

the fact that the power was given to appoint by will, he concluded that, in default of appointment, the surviving child alone would have taken. I am bound to say that I could hardly have come to that conclusion myself; but, supposing it to be right, it was a decision that the words "their children" might mean "the children living at their death, and only the children living at their death." Assuming, however, that to be quite correct, it does not in the smallest degree touch the present case, where there is nothing to admit the construction that the children meant are only those which should survive, because it is not only "all and every the children," which would be quite sufficient, but it is "all and every the children now lawfully begotten, or to be begotten." I think, therefore, that, assuming the view of LORD LANGDALE, M.R., in *Woodcock v. Renneck* (1), on the subject of the word "children" is correct, which I confess I should hesitate to admit, it seems to me not at all to govern the present case.

There is also *Winn v. Fenwick* (2), which was decided by the same learned judge, which, although apparently not in accordance with the view that I have been taking in this case, is really otherwise, and, even as it stands, LORD ST. LEONARDS expresses his dissatisfaction with the decision. A fund was settled only in the event of the wife dying in her husband's lifetime, and it was in that event only that there was any gift or any power upon trust for all and every the children of the marriage, as the wife should by deed or will appoint, and if there should be no issue living at her decease, then a general power of appointment was given to her. The wife did not exercise the power, and she had children, some of whom died in her lifetime, and others survived her. It was admitted that the children took in default of appointment by implication, but the question was, what class was entitled? LORD LANGDALE, M.R., said the rule was that none could take by implication upon the non-execution of a power, who could not take under an execution of such power. That is a perfectly just rule if you apply it to a proper case; that is, if you have no other means of ascertaining who were intended to take but by the terms of the power. [The VICE-CHANCELLOR then referred to LORD LANGDALE's remarks.] It will be observed that the wife had a power to appoint by will. LORD LANGDALE, M.R., however, came to the conclusion that those only who survived the wife were entitled to take in default of appointment. LORD ST. LEONARDS in his book (SUGDEN ON POWERS (8th Edn.), p. 696), observes upon that case :

"It may be considered doubtful whether this construction gave effect to all the words of the settlement which the court intended to construe by implication, for the power clearly embraced all and every the children, and might have been exercised by deed in favour of all, though it would not have taken effect unless some *one* survived their mother. In this view, as some did survive, all might have been held to take by implication, in default of appointment."

I have referred to that case, not because it seems to tally with the others which I have mentioned, but because LORD LANGDALE, M.R., took a view which seemed to militate against it; but when I find that LORD ST. LEONARDS expressed his dissatisfaction with it, I do not think that it presents any difficulty whatever.

I come to the conclusion that in the present case the settlor has made a distinct statement of the class whom he intended to take in default of execution of the power, or rather subject to the power. The deed gives it to all the children in such shares and proportions, manner, and form as the wife shall by will appoint, though it does not go on to say "in default of appointment, to all the children." That would have been an end of the question. The settlor means that all the children who were then in existence, as well as those who should come into existence afterwards, were to take subject to the reservation to

himself of the power of saying by will what shares they were to take. It appears to me that all the children, including Alfred, have equal shares, and that, therefore, the demurrer must be overruled.

Judgment for plaintiffs.

SCARISBRICK v. PARKINSON

[COURT OF EXCHEQUER (Kelly, C.B., Channell, Pigott and Cleasby, BB.), January 21, 1869]

[Reported 20 L.T. 175; 17 W.R. 467]

Contract—Breach—Damages—Quantum meruit—Unenforceable contract—Evidence of value of services rendered.

The plaintiff alleged that, by an agreement between himself and the defendant, in consideration that the plaintiff would serve the defendant as his clerk for three years the defendant would pay him £60. Having performed all the conditions, the plaintiff claimed (i) the £60 under the agreement, and (ii) wages payable by the defendant to him for work done and services rendered as the defendant's clerk.

Held: although the agreement, not being one to be performed within a year, came within s. 4 of the Statute of Frauds, 1677, and not being in writing, was, therefore, unenforceable, it was, nevertheless, evidence on quantum meruit of the value of the plaintiff's services and might be taken into consideration, on the question of the measure of damages, as showing the estimate which the defendant had put on the plaintiff's services.

Notes. That part of s. 4 of the Statute of Frauds, 1677, which related to contracts not to be performed within one year, was repealed, by the Law Reform (Enforcement of Contracts) Act, 1954, s. 1 (34 HALSBURY'S STATUTES (2nd Edn.) 97).

Applied: *Way v. Latilla*, [1937] 3 All E.R. 759. Considered: *Adams v. Union Cinemas, Ltd.*, [1939] 1 All E.R. 169.

As to quantum meruit, see 8 HALSBURY'S LAWS (3rd Edn.) 110 et seq.; and for cases see 12 DIGEST (Repl.) 187 et seq.

Cases referred to in argument :

Smith v. Westall (1698), 1 Ld. Raym. 316; 3 Salk. 9; 91 E.R. 1106; 12 Digest (Repl.) 335, 2592.

Peter v. Compton (1693), Holt, K.B. 326; Skin. 353; cited in Ld. Raym. at p. 317; 90 E.R. 1080; 12 Digest (Repl.) 133, 819.

Boydell v. Drummond (1809), 11 East, 142; 103 E.R. 958; 12 Digest (Repl.) 133, 820.

Carrington v. Roots (1837), 2 M. & W. 248; Murp. & H. 14; 6 L.J.Ex. 95; 1 Jur. 85; 150 E.R. 748; 12 Digest (Repl.) 184, 1250.

Birkmyr v. Darnell (1704), 1 Salk. 27; 91 E.R. 27; sub nom. *Burkmire v. Darnel*, Holt, K.B. 606; 6 Mod. Rep. 248; sub nom. *Bourkmire v. Darnell*, 3 Salk. 15; sub nom. *Buckmyr v. Darnall*, 2 Ld. Raym. 1085; 26 Digest (Repl.) 9, 2.

Reade v. Lamb (1851), 6 Exch. 130; 2 L.M. & P. 67; sub nom. *Reed v. Lamb*, 20 L.J.Ex. 161.

Rule Nisi obtained by the defendant for a new trial of an action brought by the plaintiff, an infant, by his best friend, against the defendant, to recover

A a sum of money, as wages for services rendered to the defendant, as a clerk for three years under a verbal agreement, and also for money payable for services performed by the plaintiff as the hired clerk of the defendant.

B The plaintiff claimed firstly that the defendant, a merchant by an agreement made between the plaintiff and the defendant, in consideration that the plaintiff should work for the defendant, as his clerk for three years, the defendant agreed to pay the plaintiff £60, and that having performed all conditions entitling the plaintiff to the £60, the defendant had not paid him. The plaintiff claimed, secondly, a quantum meruit for wages payable by the defendant to the plaintiff for work and services rendered by him as the hired clerk and bookkeeper of the defendant, at his request, and for money due on account stated.

C The defendant pleaded to a denial of the agreement as alleged, and further that he never indebted, on which pleas issue was joined.

D At the trial before the assessor of the Passage Court at Liverpool, on Oct. 27, 1868, it appeared that some time in July, 1865, the defendant, a merchant at Liverpool, agreed to take the plaintiff into his office as a clerk, for three years, at a salary or remuneration of £60 for the three years, being at the rate of £100 for five years, which was the usual salary and term for which merchants in Liverpool were accustomed to take young men into their offices as clerks or apprentices. The plaintiff accordingly entered the defendant's office, and continued to serve him as a clerk for three years, from July 3, 1865, to July 3, 1868. No part of the agreed salary of £60 was paid to the plaintiff during that period, nor was anything said by either party about payment in any way, during that time. At the conclusion of three years, the plaintiff applied to the defendant, and requested to be paid £60 but the defendant refused to pay it, and stated that he had not agreed to pay any salary at all for the three years' services of the plaintiff, but that what he, the defendant, had proposed as the most beneficial course for the plaintiff, and what he, the plaintiff, had agreed to, was, instead of taking the plaintiff as a clerk or apprentice for five years at the usual salary or remuneration of £100 for the whole period, that the plaintiff should be apprenticed for three years for nothing, and then obtain a situation as a paid clerk, when he would probably receive a far higher salary as a paid clerk for the last two years of the five.

F The plaintiff, upon such repudiation of the agreement by the defendant, brought the present action; and at the trial it was submitted by the defendant's counsel that, the agreement not being one to be performed within a year, was void under s. 4 of the Statute of Frauds, 1677, as it was not in writing, and that the plaintiff, therefore, could not recover upon it. The assessor was of that opinion; but he also held that, although it was void as an agreement that could not be enforced, yet it was capable of being referred to as evidence of the value of plaintiff's service under the money count. The plaintiff himself proved the agreement, which was by parol, and also that he served the defendant as clerk for three years, and evidence was also given that £100 was a usual salary to give to a young man of the plaintiff's age, condition, and position for a service of five years.

I The jury found a verdict for the plaintiff for £60 damages, and leave was reserved by the assessor to the defendant to move for a new trial, on misdirection on the point of law taken by his counsel at the trial. A rule was accordingly moved for and obtained for the defendant, to set aside the verdict found for the plaintiff, and for a new trial, on the ground of misdirection in the assessor having told the jury that there was evidence to support the work and labour count, and that the measure of damages was £60.

C. Russell for the plaintiff.

W. H. Butler for the defendant.

KELLY, C.B.—I am of opinion that the defendant's rule in this case must be discharged. The action is to recover the sum of £60, the amount claimed to be due to the plaintiff for his services for three years as clerk to the defendant, and at the trial it was proposed on the part of the plaintiff to put in evidence in support of his claim an agreement between the plaintiff and the defendant, by which it was agreed between them that the plaintiff should serve the defendant as a clerk or apprentice for the space of three years for a salary of £20 a year. It appeared that this agreement had not been reduced to writing, and the assessor of the Liverpool Passage Court, before whom the cause was tried, was of opinion that as it was an agreement not to be performed within one year, it came within s. 4 of the Statute of Frauds, 1677, and, therefore, the plaintiff could not recover upon it as it had not been reduced to writing. The plaintiff, however, then proved the fact of his service as clerk to the defendant in his office for three years, and then gave evidence of the agreement in question, in order to prove what was the value of his services, the defendant objecting that such evidence was not receivable.

The only question is whether or not the agreement which could not be recovered on by reason of its coming within the prohibition of the Statute of Frauds, 1677, could be referred to on the trial of the action for any other purpose. It was contended by the counsel for the defendant that it could not, for that to do so was to charge the defendant by means of it. But I do not think that that is the case. Suppose, for instance, that an agreement to precisely the same effect as the one in the present case had been made between the defendant and a third person, another person altogether than the plaintiff, but a young man of the same age and position, it is quite clear that the plaintiff could not have recovered, in the present action, upon that agreement; but can it be said that he could not have referred to it for the purpose of showing the value which the defendant had put upon his services, and so of enabling the jury to estimate such services? Surely not. I think, therefore, that the assessor was right in leaving to the jury what was the value of the services of the plaintiff, and in telling them that, in order to arrive at a proper estimate of such value, they might have recourse to the agreement for the purpose of seeing what the defendant himself had valued such services at, although such agreement for the reason above mentioned, could not be used for any other purpose.

CHANNELL, B.—I concur with KELLY, C.B., in thinking that this rule should be discharged. It is clear, and the plaintiff's counsel has admitted, that the plaintiff could not recover on the first count of the declaration for want of any agreement in writing. As to the second count, which, for the present purpose, may be termed the indebitatus count, there is nothing that I see to prevent the plaintiff's recovering on that. The plaintiff served the defendant for the full period of three years under an agreement which was not legally available in evidence as an agreement, because it was not reduced to writing as, under the Statute of Frauds, 1677, it ought to have been. But for services performed, the law implies a payment, and there was evidence, I think, from which the jury might infer that the plaintiff's services for three years were such as he was entitled to be paid for. Then, as to the question of damages, I cannot see anything wrong in the assessor's direction to the jury, nor any impropriety in this agreement being referred to as the rule or measure of damages which they ought to adopt, and as enabling them to estimate the value of the plaintiff's services for the three years during which he was in defendant's employ.

PIGOTT, B.—I am entirely of the same opinion, and think that the evidence was admissible. The illustration put by KELLY, C.B., is, it seems to me, conclusive upon the point. Other persons might have been called to prove the value of the services in question; so, had there been a conversation between the plaintiff

and the defendant with a view to a contract between them which was never carried out, and in the course of it the defendant had said, "I estimate your services as worth £20 a year," that would surely be evidence of the value of the plaintiff's services, though not evidence of a contract. Had the assessor left it to the jury as a binding agreement he would have been wrong; but I think that it was admissible as evidence of the value of the plaintiff's services, and that for that purpose the jury might take it into their consideration.

CLEASBY, B.—I am also of the same opinion. This is not an action brought for the purpose of charging the defendant upon the agreement alone. Had that been so it would not have been maintainable, but here we have the fact of the plaintiff's services for a period of three years, and this action is brought to recover the value of those services. The defendant's counsel stated distinctly that the agreement was the only evidence of their value, but that is not so; for the young man himself in his evidence said, "it was usual to give a youth £100 for five years." There is, apart from the agreement in question, evidence of an agreement to engage the plaintiff for three years, and there is evidence of the value of his services; the defendant kept him for three years, though he was not bound to do so. I think, therefore, the defendant's rule should be discharged.

Rule discharged.

Re HARMONY AND MONTAGUE TIN AND COPPER MINING CO., LTD. SPARGO'S CASE

[COURT OF APPEAL IN CHANCERY (James and Mellish, L.JJ.), January 25, 1873]

[Reported 8 Ch. App. 407; 42 L.J.Ch. 488; 28 L.T. 153;
21 W.R. 306]

Company—Calls—Set-off—Debt owed by company to shareholder—Payment "in cash"—Companies Act, 1867 (30 & 31 Vict., c. 131), s. 25.

Any bona fide transaction between a company and a shareholder, which, if the company were to bring an action against him for calls, would support a plea of payment, **held** to constitute a payment "in cash" for the purposes of s. 25 of the Companies Act, 1867 [now s. 52 (1) (b) of Companies Act, 1948].

S., having procured an agreement for a lease of a mine, formed a limited company to purchase the lease and work the mine, and he subscribed the memorandum of association for thirty-one shares. At a meeting of all the members of the company it was resolved that £2,176 should be credited to S. as the purchase price of the lease, and that the same should be paid out of the share capital of the company and that he should be debited with the amount payable on his shares. He was duly entered on the register as owner of thirty-one fully paid-up shares. The company had obtained possession of the mine and worked it for a few months, when a winding-up order was made.

Held: where there was a bona fide debt immediately payable in money by a company to a shareholder and a bona fide liability for the same amount on shares immediately payable by the shareholder, and in settling accounts the one debt was set-off against the other, the transaction amounted to a payment for the shares "in cash" within s. 25 of the Companies Act, 1867. S. had, therefore, fully paid up his shares in cash within the meaning of the section.

Notes. The Companies Act, 1867, s. 25 has been replaced by the Companies Act, 1948, s. 52 (1) (b) : 3 HALSBURY'S STATUTES (2nd Edn.) 504.

Followed : *Re Limehouse Works Co., Coates' Case* (1873), L.R. 17 Eq. 169. Considered : *Re Pen' Allt Silver Lead Mining Co., Frazer's Case* (1873), 42 L.J.Ch. 358. Distinguished : *Re Church and Empire Fire Insurance Fund, Pagin and Gill's Cases* (1877), 6 Ch.D. 681; *Re Church and Empire Fire Insurance Fund, Andress' Case* (1878), 8 Ch.D. 126; *Re Government Security Fire Insurance, White's Case* (1879), 12 Ch.D. 511. Applied : *Re Barrow-in-Furness and Northern Counties Land and Investment Co.* (1880), 14 Ch.D. 400; *Re Newport and South Wales Shipowners Co., Rowland's Case* (1880), 42 L.T. 785; *Re Land Development Association, Kent's Case* (1888), 39 Ch.D. 259; *Re Jones, Lloyd* (1889), 41 Ch.D. 159. Distinguished : *Re Johannesburg Hotel Co., Ex parte Zoutpansberg Prospecting Co.*, [1891] 1 Ch. 119. Approved : *Larocque v. Beauchemin*, [1897] A.C. 358. Applied : *North Sydney Investment and Tramways Co. v. Higgins*, [1899] A.C. 263. Referred to : *Re Tavarone Mining Co., Pritchard's Case* (1873), 28 L.T. 625; *Re Paraguassu Steam Tramroad Co., Ferrao's Case* (1874), 43 L.J.Ch. 264; *Re British Farmers' Pure Linseed Cake Co., Potter and Brown's Cases* (1878), 38 L.T. 757; *Credit Co. v. Potts* (1880), 6 Q.B.D. 295; *Re Government Security Fire Insurance, Mudford's Claim* (1880), 14 Ch.D. 634; *Re London Celluloid Co., Ex parte Bayley and Hanbury* (1888), 57 L.J.Ch. 843; *Re Rosherville Hotel Co., Roberts' Case* (1890), 2 Meg. 60; *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95; *Mosley v. Koffyfontein Mines* (1904), 73 L.J.Ch. 569; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527; *Tarrant v. Roberts* (1930), 47 T.L.R. 199; *Trinidad Lake Asphalt Operating Co. v. Income Tax Commissioners for Trinidad and Tobago*, [1945] 1 All E.R. 9; *I.R. Comrs. v. Gordon*, [1952] 1 All E.R. 866.

As to payments in cash, see 6 HALSBURY'S LAWS (3rd Edn.) 243-244; and for cases see 9 DIGEST (Repl.) 92.

Cases referred to :

- (1) *Re Pen' Allt Silver Lead Mining Co., Fothergill's Case* (1873), 8 Ch. App. 270; 42 L.J.Ch. 481; 28 L.T. 124; 21 W.R. 301, L.C. & L.J.J.; 9 Digest (Repl.) 91, 402.
- (2) *Re Richmond Hill Hotel Co., Pellatt's Case* (1867), 2 Ch. App. 527; 36 L.J.Ch. 613; 16 L.T. 442; 15 W.R. 726, L.J.J.; 9 Digest (Repl.) 250, 1592.
- (3) *Re Richmond Hill Hotel Co., Elkington's Case* (1867), 2 Ch. App. 511; 36 L.J.Ch. 593; 16 L.T. 301; 15 W.R. 665, L.J.J.; 9 Digest (Repl.) 245, 1578.

Also referred to in argument :

- Waterhouse v. Jamieson* (1870), L.R. 2 Sc. & Div. 29, H.L.; 9 Digest (Repl.) 310, 1948.
- Re Marlborough Club Co.* (1868), L.R. 5 Eq. 365; 37 L.J.Ch. 296; 18 L.T. 46; 16 W.R. 668; 10 Digest (Repl.) 954, 6564.
- Brighton Arcade Co. v. Dowling* (1868), L.R. 3 C.P. 175; 37 L.J.C.P. 125; 17 L.T. 543; 16 W.R. 427; 10 Digest (Repl.) 1057, 7332.
- Re Metropolitan Public Carriage and Repository Co., Cleland's Case* (1872), L.R. 14 Eq. 387; 41 L.J.Ch. 652; 27 L.T. 307; 20 W.R. 924; 9 Digest (Repl.) 314, 1966.
- Re Mercantile Trading Co., Stringer's Case* (1869), 4 Ch. App. 475; 20 L.T. 591; 17 W.R. 694; sub nom. *Re Mercantile Trading Co., Ex parte Official Liquidator*, 38 L.J.Ch. 698, L.J.J.; 9 Digest (Repl.) 524, 3454.

Appeal from a decision of the Vice-Warden of the Stannaries Court.

The Harmony and Montague Tin and Copper Mining Co., Ltd. was formed in 1871, with a capital of £3200, in sixty-four shares of £50 each, which were to be fully paid-up at once. The company was registered on Mar. 9, 1871, under the Companies Acts, 1862 and 1867. The memorandum of association—there

were no articles of association—stated that the objects of the company were, inter alia, to purchase and work a certain tin and copper mine, in Redruth, Cornwall, known as the Harmony and Montague Mine. The memorandum, which was registered on Mar. 9, 1871, was subscribed by seven persons, one of whom, Thomas Spargo, subscribed it for thirty-one shares, while two other subscribers agreed to take two shares each, and the other four one share each, thirty-nine shares being thus disposed of.

In January, 1871, the lords of the manor in which the Harmony and Montague Mine was situate, had granted a licence to two persons, Mitchell and Stephens, to work the mine for one year, from Jan 25, 1871, on certain conditions, and they agreed to grant a lease of the mine for twenty-one years, on Mitchell and Stephens producing a proper list of adventurers. Spargo formed the above company to purchase this lease, it having been agreed between him and Mitchell and Stephens that he should have one half of the purchase money paid by the company for the lease, and Mitchell and Stephens the other half, in equal shares. At a meeting held on Mar. 16, 1871, at which all the subscribers of the memorandum, who were then the only members of the company, were present, it was unanimously resolved that £2176 should be credited to Thomas Spargo for the lease of the property, and the same should be paid out of the share capital of the company; that Thomas Spargo should be appointed the manager of the company; that the statement of accounts produced to the meeting should be allowed and passed, the balance in favour of the adventurers being £989 11s. 6d.; that Spargo, as manager, should issue certificates for the shares in the company, etc. Spargo himself had applied for twenty more shares, and applications had been received for five shares, and these, with the thirty-nine shares subscribed for in the memorandum of association, made up the whole sixty-four shares into which the capital was divided. Spargo duly issued the certificates, in which the shares were all described as fully paid-up, and they were also described on the register of shareholders as fully paid-up shares.

The company took possession of and worked the mine till an order for winding-up the company was made on Dec. 21, 1871. A lease of the mine to certain persons on behalf of the company was prepared by the solicitor to the lords of the manor, one of whom executed it, after it had been approved by Spargo on behalf of the company. Afterwards, however, objections were raised as to some of the covenants by the persons in whose names the lease was to be taken, and the result was, that the lease was not completed when the winding-up order was made. The company had, however, made a payment of £50. to the lords of the manor on account of royalties.

At a meeting of the company, held on Sept. 13, 1871, a discussion arose as to the sum paid for the purchase of the lease and as to the non-completion of the lease, and it was ultimately proposed and agreed that Spargo should forthwith pay £543 in cash, and execute a transfer of twenty shares to the company as a security for the transfer of the lease, the company undertaking to settle with Mitchell and Stephens out of the said money and shares, and to pay the balance in new shares and money to Spargo.

Spargo paid the money, and executed transfers of twenty shares, in accordance with this arrangement. He sold several of his shares, and at the date of the winding-up order only nine shares were standing in his name. The company's books showed that Spargo had paid the full amount of the fifty-one shares taken by him, by means of the £2176 credited to him for the lease of the mine and certain sums of money which he had paid to or on behalf of the company.

On the application of the official liquidator, the Vice-Warden made an order that Spargo should pay him £450, which the order expressed to be "the amount payable to the said company on the said nine shares in respect of which the name of the said Thomas Spargo has been duly settled on the list of contributors," and also the sum of £893 1s. 3d., being the balance claimed to be due

from Spargo to the company in respect of the sum of £2100 payable on the forty-two shares allotted to Spargo and subsequently transferred by him, after crediting him with £1206 18s. 9d. appearing to have been properly expended by him on behalf of the company. From this order Spargo appealed.

Roxburgh, Q.C., and *Woodroffe* for the appellant.

Fry, Q.C., and *Joseph Dixon* for the respondent.

JAMES, L.J.—I am of opinion that the order of the Vice-Warden cannot stand. The real question is what is the true intent and meaning of s. 25 of the Companies Act, 1867, which we had to consider in *Fothergill's Case* (1), in which judgment was delivered yesterday by LORD SELBORNE, L.C., and ourselves. The point did not exactly arise there as to what the meaning of payment "in cash" is, except that there was no payment of cash, or anything that could be called a payment of cash in that particular case. It was stated by the Lord Chancellor, and we entirely concurred with him, that we could not put on that section any construction which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be payment in cash, or that an order on a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. It appeared to me that anything which amounted in fact to that which would be in law sufficient evidence on a plea of payment would be a payment of cash within the meaning of this provision. The object of the section was to prevent those transactions which had then been before the court in which a man was on the one side to take shares, and on the other to supply goods. Such contracts occurred in *Pellatt's Case* (2) and *Elkington's Case* (3). It was supposed that there would be mischief in collateral contracts of that kind, which would deprive creditors of the hope or chance of obtaining payment from persons whose names they saw on the register of shareholders. The section was aimed at that.

There are a great many cases that might be put. In *Fothergill's Case* (1), the bargain was to give paid-up shares in satisfaction of money which was to be paid for other shares. If, however, the transaction resulted in a bona fide debt payable in money at once on the one side, and a bona fide liability on shares payable at once on the other side, it would be a perfectly good and valid transaction under this section if bank notes were handed from one side of the table to the other in payment of calls, and handed back in payment for the property. If that had been done, it appears to me as it did in *Fothergill's Case* (1), and as it does now—that this Act of Parliament does not make it necessary that formality of the money being handed over by one and handed back by the other person is necessary. If it came to this, a debt in money payable immediately, and another debt in money also payable immediately, and the one was accepted in full payment of the other on both sides, the company could have pleaded payment in bar to an action brought against them, and the shareholder could have pleaded payment in bar to a corresponding action brought by the company against him for calls. That is so where the transaction is an honest transaction, and where there is no fraud of any kind. That is a payment in cash; it would be proof of payment on a plea of payment in cash. If those were the words of the contract, or it was a promissory note, it would be sufficient evidence of that in a court of law. It is sufficient for the court sitting in a winding-up matter. Of course, the thing might have been a mere sham, or evasion, or trick to get rid of the effect of the Act. Any question of sham, or fraud, or deceit, seems to be entirely out of the question in this case, however, because everybody knew what was done; every shareholder of the company was present, and was a party to the resolution; there was no deceit practised on any creditor, nor was there any registration of these shares, except as shares paid-up, payment being made in the manner I have described.

The question must be determined on the construction of the Act, even if the payment was made for a consideration which has absolutely failed. If the payment were made, the subsequent failure of the consideration could not prevent its being a payment in full of the shares. There might be an action or a bill either for the return of the money or for damages in case there was a subsequent failure to fulfil the contract in respect of the property. But I see no trace here of what may be called a failure of consideration. What the parties were dealing with was a licence for a year, with a right to get a lease or sett for twenty-one years. The company, after knowledge of all this, not only paid the £2176 to the appellant in the manner which appears, but absolutely made arrangements with him and the two other persons who were interested with him, with full knowledge of the state of the title, and what the property was that they were buying. After that disputes arose, not between the appellant and themselves as lessees, but between the intending lessors and the intending lessees; not as to the right of one to have the lease, and the obligation of the other to grant a lease, but as to what would be the proper conveyancing language in which that lease was to be expressed. It would be an abuse of language to say that there was anything like a failure of consideration on the part of the appellant which can entitle the company to treat that payment as a payment never made, and to insist that the shares remain unpaid to this day. If that be so, it applies to the forty-two shares as well as the nine. The order of the Vice-Warden ought to be discharged.

MELLISH, L.J.—I am of the same opinion. I gave my opinion in *Fothergill's Case* (1) yesterday, on the proper construction of s. 25 of the Act of 1867. I then stated that if the only defence at law to an action for the money due on shares would be a plea of accord and satisfaction, this section would prevent such a plea being good; but that if what was done could be given in evidence under a plea of payment, if there was that which would support a plea of payment, then that was not within the prohibition of s. 25.

In the present case I am of opinion that, if an action were brought at law for the amount of these shares, there would be a valid defence under a plea that money had been actually paid in satisfaction of the amount. It is a payment in account, because nothing is clearer than that if two parties account with each other, and sums are stated to be due on both sides, and those sums are set-off by both parties, it is exactly the same thing as if they had been paid. Indeed, it is a general rule of law that in every case where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet and agree to set the one against the other, they need not go through the form and ceremony of handing the money backwards and forwards.

Appeal allowed.

CHARLESWORTH AND ANOTHER *v.* HOLT

[COURT OF EXCHEQUER (Kelly, C.B., Bramwell and Pigott, BB.), November 19, 1873]

[Reported L.R. 9 Exch. 38; 43 L.J.Ex. 25; 29 L.T. 647;
22 W.R. 94]

Husband and Wife—Separation agreement—Annuity payable by husband to wife—Payment “so long as they shall live separate and apart”—Divorce on ground of wife’s adultery—Liability of husband to continue annuity.

A husband, by a deed of separation between himself and his wife, covenanted to pay an annuity to trustees for the wife’s use and benefit “during the joint lives of [the husband] and [the wife], and during so long as they shall live separate and apart.” Subsequently the husband obtained a decree of divorce on the ground of the wife’s adultery. In an action by the trustees for arrears of the annuity,

Held: the covenant being absolute and unconditional to pay the annuity so long as the two parties “should live separate and apart,” the adultery of the wife and the divorce decree were no bar to the trustees’ claim in the absence of an express provision in the deed.

Notes. Considered: *Grant v. Budd* (1874), 30 L.T. 319; *Negus v. Forster* (1882), 46 L.T. 675. Explained: *Fearon v. Aylesford* (1884), 12 Q.B.D. 539. Distinguished: *Re Gilling, Procter v. Watkins* (1905), 74 L.J.Ch. 335. Considered: *Hyman v. Hyman*, [1929] All E.R. Rep. 245. Followed: *May v. May*, [1929] All E.R. Rep. 484. Considered: *Kirk v. Eustace*, [1936] 3 All E.R. 520. Followed: *Adams v. Adams*, [1941] 1 All E.R. 334. Referred to: *Nicol v. Nicol*, [1886-90] All E.R. Rep. 297.

As to the construction and operation of a contract for separation and maintenance, see 19 HALSBURY’S LAWS (3rd Edn.) 882 et seq.; and for cases see 27 DIGEST (Repl.) 229 et seq.

Case referred to:

(1) *Worsley v. Worsley and Wignall* (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 17 W.R. 743; 27 Digest (Repl.) 245, 1980.

Also referred to in argument:

Baynon v. Batley (1832), 8 Bing. 256; 1 Moo. & S. 339; 1 L.J.C.P. 75; 131 E.R. 400; 27 Digest (Repl.) 233, 1873.

Jee v. Thurlow (1824), 2 B. & C. 547; 4 Dow & Ry.K.B. 11; 2 L.J.O.S.K.B. 81; 107 E.R. 487; 27 Digest (Repl.) 220, 1753.

Goslin v. Clark (1862), 12 C.B.N.S. 681; 31 L.J.C.P. 330; 6 L.T. 824; 9 Jur.N.S. 520; 142 E.R. 1310; 27 Digest (Repl.) 229, 1836.

Evans v. Carrington (1860), 2 De G.F. & J. 481; 30 L.J.Ch. 364; 4 L.T. 65; 25 J.P. 195; 7 Jur.N.S. 197; 45 E.R. 707, L.C.; 27 Digest (Repl.) 222, 1774.

Demurrer to a plea in an action by the plaintiffs, trustees, against the defendant for breach of covenant to pay them an annuity of £63 in quarterly instalments, for the separate use of Lucy Holt, the defendant’s wife, during the joint lives of the defendant and Lucy Holt, and during so long as they shall live separate and apart.

The declaration charged that by a certain deed, made and dated on Dec. 13, 1858, and made between the defendant, Richard Holt, of the first part, Lucy Holt, (the wife of the defendant) of the second part, and the plaintiffs, the trustees, of the third part, the defendant covenanted, pursuant to agreement to and with the plaintiffs, that he would thenceforth, during the joint lives of him-

A self and the wife, and "during so long time as they should live separate and apart," pay or cause to be paid unto the plaintiffs, for the separate use of the wife, an annuity of £63, by four equal quarterly payments; and that although the defendant and the wife were both alive, and had from the time of the making of the said deed, lived and still lived separate and apart, and although two of the quarterly payments before action became due on Mar. 13 and June 13, B 1873, respectively, and although all conditions had been fulfilled, yet the defendant had not paid the said two quarterly payments.

The defendant, in his plea, set out the deed at full length. He averred that the deed was made between and executed by the plaintiffs, the defendant, and the wife, and was made after the marriage of the defendant and the wife, and that after the execution thereof the wife committed adultery with Samuel C Oxley, and thereupon the defendant duly commenced a suit for dissolution of the marriage in the Divorce Court; that, on Nov. 26, 1872, by the decree absolute of the court, the marriage was absolutely dissolved, which decree still remained in force. And the payments sued for accrued after the dissolution. For a second plea, on equitable grounds, the defendant stated that the plaintiffs D were mere trustees for the wife of the annuity, and of the cause of action sued for, and sue solely for her benefit, and had no interest, claim, or demand, save for her benefit. Demurrer to both pleas respectively, on the ground that they disclosed no ground for an absolute perpetual and unconditional injunction to stay the proceedings in this action, and joinder in demurrer.

Points for argument on the part of the plaintiffs; First, that it appears from E the pleas that the defendant has had all the consideration upon and for which he covenanted to pay the moneys sought to be recovered; secondly, that such moneys constitute the consideration for the plaintiffs' covenants contained in the deed declared upon; thirdly, that the covenant is absolute and undeniable to pay the money therein mentioned during the joint lives of the defendant and his wife; fourthly, that if the defendant's wife had simply committed adultery, F that would not have discharged him from his covenant, and, therefore, he cannot be so discharged either at law or in equity, because he succeeds in obtaining a divorce on account of such adultery; fifthly, that the covenant might have been conditioned on the wife's remaining chaste, but, not being so, he cannot be entitled to be relieved from it by a want of chastity in her; sixthly, that G the only object of the deed, so far as the defendant is concerned, was to secure to the defendant that he and his wife should live separate, and the adultery and divorce effectuate that object, and do not defeat it; seventhly, that if the defendant had, for the reasons mentioned in the deed, contracted to pay, and had paid, a lump sum to the plaintiffs, the facts stated in the plea disclose no equity for him to recover back any part of such sum, and if not he cannot be entitled to be relieved from the payment of the consideration, merely because the H payment of it is spread over an uncertain period, i.e., the joint lives of the parties; eighthly, that the obtaining the divorce was the voluntary act of the defendant, and cannot relieve him from his covenant.

Points for argument on the part of the defendant: The pleas demurred to I are good because, First, it appears in the deed that the annuity was only to last while the relation of husband and wife subsisted; secondly, the marriage being dissolved the whole object of and consideration for the deed failed; thirdly, the case depends on the construction of the deed, and is not a case in which an estate has become vested in the wife.

Herschell, Q.C. (with him *H. Tindal Atkinson*) for the plaintiffs.

Holker, Q.C. (with him *K. Digby*) for the defendant.

KELLY, C.B.—I am of opinion that judgment should be given for the plaintiff. All the authorities are one way. There is not a shadow of authority in favour

of the proposition, which counsel for the defendant has contended for before us, that any court of law can introduce words into a deed, so as to alter the express terms of a covenant contained therein. He has urged that if the court has any such power, it would use it in this case because it is unreasonable, inexpedient, and unjust that a woman who by reason of her own wilful and unjustifiable act of adultery has been divorced by sentence of the court having jurisdiction in such matters, should nevertheless continue to receive an annuity from and to be supported by the person who had previously to the divorce stood towards her in the relation of husband. That may be so as a matter of reasoning, but the answer to it is shortly and simply this, that the court has no power to introduce any such condition into this deed, however proper and reasonable in a moral and social point of view it might be to do so. Indeed, the argument of expediency is greatly weakened, if not entirely destroyed, by the provisions of the Matrimonial Causes Act, 1859, which have been referred to in the course of the argument. By that Act the Divorce Court has power and authority given to it to make all such orders relating to settlements between husband and wife as it shall see fit to do; unless, indeed, having regard to the date of the separation deed in this particular case, 1858, the year before that Act was passed, we are to hold that a covenant such as the present one is to be construed in one way, before the passing of that Act, and in another way after it.

BRAMWELL, B.—I am entirely of the same opinion. We are asked to import, as by implication, a condition into this deed to the effect that in case the marriage between the defendant and his wife should be dissolved, then the defendant is to be freed from further liability on his covenant.

We must, however, look at the circumstances in which persons in general, and no doubt these parties also, enter into these arrangements. There can be no doubt that it was intended by this deed to effect and arrange a separation, once and for all, between the defendant and his wife. It was perfectly competent to the husband, and quite easy for him, had he wished or chosen so to do, to have inserted a provision in the deed that the annuity should be payable only so long as the marriage should remain undissolved, or so long only as the wife led a chaste and virtuous life; but he has not done so, and I do not think that we ought to do for him that which he might so easily have done for himself, unless we were clearly convinced that our not doing so would be absurd, unjust, or unreasonable. The wife gave up certain advantages at the time she agreed to the separation and, therefore, we ought not now to attach any new term or condition to this deed, such as that which we are asked on the part of the defendant to import into it.

Counsel for the defendant has contended that the true construction of the deed is, that the covenant to pay this annuity is to be in force only so long as the marriage tie exists between the defendant and his wife—so long, that is, as they shall live "separate and apart," with the status of husband and wife existing between them. I think that is not so. When this deed was made, the contemplation of the parties was, that they might come to live together again. Let us see what the covenant is. The defendant covenants to pay the money to the trustees for his wife's separate use, "thenceforth during the joint lives of the said R. Holt and Lucy Holt." Had it stood there, and the defendant and his wife had come to live together again, he would still have been liable to pay the annuity. Therefore, to guard against that, they add—though the phraseology is inaccurate—"and during so long time as they shall live separate and apart." That is not accurate. The copulative conjunction in that place is wrong, because it would still be "during their joint lives," when they might be living together again. It should have been, "during their joint lives, but only so long as they shall live separate and apart." As I have observed, the copulative conjunction "and" is wrong to be used here, but the meaning of the clause surely is, "provided that

if the defendant and his said wife shall come to live together again, then the annuity shall cease to be payable."

There is no doubt the deed contains, as counsel has called to our attention, expressions with reference to the payment of the annuity to Lucy Holt, as "the wife" of the defendant, and to its payment up to the time of his death, and also a covenant by the defendant, in case she should die before him, to pay a sum of money towards her funeral expenses, and a general covenant by the trustees that the said Lucy Holt shall not at any time molest the said Richard Holt. All these things seem to show that the notion of a divorce had never for a moment entered into the minds of either of the parties. Nevertheless, I am of opinion that the defendant has, by this deed, absolutely covenanted for the payment of this annuity to his wife's trustees, subject to this contingency only, that if he and his wife should come to live together again, then it is to be no longer payable. Although the matter set forth in the defendant's plea may be a moral answer, it certainly furnishes no legal answer to this action, which is brought on a covenant which is absolute, unqualified, and unconditional in its terms.

With respect to the arguments urged before us by counsel for the defendant, that the benefit of this covenant was intended to enure to the wife only so long as the relation of husband and wife existed between her and the defendant, it was answered by the illustration, so much in point, put to him by KELLY, C.B., namely, by supposing that this marriage had been dissolved in the Divorce Court by reason of the husband's adultery and cruelty; for although, as I suggested during the argument, it might be answered to that, that the wife has the option whether or not she will move to have the marriage dissolved, and that she need not do so unless she chooses, still the real reply to that would be, as it is in this case, "The covenant for payment of the annuity is absolute, and without any condition or limitation whatsoever, except only the contingency of the defendant and his wife coming to live together again."

As to *Worsley v. Worsley and Wignall* (1), before LORD PENZANCE, which has been referred to, I am not sure that we can rely on that case as any guide in the present matter, inasmuch as the marriage settlement which the judge was dealing with in that case, was executed in 1865, some years after the passing of the Matrimonial Causes Act, 1859, and the deed in the present case was executed in 1858, before that Act was passed.

PIGOTT, B.—I am of the same opinion. At one time, during the early part of the argument, I was inclined to think that the defendant had covenanted to pay this annuity during such time only as the parties lived separate and apart, with the status of husband and wife existing between them. However, I am now clearly of opinion that the true answer to that has been given by KELLY, C.B., and BRAMWELL, B., that their construction of this deed is the right one, and that the payment of this annuity is to continue to be made to the wife, or to her trustees, until she and the defendant shall come to live together again, and that it is to cease only on the happening of that event. The contingency of adultery being committed by either of the parties was evidently not contemplated by any one when the deed was executed, and, therefore, the court cannot introduce into the deed a condition not already there, merely to meet a state of things not contemplated at the time the arrangement was effected, and which has arisen long subsequently thereto.

Judgment for plaintiffs.

SNOW v. TEED

[VICE-CHANCELLOR'S COURT (James, V.-C.), February 21, 1870]

[Reported L.R. 9 Eq. 622; 39 L.J.Ch. 420; 18 W.R. 623;
23 L.T. 303]*Power of Appointment—Spinster—Power to appoint among “family or next of kin”—Inclusion of any relative.*

A power to a spinster to appoint among “her family or next of kin” is not confined to her statutory next of kin but includes any of her relatives.

Notes. Considered: *Price v. Gould*, [1930] All E.R. Rep. 389. Referred to: *Pigg v. Clarke* (1876), 24 W.R. 1014; *Standingford v. Probert*, [1949] 2 All E.R. 861.

As to gift in a will to family or dependants, see 39 HALSBURY'S LAWS (3rd Edn.) 1068; and for cases see 44 DIGEST 886 et seq.

Cases referred to in argument:

Cruwys v. Colman (1804), 9 Ves. 319; 32 E.R. 626; 44 Digest 888, 7449.

Grant v. Lynam (1828), 4 Russ. 292; 6 L.J.O.S.Ch. 129; 38 E.R. 815; 44 Digest 888, 7450.

Halton v. Foster (1868), 3 Ch.App. 505; 37 L.J.Ch. 547; 18 L.T. 623; 16 W.R. 683, L.J.J.; 44 Digest 876, 7324.

Further Consideration of a suit for carrying into execution the trusts of the will of Mary Parker, deceased.

The bill was filed by the plaintiff, Arthur Leopold Parker Snow, against the defendants, John Godfrey Teed, an original trustee, and Edmund White, a subsequently appointed trustee of the will, the statutory next of kin of the testatrix, Mary Parker, and Mary Beatrice Snow, the goddaughter mentioned in the codicil, who was a daughter of the plaintiff, and hence a great niece of the testatrix. One question was whether the words “family or next of kin must not be confined to nearest of kin”; and the other and more important question was whether the same words could be extended beyond the statutory next of kin, so as to let in Mary Beatrice Snow.

Catherine Parker, wife of John Robert Parker, by her will dated Feb. 20, 1832, and made in execution of certain powers, appointed freehold estate to the use of trustees, and their heirs, upon trust, after the decease of her husband, to sell, and stand possessed of the residue of the moneys to arise from such sale, upon trust, after satisfying an annuity, as to one-fifth, to invest the same, and stand possessed of the income upon certain trusts for the benefit of her daughter Mary Parker for life, and in case (which happened) her daughter Mary should die without having been married “in trust for such of [Mary Parker's] own family or next of kin in such parts, shares, and proportions, manner and form, as she, my said daughter Mary” should by will appoint; and in default of appointment, and subject thereto, “in trust for the next of kin of my said daughter Mary, according to the statute for distribution of the personal estate and effects of intestates.” Catherine Parker died on Dec. 31, 1832, and John Robert Parker died on May 26, 1842.

By her will, dated Mar. 4, 1853, the testatrix, Mary Parker, appointed the above fund unto, and among her nephew, Arthur Leopold Parker Snow, and her three nieces, Frances Catherine, Susan, and Charlotte Caroline Augusta Snow, in certain unequal proportions. By a codicil dated Sept. 7, 1864, the testatrix revoked the gift of the share given to her niece Susan Snow, and gave to Susan Snow a life interest in the same, and after her death the testatrix bequeathed the share to Mary Beatrice Snow, “the goddaughter of my said niece Susan Snow.” Mary Parker died on July 23, 1868.

A *C. M. Roupell* for the plaintiff.—This power is well executed as to all the objects within the class of “statutory next of kin,” but it is doubtful whether “family” will include more than statutory next of kin.

Cottrell for the defendants, the next of kin and Mary B. Snow.—The testatrix was a spinster so in her case “family” must extend to her relatives generally, which would include her grandniece.

B *Fry, Q.C.*, and *Springall Thompson* for the defendant Teed, the trustee, argued on behalf of the statutory next of kin that the word “or” was explanatory, and did not extend the class “next of kin.”

Caldecott for the other trustee.

C **JAMES, V.-C.**—The word “family” must receive its natural meaning. If the testatrix had used the expression “in trust for such of her own family,” and had said nothing about next of kin, there would have been no doubt. I do not think the word “or” is explanatory as signifying an equivalent; but I consider it to be alternative. The result is that the word “family” will not be restricted to statutory next of kin but will include this grandniece.

D Declaration accordingly.

E CHAMBERLAYNE v. BROCKETT

[COURT OF APPEAL IN CHANCERY (Lord Selborne, L.C., James and Mellish, L.JJ.), December 9, 10, 16, 1872]

F [Reported 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248;
37 J.P. 261; 21 W.R. 299]

Charity—Charitable bequest—Uncertainty—Remoteness—Contingent on future and uncertain event.

G When personal estate is once effectively given to charity, the gift is taken entirely out of the scope of the law of remoteness; but when a gift in trust for charity is conditional upon a future and uncertain event, which is so remote and indefinite as to transgress the rule against perpetuities, the gift fails ab initio.

H By her will, dated Jan. 13, 1858, after giving small legacies to certain relatives and reciting that she could not select any of her family that she could confidently feel would not spend her money on the vanities of the world and that she felt she was doing right in returning it in charity to God who gave it, the testatrix gave all her residuary personal estate to trustees on trust to invest, and, when and so soon as land should at any time thereafter be given for the purpose, she directed that almshouses should be built in certain parishes and that the surplus remaining after building the almshouses should be appropriated in making weekly allowances to the inmates.

I **Held:** the gift of the residuary personal estate was a valid charitable gift and was not void for remoteness, and an inquiry was directed whether any land had been given or was legally available for the purpose intended.

Notes. Explained and Distinguished: *Biscoe v. Jackson* (1881), 50 L.J.Ch. 597. Applied: *Re White's Trusts* (1886), 33 Ch.D. 449; *Re Stratheden and Campbell, Alt v. Stratheden and Campbell*, [1894] 3 Ch. 265. Considered: *Re Gyde, Ward v. Little* (1898), 79 L.T. 261. Explained and Applied: *Re Swain, Monckton v. Hands*, [1905] 1 Ch. 669. Considered: *Re Burnett, Waring v. Painter Stainers' Co.* (1908), 24 T.L.R. 788. Applied: *Re University of London Medical Sciences Institute Fund.*

Fowler v. A.-G., [1909] 2 Ch. 1. Considered: *Re Monk*, *Giffen v. Wedd*, [1927] All E.R. Rep. 157. Followed: *Re Dalziel*, *Midland Bank Executor and Trustee Co., Ltd., v. Governors of St. Bartholomew's Hospital*, [1943] 2 All E.R. 656. Considered: *Re Wightwick's Will Trusts*, *Official Trusts of Charitable Funds v. Fielding-Ould*, [1950] 1 All E.R. 689; *Re Mander*, *Westminster Bank, Ltd. v. Mander*, [1950] 2 All E.R. 191. Referred to: *Re Slevin*, *Slevin v. Hepburn*, [1891-4] All E.R. Rep. 200; *Re Bowen*, *Lloyd Phillips v. Davis*, [1891-4] All E.R. Rep. 238; *Wallis v. New Zealand Solicitor-General*, [1903] A.C. 173.

As to rules applicable to creation of charitable trusts, see 4 HALSBURY'S LAWS (3rd Edn.) 295 et seq.; and as to rule against perpetuities and the period of vesting, see 29 HALSBURY'S LAWS (3rd Edn.) 284 et seq.; and for cases see 8 DIGEST (Repl.) 438 et seq.

Cases referred to :

- (1) *A.-G. v. Bishop of Chester* (1785), 1 Bro. C.C. 444; 28 E.R. 1229, L.C.; 8 Digest (Repl.) 422, 1129.
- (2) *Henshaw v. Atkinson* (1818), 3 Madd. 306; 56 E.R. 517; 8 Digest (Repl.) 371, 571.
- (3) *Sinnett v. Herbert* (1872), 7 Ch. App. 232; 41 L.J.Ch. 388; 26 L.T. 7; 36 J.P. 516; 20 W.R. 270, L.C.; 8 Digest (Repl.) 422, 1131.
- (4) *A.-G. v. Earl of Craven* (1856), 21 Beav. 392; 25 L.J.Ch. 291; 27 L.T.O.S. 23; 20 J.P. 261; 2 Jur.N.S. 296; 4 W.R. 340; 52 E.R. 910; 8 Digest (Repl.) 435, 1256.
- (5) *Christ's Hospital v. Grainger* (1849), 1 Mac. & G. 460; 1 H. & Tw. 533; 19 L.J.Ch. 33; 15 L.T.O.S. 497; 13 J.P. 778; 14 Jur. 339; 41 E.R. 1343, L.C.; 8 Digest (Repl.) 435, 1259.
- (6) *Cherry v. Mott* (1836), 1 My. & Cr. 123; 5 L.J.Ch. 65; 40 E.R. 323; 8 Digest (Repl.) 431, 1221.
- (7) *Green v. Ekins* (1742), 2 Atk. 473; 3 P. Wms. 306, n.; 26 E.R. 685, L.C.; 44 Digest 1102, 9514.
- (8) *Hodgson v. Earl of Bective* (1863), 1 Hem. & M. 376; 2 New Rep. 233; 32 L.J.Ch. 489; affirmed sub nom. *Bective v. Hodgson* (1864), post p. 324; 10 H.L.Cas. 656; 3 New Rep. 654; 33 L.J.Ch. 601; 10 L.T. 202; 10 Jur.N.S. 373; 12 W.R. 625; 11 E.R. 1181, H.L.; 44 Digest 741, 5982.

Also referred to in argument :

- Martin v. Margham* (1844), 14 Sim. 230; 13 L.J.Ch. 392; 3 L.T.O.S. 433; 8 J.P. 532; 8 Jur. 609; 60 E.R. 346; 8 Digest (Repl.) 442, 1323.
- Mills v. Farmer* (1815), 1 Mer. 55; 19 Ves. 483; 35 E.R. 597, L.C.; 8 Digest (Repl.) 466, 1659.
- A.-G. v. Andrew* (1798), 3 Ves. 633; 30 E.R. 1194, L.C.; affirmed (1800), Feb. 20, H.L. (see 7 Ves. 223); 8 Digest (Repl.) 466, 1669.
- Andrew v. Merchant Taylors' Co. (Master and Wardens)* (1802), 7 Ves. 223, 32 E.R. 90; 8 Digest (Repl.) 522, 2556.
- Moggridge v. Thackwell* (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 450, 1462.
- Hayter v. Trego* (1830), 5 Russ. 113; 38 E.R. 970; 8 Digest (Repl.) 463, 1629.
- Loscombe v. Wintringham* (1850), 13 Beav. 87; 51 E.R. 34; 8 Digest (Repl.) 417, 1084.
- Simon v. Barber* (1828), 5 Russ. 112; 38 E.R. 970; 8 Digest (Repl.) 409, 1013.
- De Costa v. De Pas* (1754), Amb. 228; Dick. 258; 3 Hare, 194, n.; 27 E.R. 150; sub nom. *De Costa v. De Paz*, 2 Swan. 487, n., L.C.; 8 Digest (Repl.) 461, 1615.
- Cary v. Abbot* (1802), 7 Ves. 490; 32 E.R. 198; 8 Digest (Repl.) 503, 2243.
- A.-G. v. Oglander* (1790), 3 Bro. C.C. 166; 1 Ves. 246; 29 E.R. 468, L.C.; 8 Digest (Repl.) 461, 1622.

A.-G. v. Ironmongers' Co. (1834), 2 My. & K. 576; 3 L.J.Ch. 11; 39 E.R. 1064, L.C.; subsequent proceedings (1840), 2 Beav. 313; (1841), Cr. & Ph. 208, L.C.; sub nom. *Ironmongers' Co. v. A.-G.* (1844) 10 Cl. & Fin. 908, H.L.; 8 Digest (Repl.) 504, 2254.

Lewis v. Allenby, [1871] W.N. 213; 25 L.T. 785.

A.-G. v. Goulding (1788), 2 Bro. C.C. 428; 29 E.R. 239; 8 Digest (Repl.) 421, 1118.

A.-G. v. Whitchurch (1796), 3 Ves. 141; 30 E.R. 937; 8 Digest (Repl.) 421, 1119.

A.-G. v. Sibthorp (1830), 2 Russ. & M. 107; 39 E.R. 335, L.C.; 8 Digest (Repl.) 387, 809.

Cary v. Abbot (1802), 7 Ves. 490; 32 E.R. 198; 8 Digest (Repl.) 338, 203.

London University v. Yarrow (1857), 1 De G. & J. 72; 26 L.J.Ch. 430; 29 L.T.O.S. 172; 21 J.P. 596; 3 Jur.N.S. 421; 5 W.R. 543; 44 E.R. 649, L.C. & L.J.J.; 8 Digest (Repl.) 348, 285.

Philpott v. St. George's Hospital (President) (1857), 6 H.L.Cas. 338; 27 L.J.Ch. 70; 30 L.T.O.S. 15; 21 J.P. 691; 3 Jur.N.S. 1269; 5 W.R. 845; 10 E.R. 1326, H.L.; 8 Digest (Repl.) 360, 387.

Appeal by the Attorney-General from a decision of LORD ROMILLY, M.R., that the gift of the residue was void for remoteness, being conditional on the gift of land at a future indefinite time.

By her will, dated Jan. 13, 1858, the testatrix, Sarah Chamberlayne, after giving legacies of £100 apiece to certain relatives, proceeded as follows :

"As I consider all my family the same to me, I wish to make no difference, and as I could not select any of them that I confidently could feel would not spend my money on the vanities of the world, as a faithful servant of the Lord Jesus Christ, I feel I am doing right in returning it in charity to God who gave it; I, therefore, give and bequeath all the rest, residue, and remainder of my personal estate unto my brothers,"

upon trust to invest, and out of the dividends of the investments to make certain charitable payments, and

"when and so soon as land shall at any time hereafter be given for the purpose, my will and desire is, that almshouses for poor, aged, and infirm men and women, shall be built"

in certain specified parishes, and that the surplus remaining after building the almshouses should be appropriated in making weekly allowances to the inmates.

The Attorney-General, as the representative of charitable interests, appealed.

The Solicitor-General (Sir George Jessel, Q.C.), and *Hemming* for the Attorney-General.

Sir Richard Baggalay, Q.C., and *Speed* for the plaintiff.

Fry, Q.C., and *Cadman Jones* for the defendants, the next of kin.

Cur. adv. vult.

Dec. 16, 1872. **LORD SELBORNE, L.C.**, read the following judgment of the court.—The only question which appears to us to require decision in this case is, whether upon the true construction of the will a trust for charitable purposes of the whole residuary personal estate was constituted immediately upon the death of the testatrix, or whether the charitable trust as to the residue not required to make the fixed payments mentioned before the directions as to the almshouses and alms people, were conditional upon the gift of land at an indefinite future time for the erection of almshouses thereon. If there was an immediate gift of the whole residue for charitable uses, the authorities mentioned during the argument: *A.-G. v. Bishop of Chester* (1); *Henshaw v. Atkinson* (2); and *Sinnett v. Herbert* (3); to which may be added *A.-G. v. Earl of Craven* (4); prove that such gift was valid, and that there was no resulting trust for the next of

kin of the testatrix, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except on the occurrence of events in their nature contingent and uncertain. A

When personal estate is once effectually given to charity, it is taken entirely out of the scope of the law of remoteness. The rules against perpetuities, as was said by LORD COTTENHAM, L.C., in *Christ's Hospital v. Grainger* (5) (1 Mac. & G. at p. 464), "are to prevent, in the cases to which they apply, property from being inalienable within certain periods." The word "within" is here slightly inaccurate; "beyond" would have been more exact. But those rules do not prevent pure personal estate from being given in perpetuity to charity, and when this has once been effectually done, it is not, to use again the language of LORD COTTENHAM, L.C., "either more or less inalienable," because there is an indefinite suspense or abeyance of its actual application, or of its capability of being applied to the particular use for which it is destined. If the fund should either originally, or in process of time, be or become greater in amount than is necessary for that purpose, or if strict compliance with the wishes and directions of the author of the trust, should turn out to be impracticable, this court has power to apply the surplus or the whole, as the case may be, to such other purposes as it may deem proper, upon what is called the *cy près* principle. On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled the estate never arises, and if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*. B C D E

We agree with what was said by SIR CHARLES PEPPYS, M.R., in *Cherry v. Mott* (6) (1 My. & Cr. at p. 132), that "there may no doubt be a conditional legacy to a charity as well as for any other purpose," and we think that the question whether this is so or not ought to be determined, like all other questions of construction, by the application of the ordinary rules of interpretation to the language of each particular will. We do not assent to the suggestion made by the Solicitor-General that *Cherry v. Mott* (6) and other cases of the same class which have followed it, were ill decided. If we thought, as appears to have been the view of LORD ROMILLY, M.R., that the case now before us was really the same as if the testatrix had left her residuary personal estate to devolve on her next of kin, subject to a contingent gift to trustees, "when and so soon as land shall at any time hereafter be given for the purpose," for the erection of almshouses upon the land to be so given and the maintenance of almspeople therein, we should probably have concurred in the conclusion of his Lordship, that such a contingent gift to trustees, although for a charity, having the effect of rendering the property inalienable during the whole continuance of the preceding non-charitable estates, must, in order to be valid, necessarily vest within the same limits of time as if the trustees had taken the residue, upon the same condition, for their own benefit or for any other than charitable objects. F G H

If, therefore, we differ, as we are compelled to do, from the decree at the Rolls, it is not on any principle of law, but upon the construction of this particular will. In this case the testatrix expressly declares her intention to "return" the whole residuary estate "in charity to God who gave it," and she "therefore" gives and bequeaths it, immediately upon her death, to trustees, to invest the whole in consols, proceeding to direct various specified payments to be made out of the trust fund so created, and adding the directions, on which the present question arises, for the erection of almshouses and the maintenance of alms people therein, "when and so soon as land shall at any time hereafter be given for that purpose." According to *Green v. Ekins* (7), *Hodgson v. Earl of Bective* (8) (1 Hem. & M. at p. 397) and other similar I

cases, a gift of the residue of personal estate carries with the corpus the whole income arising therefrom and not expressly disposed of as income or expressly directed to be accumulated from the day of the death of the testator. Here, therefore, nothing is undisposed of; there is no resulting trust for the next of kin. The intention in favour of charity is absolute, the gift and the constitution of the trust is immediate, the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode of charity to which the testatrix wished her property to be applied.

Taking this view of the proper construction of the will, we hold the present case to be completely governed by *A.-G. v. Bishop of Chester* (1), *Sinnett v. Herbert* (3), and the other authorities of that class, and we propose accordingly to vary the decree of LORD ROMILLY, M.R., by a declaration that the residue of the personal estate of the testatrix, which we assume to be all pure personality, is well given to charity, and by directing an inquiry, similar in principle to that in *Sinnett v. Herbert* (3), whether any land has been given or legally rendered available for the purposes intended by the testatrix, further consideration being reserved. The costs of all parties of the suit and of the appeal will be paid out of the residuary estate, and the deposit will be returned.

Appeal allowed.

WATKIN v. HALL

[COURT OF QUEEN'S BENCH (Blackburn and Lush, JJ.), April 28, 1868]

[Reported L.R. 3 Q.B. 396; 9 B. & S. 279; 37 L.J.Q.B. 125;
18 L.T. 561; 32 J.P. 485; 16 W.R. 857]

Slander—Repetition—Rumour—Defence—Plea that words previously said by others.

To a declaration alleging that the defendant, referring to a fall that had taken place in the market value of the shares of the South Eastern Railway Co., spoke the following words of the plaintiff, the chairman of the company: "You have heard what has caused the fall, I mean the rumour about the South Eastern chairman having failed," meaning thereby that the plaintiff had become embarrassed in his pecuniary affairs and had become and was insolvent, the defendant pleaded that in speaking the words he meant, and was understood by the bystanders to mean, that there had been and was a rumour current on the Stock Exchange about the chairman of the company having failed and not that the plaintiff had become embarrassed or had become insolvent as alleged in the innuendo, and that it was true that there had been and was such a rumour.

Held: (i) the defendant having used slanderous words in circumstances which did not excuse or justify him, the fact that others had uttered them before him was no justification for his repetition and did not disentitle the plaintiff from recovering damages for the mischief caused by them. (ii) Under the provisions of s. 61 of the Common Law Procedure Act, 1852, every declaration in libel or slander actions was to be taken as containing two counts, one with and the other without an innuendo and it was sufficient for the plaintiff to prove either.

Notes. Although s. 61 of the Common Law Procedure Act, 1852, has been repealed it is still acted upon in practice; see 24 HALSBURY'S LAWS (3rd Edn.) 31, note (c).

Applied: *Loughans v. Odhams Press, Ltd.*, [1962] 1 All E.R. 404. Considered: *Lewis v. Daily Telegraph, Ltd.*, *Lewis v. Associated Newspapers, Ltd.*, [1963] 2 All E.R. 151. Referred to: *Mulligan v. Cole* (1875), L.R. 10 Q.B. 549; *Sim v. Stretch*, [1936] 2 All E.R. 1237; *Holdsworth, Ltd. v. Associated Newspapers, Ltd.*, [1937] 3 All E.R. 872; *Grubb v. Bristol United Press, Ltd.*, [1962] 2 All E.R. 380.

As to publication in slander actions, see 24 HALSBURY'S LAWS (3rd Edn.) 41-43; and for cases see 32 DIGEST (Repl.) 100 et seq. For the Common Law Procedure Act, 1852, see 18 HALSBURY'S STATUTES (2nd Edn.) 370.

Cases referred to:

- (1) *M'Pherson v. Daniels* (1829), 10 B. & C. 263; 5 Man. & Ry.K.B. 251; 8 L.J.O.S.K.B. 14; 109 E.R. 448; 32 Digest (Repl.) 102, 1248.
- (2) *Bremridge v. Latimer* (1864), 4 New Rep. 285; 10 L.T. 816; 12 W.R. 878; 32 Digest (Repl.) 106, 1284.

Demurrer to the declaration in an action for slander.

The declaration, after setting out that the plaintiff was the chairman, and a director and shareholder of the South Eastern Railway Co., stated that shortly before the committing of the grievances hereinafter mentioned, a fall in the market value of the shares in the said South Eastern Railway Co. had occurred and taken place. And the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him as such chairman and director of the said South Eastern Railway Co., and of and concerning him in his said connection with the said company, and of his said position therein; and of and concerning the said fall in the market value of the said shares in the South Eastern Railway Co., and of and concerning a rumour assumed by the defendant to have existed and been circulated respecting the plaintiff, and respecting his pecuniary position and solvency, and of and concerning the premises, the words following, that is to say, "You have heard what has caused the fall" (meaning thereby the said fall in the market value of the said shares in the said South Eastern Railway Co.). "I" (meaning the defendant) "mean the rumour about the South Eastern chairman having failed" (meaning thereby that the plaintiff, so being such chairman of the said South Eastern Railway Co. as aforesaid, and such director of the said company, had become embarrassed in his pecuniary affairs, and had become and was insolvent) whereby the plaintiff was injured in his credit and reputation, and in his official capacity and appointment as such chairman and director of the said South Eastern Railway Co. and otherwise; and thereby also the said shares and interest of the plaintiff in the said South Eastern Railway Co., and in the said other companies whereof he was chairman and director and shareholder as aforesaid, became and were greatly depreciated in value; and thereby also, and by reason of the premises, the said position of the plaintiff, and his said offices and appointments in and in connection with the said South Eastern Railway Co. and the said several other companies, were greatly endangered, and he was thereby rendered likely to lose and be deprived of the same; and thereby also, and by reason of the premises, the plaintiff was and is otherwise damnified.

It was alleged on behalf of the defendant that in speaking the said words in the declaration mentioned, the defendant meant, and was understood by the bystanders to mean, that there had been, and there was, a rumour current on the Stock Exchange about the chairman of the South Eastern Railway Co. having failed, and not that the plaintiff had become embarrassed, and had become and was insolvent, as in the innuendo in that behalf in the declaration alleged. The defendant further alleged that it was and is true that there had been,

and there was, a rumour current on the Stock Exchange about the said chairman of the South Eastern Railway Co. having failed.

Demurrer and joinder in demurrer.

Beasley for the plaintiff.

Holl for the defendant.

BLACKBURN, J.—In this case the only real question is whether or not an action will lie for stating, without any reason or privileged occasion, that a rumour exists on the Stock Exchange or elsewhere, that the plaintiff, a trader, is in insolvent circumstances, not stating that it was so, but that there was such a rumour; and whether or not it would be a justification to show that the rumour did really exist, and that the defendant only repeated it, without expressing any opinion of his own about it.

The general rule as to defamation is that where the words are such as may be injurious to your neighbour, and either actual damage has accrued from them, or they are spoken under such circumstances that damage will be imported by law, as where they are spoken of a person in the way of his trade, or imputing an indictable offence, or being afflicted with an infectious disease, so that the person's company would be avoided—in all these cases, where there was either actual damage, or damage which the law implies, the person making the injurious statements must pay damages for what he has said wantonly, if it can be shown that the law would imply malice from the mere fact of stating that which is injurious without sufficient reason for it. If, however, the statement is made on such an occasion as to justify or excuse it, that *prima facie* negatives malice and malice in fact must be proved.

In the present case, as the record stands, whatever the evidence may turn out to be, there is no pretence that the words were spoken in circumstances that would justify the repetition of the rumour on the ground of its being a privileged communication.

Then comes the question whether a defence stating that the rumour was repeated merely as a rumour is a sufficient defence. I cannot better express the law on this subject than in the words of LITTLEDALE, J., in *M'Pherson v. Daniels* (1): He says (10 B. & C. at pp. 272, 273):

"It is competent to a defendant upon the general issue to show that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law, on grounds of public policy, allows, as in the course of a Parliamentary or judicial proceeding, or in giving the character of a servant; that if the defendant relies upon the truth as an answer to the action, he must plead that matter specially, because the truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess. Now a defendant by showing that he stated at the time when he published slanderous matter of a plaintiff, that he heard it from a third person, does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion, or under circumstances, which the law, on grounds of public policy, allows. Nor does it show that the plaintiff has not sustained, or is not entitled in a court of law, to recover damages. As great an injury may accrue from the wrongful repetition as from the first publication of slander; the first utterer may have been a person insane or of bad character. The person who

repeats it gives great weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him because another person previously published it. That shows, not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant, and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant."

I adopt these words as expressing in very good and accurate language what was in my mind on the subject. The slanderous words being used by the defendant under circumstances which did not justify or excuse him in using them, the fact that other people had repeated them before him, is no justification of his repetition of them, and does not disentitle the plaintiff to recover damages for the mischief caused by them. Whether a farthing would be sufficient for that purpose, or whether the amount of damages should be large, is a question for a jury to decide.

As to the other point, viz., the contention that the denial by the plea that the words were used in the sense charged by the innuendo in the declaration, viz., that the plaintiff had actually failed, amounts to the general issue. Before the alteration in the law effected by the Common Law Procedure Act, 1852, whenever an innuendo was supported by the prefatory matter as to having used the words in a particular sense, it must have been proved as laid, and a different character of slander could not have been proved. Where it was not supported by the prefatory matter it might be rejected, and then the plaintiff might stand on the simple words if they were injurious or mischievous. That state of affairs was considered unsatisfactory, and the legislature altered it, and enacted, by s. 61 of the Act of 1852, that

"In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth with or without the alleged meaning show a cause of action, the declaration shall be sufficient."

On these latter words I can put no other meaning than this, that a count for libel or slander, with an innuendo that the words were used in a particular sense, shall be for all intents and purposes equivalent to two counts, one with, and the other without, an innuendo; and that if the plaintiff prove either that shall be sufficient. The defendant may plead a justification as to the count with the innuendo, and also as to the count without it.

As to *Bremridge v. Latimer* (2), I think the decision there was a right and proper one. A portion of a newspaper article was set forth with an innuendo, and the defendant pleaded that, if the whole had been set forth, the meaning would have been different, and he sought to set out the context in his pleas, and so to justify the libel. That would have been very embarrassing, and was irrelevant to the question at issue—whether or no he had published the libel charged in the declaration; and the Court of Common Pleas very properly refused to allow such pleas. All that WILLES, J., said on that occasion was quite consistent and right when taken as being said on such an occasion, but it does not apply at all to the present case.

LUSH, J.—I am of the same opinion. The defendant admits that he used the words mentioned in the declaration, speaking of a person in a commercial position who was likely to be injured by them, "You have heard what has caused the fall, I mean the rumour about the South Eastern chairman having

A failed." By his plea, the defendant says in effect, "I am not responsible, because I did not invent the rumour. There was such a rumour, and I did not say that it was true. I did not intend to convey the meaning averred in the declaration." That is, he asserts the broad proposition that a person may circulate a rumour injurious to another, provided he can prove that he did not invent it. That is a proposition which has been negatived so long as the law of slander has been known. It is no justification to a person in giving currency to that which is injurious to the character of another, to say that he heard the statement made by a third party. If he justifies at all he must show that he used the words under circumstances which made the statement privileged, or that the words were in substance true.

C As to the other point, counsel for the defendant says that the plaintiff is bound by the meaning which he has put on the words, and that the plea which negatives that meaning is a good one. To hold that, as it seems to me, would be to neutralize entirely s. 61 of the Common Law Procedure Act, 1852, the object of which is to give to a declaration of this kind a sort of double character, and to give the plaintiff the benefit of an action, if the words are actionable, whether the precise meaning ascribed to them by the innuendo be proved or not. It is not enough to say that that could never have been the meaning, or that the plaintiff has failed in placing upon them the meaning intended by his innuendo, if the words which the defendant did use are capable of another meaning equally injurious.

Judgment for plaintiff.

WILKINSON v. LINDGREN

[COURT OF APPEAL IN CHANCERY (Lord Hatherley, L.C.), June 29, 1870]

[Reported 5 Ch.App. 570; 39 L.J.Ch. 722; 23 L.T. 375;
18 W.R. 961]

G *Charity—Uncertainty—Gifts to religious institutions—Residue* "among the different institutions or to any other religious institution or purposes" as trustees might think proper.

H By her will dated Mar. 3, 1840, the testatrix, after making gifts to various religious institutions by name, gave the residue of her personal estate on trust to pay and divide the same "to and among the different institutions or to any other religious institution or purposes" as her trustees should in their discretion think proper.

Held: on construction, the gift of residue was a good charitable gift and was not void for uncertainty.

I **Notes.** Considered: *Re White, White v. White*, [1891-4] All E.R. Rep. 242; *Re Ward, Public Trustee v. Ward*, [1941] Ch. 308. Referred to: *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60.

As to gifts in wills for religious purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 221; and for cases see 8 DIGEST (Repl.) 394 et seq.

Cases referred to in argument:

Baker v. Sutton (1836), 1 Keen. 224; 5 L.J.Ch. 264; 48 F.R. 292; 8 Digest (Repl.) 399, 901.

Ellis v. Selby (1835), 7 Sim. 352; 4 L.J.Ch. 69; affirmed (1836), 1 My. & Cr. 286; **A**
5 L.J.Ch. 214; 40 E.R. 384, L.C.; 8 Digest (Repl.) 395, 371.

Dolan v. MacDermot (1867), L.R. 5 Eq. 60; affirmed (1868), 3 Ch.App. 676; 17
W.R. 3, L.C.; 8 Digest (Repl.) 399, 902.

Vezev v. Jamson (1822), 1 Sim. & St. 69; 57 E.R. 27; 8 Digest (Repl.) 394, 364.

Appeal by the defendants, the next of kin, from a decree of LORD ROMILLY, **B**
M.R., that on construction, the residuary gift was not void for uncertainty and
was a good charitable gift. By her will dated Mar. 3, 1840, the testatrix, Mary
Davison, after appointing T. Fletcher and J. Wilkinson trustees, and bequeathing
several sums to the Wesleyan Methodist Missionary Society, the British and
Foreign Bible Society, the Worn-out Preachers' Fund, the Woodhouse Grove
School, the Kingwood School-chapel Fund, the trustees of the Wesleyan Methodist **C**
chapel called Brunswick Chapel, and the Wesleyan Methodist Benevolent Society,
gave the residue of her personal estate

"to and among the different institutions or to any other religious institution
or purposes as . . . T. Fletcher and J. Wilkinson may think proper, which
disposition I entirely leave to their discretion."

T. Fletcher never acted in the trusts, and J. M. Wilkinson was appointed
trustee in the place of J. Wilkinson. **D**

Roxburgh, Q.C., Swanston, Q.C., and Phear for the defendants.

Sir Richard Baggallay, Q.C., and C. Hall for the trustees.

Southgate, Q.C., and Bunting for the charities. **E**

LORD HATHERLEY, L.C.—The construction of this will is reasonably
plain. When you have a phrase of this kind, "or to any other religious institution
or purposes," I do not see how you can carry over the adjective "other,"
without also carrying over the other word "religious." The best argument in
favour of the defendants no doubt is that the word "institution" is in the **F**
singular, and the word "purposes" is in the plural. That would have been
avoided if our language had, like most other languages, different terminations
for the singular and plural, but it has not. In this particular will I think the
whole intention of the testatrix is made plain and apparent on the face of it.
I do not pause to inquire whether the schools mentioned in the will had religious
instruction or not; but plainly the testatrix has mentioned a great many distinctly **G**
religious institutions. She appears to have been a person having a turn for
fostering the religion called Wesleyan. She gives a sum of money to the "Worn-
out Preachers' Fund," and another to the Brunswick chapel, and a third to
the Wesleyan Methodist Benevolent Society. Having disposed of a good deal
of money in that way, at the end there is this gift to the executors,

"in trust to pay and divide the same to and among the different institutions,
or to any other religious institution or purposes." **H**

On that alone I should say the true construction of her intention is that she,
at all events, considered she was giving a benefit to some religious institution.
She says in substance, "I give to this institution, or any other religious
institution, and I allow you, the executors, to choose any other you please." **I**

Suppose a military man gives £100 to a military institution, and then says
a certain sum is to be given to any other military institution or purposes; or
suppose a political person, or a medical man did the same, who could doubt on
the whole of the instrument, that it was intended that the true English construc-
tion of the words should follow when you came to the end of the sentence?
The testatrix says, in fact, "I think my executors will dispose of that which
I have given in my will as regards religious institutions," and then she thinks
it need not be strictly a religious institution, but it may be a religious purpose

A to which this latter gift may be applied, and she might think any religious purpose equally good. If it were intended to create a larger latitude altogether, all these words are superfluous, because then the words would have been, "to give to any other religious institution or any other purpose they think fit." If you take the words as applying to universal purposes, you make the words "other religious institution" entirely void. There would be no institution for them to

B give the money to at all, because they might give it to any purpose they thought fit. I mean as regards the construction of the will, the testatrix would not think about the vagueness of a gift to charity. That would make it a large and general purpose covering everything; and why, if that were so, particularise at all? But it is clear she intended that the word "religious" should govern the word "purposes." I think, therefore, that the judgment of the Master of

C the Rolls must be affirmed.

Appeal dismissed.

D

MAKIN v. WATKINSON

E [COURT OF EXCHEQUER (Channell, Bramwell and Martin, BB.), November 22, 1870]

[Reported L.R. 6 Exch. 25; 40 L.J. Ex. 33; 23 L.T. 592;
19 W.R. 286]

Landlord and Tenant—Repair—Liability of landlord—Need for notice to landlord of want of repair—Condition of premises known only to tenant.

F The defendant, the lessor, covenanted with the plaintiff, the lessee, to keep the main walls, main timbers and roofs of the demised premises in good repair during the continuance of the lease. In an action for breach of the covenant, the defendant pleaded that the plaintiff had not given the defendant any notice of want of repair.

G **Held:** as the condition of the premises was a matter within the knowledge of the plaintiff and not of the defendant, the defendant was entitled to notice of want of repair before action; the covenant must be read as a covenant to repair upon notice; and the defendant was entitled to succeed.

H **Notes.** Followed: *Hugall v. M'Lean* (1885), 53 L.T. 94; *Torrens v. Walker*, [1904-7] All E.R. Rep. 800. Considered: *Murphy v. Hurly*, [1922] All E.R. Rep. 169; *Griffin v. Pillet*, [1926] 1 K.B. 17; *Bishop v. Consolidated London Properties, Ltd.*, [1933] All E.R. Rep. 963; *Uniproductions (Manchester), Ltd. v. Rose Furnishers, Ltd.*, [1956] 1 All E.R. 146. Referred to: *London and South Western Rail. Co. v. Flower* (1875), 1 C.P.D. 77; *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C.P.D. 507; *Melles & Co. v. Holme*, [1918-19] All E.R. Rep. 271; *Fisher v. Walters*, [1926] 2 K.B. 315; *Morgan v. Liverpool Corpn.*, [1926] All E.R. Rep. 25; **I** *McCarrick v. Liverpool Corpn.*, [1946] 2 All E.R. 646.

As to requirement of notice to landlord of want of repair, see 23 HALSBURY'S LAWS (3rd Edn.) 57; and for cases see 31 DIGEST (Repl.) 345 et seq.

Cases referred to:

- (1) *Moore v. Clark* (1813), 5 Taunt. 90; 128 E.R. 620; 31 Digest (Repl.) 345, 4767.
- (2) *Vyse v. Wakefield* (1840), 6 M. & W. 442; 8 Dowl. 377; 9 L.J. Ex. 274; 4 Jur. 509; 151 E.R. 491; affirmed, 7 M. & W. 126, 8 Dowl. 912, Ex. Ch.; 29 Digest (Repl.) 394, 2977.

(3) *Page v. Barnes* (1648), cited Hard. at p. 42; 145 E.R. 371; 12 Digest (Repl.) A 485, 3616.

(4) *Fletcher v. Pynsett* (1605), Cro. Jac. 102.

Also referred to in argument :

Cutler v. Southern (1667), 1 Saund. 116; 1 Lev. 194; 85 E.R. 125; 7 Digest (Repl.) 204, 388.

Coward v. Gregory (1866), L.R. 2 C.P. 153; 36 L.J.C.P. 1; 15 L.T. 279; 12 Jur.N.S. 1000; 15 W.R. 170; 31 Digest (Repl.) 361, 4931.

Demurrer to a declaration in an action by a tenant against the landlord for breach of covenant to repair.

By his declaration the plaintiff, the lessee, stated that the defendant, one of the lessors, had by deed leased to the plaintiff a mill and other buildings, with steam engines, boilers, main and cross shafting machinery, apparatus and fixtures, for a term of ten years, from Oct. 1, 1868, and that the defendant covenanted that he would at all times during the continuance of the lease, at his own expense, maintain and keep the main walls, main timbers and roofs of the buildings in good and substantial repair, order and condition. The plaintiff claimed that the defendant had failed to maintain and keep the main walls, etc., in good and substantial repair and thereby the plaintiff had suffered loss, etc. The defendant pleaded that the plaintiff gave no notice to the defendant of any want of repair in the main walls, main timbers, and roofs, nor that the same were not in good and substantial order and condition as aforesaid. Demurrer and joinder in demurrer to the plea.

Kemplay for the plaintiff.

A. *Wills* for the defendant.

CHANNELL, B.—I am of opinion that this plea is a good plea. The declaration is good on the face of it. Its language, if a request be necessary, is large enough to cover it. It avers that although all conditions were performed and all things necessary, etc., were done to entitle the plaintiff to have the covenant kept and performed. That involved a request. The defendant by his plea alleges as matter of excuse, that the plaintiff gave no notice to him of any want of repairs. I entirely agree that *Moore v. Clark* (1) is not a distinct authority on the matter in question here. The opinion there thrown out by SIR JAMES MANSFIELD, C.J., and GIBBS, J., who have been referred to was nothing more than an obiter dictum, and an obiter dictum moreover which was not necessary to the decision of the case, and which, therefore, does not carry with it the weight which would attach to an obiter dictum of two such very learned judges. We must, then, look at the present case on principle, and I think that the case in this court of *Vyse v. Wakefield* (2), which has been cited in argument before us is, to a great extent, an authority in the defendant's favour.

In my opinion it seems to warrant this, that we may interpret the words of a covenant so as to give a reasonable construction to it, and that a covenant which would be unreasonable and unconscientious if strictly interpreted, may be rendered just and reasonable by importing an implied qualification, if it be consistent with all the circumstances of the case, to which, of course, due regard must be had. Here the covenant, for the breach of which the action is brought, is a covenant to maintain and keep in good repair the main walls and also the main timbers and roofs included within the main carcass of the demised buildings, the condition of which the defendant could have no external knowledge or notice whatever. I do not see that the defendant would, in point of law, have a right to enter and go upon the premises in order to see for himself the state of the repairs.

A Trying this case by the rules of common sense, there being no authority against the view which I am inclined to take of the matter, and there being, moreover, *Vyse v. Wakefield* (2) in the Exchequer, and the dictum of the judges in *Moore v. Clark* (1) in the Common Pleas, which are authorities to a great extent for the defendant, I am of opinion that the plea demurred to is good, and that our judgment should be for the defendant.

B

BRAMWELL, B.—I also think that this plea is a good plea. In order to hold it to be a good plea, it is, of course, necessary that the defendant's covenant to repair should be read as a covenant to repair upon notice to him that repairs are required. I entertain as strong an objection as anyone possibly can do to the subsequent introduction and interpolation of words or matter into agreements or other written documents, which have been once finally settled and signed by the parties, and, therefore, I would on no account introduce them, unless it be in order to avoid some great absurdity or injustice. What is the case here? Does the introduction or addition to this covenant of the condition "upon notice of the want of such repairs" prevent any such absurdity or injustice? It seems to me that it inevitably does. I cannot suppose that any man would ever enter into so preposterous a covenant, and one involving such a monstrous absurdity as that which has been contended for on the plaintiff's part in this case, under which the tenant may say to his landlord, "If you set your foot on the premises to see the state of repairs, in order to inform yourself whether or not any are required to be done under your covenant, I will bring an action of trespass against you; and if you do not repair, then I will bring an action against you for breach of your covenant"; and that, too, not so much for the repairs, but, as in the present case, to recover damages consequent upon the non-repair, thus preventing the landlord from coming to view and inform himself, and at the same time claiming to be entitled to substantial damages for his not doing so. This seems to be a state of things so utterly preposterous and unreasonable that we ought, I think, to hold that the parties in this case contemplated notice, and to import that important and necessary qualification into this covenant.

F

With regard to the authorities on the matter they are not quite clear, some going one way and some the other. There is the obiter dictum of SIR JAMES MANSFIELD, C.J., and GIBBS, J., in *Moore v. Clark* (1), which comes very apt to the point in question, and is in my judgment entitled to great weight as the opinion of two most eminent judges, and which, had it been delivered on a point in issue in the particular case, would be a distinct authority in the defendant's favour. There are passages also which have been referred to and read from COMYN'S DIGEST (Condition 8, 9, 10), which are very much in favour of the defendant. On the other hand there are the cases of *Page v. Barnes* (3), and *Fletcher v. Pynsett* (4), referred to in the argument, which are strongly in the plaintiff's favour. In *Fletcher v. Pynsett* (4) the defendant covenanted that he would assure a certain copyhold to the plaintiff if he married his daughter, and it was held that it was sufficient for the plaintiff to sue without giving notice of the marriage. Yet surely the man's marriage was a fact more within his own knowledge than within that of his father-in-law.

H

I The principle of the rule would seem to be that where the thing is within the knowledge of the plaintiff and cannot be within the knowledge of the defendant, then, upon the occasion arising, notice would seem to be necessary, and that I think is consonant with good sense. It would undoubtedly have been good sense and wise in the parties here, if they had introduced these words into the covenant before they entered into it. Whether it would be equally good sense for the court to introduce them afterwards, the parties themselves not having done so originally, may be a matter of some doubt. But on the whole, looking at the authorities on the one side and the other, and treating it as a matter of

good sense and justice, I have, though not without having had some doubt A
on the point, come to the conclusion that the words in question ought to be
imported into this covenant, and, therefore, I give judgment in favour of the
defendant, that this is a good plea.

MARTIN, B.—I am of opinion that this plea is a bad one. In giving a con- B
struction to the words of a deed I think it is only good sense to adhere to
them, and not to introduce into it words which are not found in the document
itself. It is most desirable that the rule of law in these cases should be fixed
and strictly adhered to, as it would be impossible otherwise for any lawyer to
know how to construe a covenant or a deed of any sort when advising his
clients upon it, if words are to be introduced and imported into it, ex post C
facto as it were, at one's fancy or pleasure. [His LORDSHIP read the covenant
to repair, and continued:] It is admitted that the premises are not in repair;
and the answer to the plaintiff's action for non-repair is, that the plaintiff gave
the defendant no notice of the want of repairs. The question is whether that
is a good plea. I am of opinion that it is a bad plea; and for this simple
reason, that it contains and imports words which are not in the deed. The D
covenant is absolute, and makes no mention whatever of any notice; and I do
not think that there is anything unreasonable or contrary to good sense in such
a covenant. There was no necessity for notice here, for it is not contained or
provided for in the covenant.

According to my view of them, the authorities are all with the plaintiff.
Vyse v. Wakefield (2) has been relied on as in favour of the defendant. There E
the defendant had covenanted that he would at any time appear at an insur-
ance office or offices within London or the bills of mortality, and answer all
questions respecting his age, in order to enable the plaintiff to insure his life,
that he would not afterwards do any act whereby the insurance might become
avoided, and the declaration alleged that the defendant, at the plaintiff's request,
appeared at the Rock Insurance Office and answered certain questions, and that F
the plaintiff insured the defendant's life by a policy in that office, containing
a proviso that in case the defendant went beyond the limits of Europe the
policy should be null and void. The defendant went abroad beyond the limits
of Europe, and the question on demurrer was whether the declaration was
bad for not averring that the defendant had notice of the policy having been
effected. The case was argued by two most eminent members of the Bar, and G
I think the true rule was stated in argument, that there is no necessity to
allege notice, if the defendant could have informed himself of the fact of the
assurance and of the terms upon which it was granted, and that, as a general
rule, a party is not bound to do more than his contract obliges him to do; and
there was no stipulation there requiring the plaintiff to give notice.

The Court of Exchequer held the declaration to be bad for not averring H
notice to the defendant that the policy had been effected, but they were evidently
of opinion that, if such notice had been given, the defendant would have been
bound to take notice of the conditions of the policy. In giving judgment there,
LORD ABINGER, C.B., said (5 M. & W. at p. 452):

"The rule to be collected from the cases seems to be this, that where a I
party stipulates to do a certain thing in a certain specific event, which may
become known to him, or with which he can make himself acquainted, he
is not entitled to notice, unless he stipulates for it."

And PARKE, B., said (*ibid.* at p. 453):

"The general rule is, that a party is not entitled to notice unless he has
stipulated for it; but there are certain cases where, from the very nature
of the transaction, the law requires notice to be given, though not expressly
stipulated for."

A He observes that there are two classes of cases on this subject,

“one where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite, as where a man promised to pay for certain weys of barley as much as he sold them to any other man; there the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases, and, in such cases, the right of the defendant to a notice before he can be called on to pay, is implied by law from the construction of the contract.”

And further on he said :

C “On the other hand, no notice is requisite where a specific act is to be done by a third party, or even by the obligee himself, as for example, where the defendant covenants to pay money on the marriage of the obligee with B., or perhaps on the marriage of B. alone (for there are cases to that effect), or to pay such a sum to a certain person, or at such a rate as A. shall pay to B. In these cases there is a particular individual specified, and no option is to be exercised, and the party who, without stipulating for notice, has entered into the obligation to do these acts, is bound to do them.”

D ROLFE, B., goes further when he said (ibid. at p. 456) :

E “I own that when the case was first opened, my impression was in favour of the plaintiff, and for this reason, that when a party enters into a contract, he is bound to perform it whether reasonable or not. Where the law casts an obligation upon him, it says that it shall be reasonable; but that is not so where a party contracts to do a particular act, for there it is his own fault for entering into such a contract.”

F I apprehend that that is the rule of law, and I think that this is not a case in which the law would imply such a condition, and import it into the covenant as has been contended for on the defendant's behalf. It seems to me idle to assume that the lessor would be unable to inform himself of the state of the repairs. In my opinion, therefore, this is a bad plea, and judgment should be for the plaintiff.

G *Judgment for defendant.*

NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCIATION v. ARMSTRONG AND OTHERS

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Mellor and Lush, JJ.),
January 21, 1870]

[Reported L.R. 5 Q.B. 244; 39 L.J.Q.B. 81; 21 L.T. 822;
18 W.R. 520; 3 Mar.L.C. 330]

Insurance—Marine insurance—Valued policy—Ship valued at less than actual value—Value stated in policy conclusive between parties—Subrogation—Underwriters entitled to damages recovered by shipowner in collision action.

A valued policy of insurance for £6,000 on the defendant's ship H. was underwritten by the plaintiffs. The real value was £9,000, but no other insurance was effected. During the currency of the policy the H. was sunk by the ship G. The plaintiffs paid the defendants the £6,000, as for a total loss, and subsequently recovered, by right of subrogation, against the owners of the G., £5,683 11s. 7d. damages, less a small sum paid the master and crew of the H., leaving a residue of £5,495 18s.

Held: in a valued policy of insurance the parties were bound by the value stated therein in respect of all rights and obligations which arose out of it; and, therefore, the plaintiffs were entitled to the whole of the £5,495 18s. after deduction of the amount payable to the owners of the cargo and freight and the defendants were not entitled to any portion of it on the ground that the H. was of greater value than the amount stated in the policy.

Notes. Valued policy is dealt with by s. 27 of the Marine Insurance Act, 1906, and the right of subrogation is dealt with by s. 79 of that Act (13 HALSBURY'S STATUTES (2nd Edn.) 28 and 53 respectively).

Considered: *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333; *The Commonwealth*, [1907] P. 216. Followed: *Thames and Mersey Marine Insurance Co. v. British and Chilian Steamship Co.*, [1914-15] All E.R. Rep. 239; *Boag v. Standard Marine Insurance Co.*, [1937] 1 All E.R. 714; *Yorkshire Insurance Co., Ltd. v. Nisbet Shipping Co., Ltd.*, [1961] 2 All E.R. 487. Referred to: *Simpson v. Thompson* (1877), 3 App. Cas. 279; *Midland Insurance Co. v. Smith* (1881), 6 Q.B.D. 561; *Goole and Hull Steam Towing Co., Ltd. v. Ocean Marine Insurance Co., Ltd.*, [1927] All E.R. Rep. 621.

As to the attributes of a valued policy, see 22 HALSBURY'S LAWS (3rd Edn.) 13; and for cases see 29 DIGEST (Repl.) 47 et seq.

Cases referred to in argument :

Randal v. Cockran (1748), 1 Ves. Sen. 98; 27 E.R. 916, L.C.; 29 Digest (Repl.) 339, 2581.

Mason v. Sainsbury (1782), 3 Doug. K.B. 61; 99 E.R. 538; 29 Digest (Repl.) 451, 3293.

Yates v. Whyte (1838), 4 Bing. N.C. 272; 1 Arn. 85; 5 Scott, 640; 7 L.J.C.P. 116; 132 E.R. 793; 29 Digest (Repl.) 339, 2584.

Quebec Fire Assurance Co. v. St. Louis (1851), 7 Moo. P.C.C. 286; 13 E.R. 891.

Dickenson v. Jardine (1868), L.R. 3 C.P. 639; 37 L.J.C.P. 321; 18 L.T. 717; 16 W.R. 1169; 3 Mar. L.C. 126; 29 Digest (Repl.) 273, 2056.

Brooks v. MacDonnell (1835), 1 Y. & C.Ex. 500; 4 L.J.Ex. Eq. 60; 160 E.R. 204; 29 Digest (Repl.) 349, 2676.

Irving v. Richardson (1831), 2 B. & Ad. 193; 1 Mood. & R. 153; 9 L.J.O.S.K.B. 225; 109 E.R. 1115; 29 Digest (Repl.) 134, 756.

Bousfield v. Barnes (1815), 4 Camp. 228, W.P.; 29 Digest (Repl.) 150, 884.

- A *Bruce v. Jones* (1863), 1 H. & Co. 769; 1 New Rep. 333; 32 L.J.Ex. 132; 7 L.T. 748; 9 Jur.N.S. 628; 11 W.R. 371; 1 Mar. L.C. 280; 158 E.R. 1094; 29 Digest (Repl.) 147, 854.
- Stringer v. English and Scottish Marine Insurance Co.* (1869), L.R. 4 Q.B. 692; 38 L.J.Q.B. 321; affirmed (1870), L.R. 5 Q.B. 599; 10 B. & S. 770; 39 L.J.Q.B. 214; 22 L.T. 802; 18 W.R. 1201; 3 Mar. L.C. 440, Ex. Ch.; 29 Digest (Repl.) 298, 2257.
- B

Action by the plaintiffs, the underwriters of a valued policy, for the recovery of £4,948 18s., in the form of a Case stated by consent of the parties.

C The defendants under the name and firm of the Hetton Coal Co., by a policy of insurance caused themselves to be insured, lost or not lost, from Feb. 20, 1866, at noon, until Feb. 20, 1867, at noon, upon the body, machinery, tackle, apparel, boats, and other furniture, of and in the steamship *Hetton*, of which they were owners, beginning the adventure upon the steamship, with all her machinery, ordnance, tackle, apparel, etc., whatsoever, from the day and date above mentioned, at noon, until Feb. 20, 1867, at noon, against perils of the seas, and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the steamship, machinery, and premises, or any part thereof, including damage done to the steamship; and it was by the same policy provided that in case of any loss or misfortune it should be lawful for the plaintiffs to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the steamship, machinery, and premises, or any part thereof, without prejudice to that insurance. By the policy it was stipulated that the steamship, machinery, tackle, apparel, boats, and other furniture, for so much as concerned the defendants, by agreement between them and the assurers, the plaintiffs, in and by the policy, should be valued at £6,000. The plaintiffs subscribed the policy for £6,000 and became insurers thereon to the defendants for that amount on the steamship, machinery, tackle, apparel, boats, and other furniture. The defendants at the time of the making of the policy and until the time of the loss, were interested in the steamship and premises to the amount insured.

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In December, 1866, the *Hetton* was run down and sunk by the steamship *Uhlenhorst* and was thereby, being one of the perils insured against, totally lost. The plaintiffs thereupon, under the policy paid the defendants £6,000 for such loss. Proceedings were afterwards instituted, under instruction from the plaintiffs, in the High Court of Admiralty in the name of the defendants against the owners of the *Uhlenhorst* for the recovery of damages and compensation for the loss of the *Hetton* and her cargo, and the injuries to her master and crew occasioned by being run down by the *Uhlenhorst*, and eventually on an appeal, the Privy Council gave judgment against the owners of the *Uhlenhorst* for £5,683 11s. 7d. About three months after proceedings in the High Court of Admiralty, notice was served by the owners of the *Hetton* on the plaintiffs claiming any sum received from the owners of the *Uhlenhorst*, and ultimately it was agreed between them that any sum recovered should be paid into a bank to abide the decision of the court.

G

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I £5,683 11s. 7d. was paid by the owners of the *Uhlenhorst*, and £5,495 18s., part thereof, was deposited, pursuant to the agreement, in the London and Westminster Bank pending the decision of the court in this case. The residue of £5,683 11s. 7d., namely £187 13s. 6d., was paid to the master and crew of the *Hetton*, who were entitled to it. A portion of the £5,495 18s. was payable to the owners of freight, and of the cargo on board the *Hetton* up to the time of the loss. The residue was payable for the loss of the *Hetton* and its machinery, tackle, apparel, boats, and other furniture. The value of the *Hetton*, and the machinery, tackle, apparel, boats, and other furniture of and in it, was before and at the time of effecting the insurance, declared by the defendants

to be £6,000. That was the only insurance effected on the *Hetton*. The plaintiffs A claimed the whole of the £5,495 18s., after deducting the amount payable to the owners of the cargo and freight (i.e. £4,948 18s. claimed). On the other hand, the defendants alleged that the value of the *Hetton* at the time she was lost was £9,000, and, notwithstanding that its value declared in the policy to be £6,000, and that that sum had been paid by the plaintiffs; the defendants B claimed to be entitled to participate in £5,495 18s., after the above deduction.

The question for the opinion of the court was whether or not the plaintiffs (assuming the *Hetton* at the time of the loss to have been of the value of £9,000) were entitled to have payment made to them of the whole, or, if not of the whole, of any and what part, of the £5,495 18s., after deducting the amount payable to the owners of the cargo and freight.

Honyman, Q.C. (with him *Udall*), for the plaintiffs.

A. L. Smith (with him *Watkin Williams*) for the defendants.

SIR ALEXANDER COCKBURN, C.J.—We are satisfied that our judgment must be in favour of the plaintiffs; and I ground my judgment on the general proposition that where the value of a vessel insured is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the whole value of the thing insured, then, in respect of all rights and obligations which arise upon the policy of insurance, the parties are estopped between themselves from disputing the value of the thing insured as stated in the policy. I take it to be clearly established that it is one of the rights of the underwriter in the case of a total loss, that whatever remains of the vessel in the shape of salvage, and whatever rights accrue to the owner of the thing insured and lost, pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does so satisfy it. It is admitted here that if this ship had been recovered from the bottom of the sea by being brought up by any of those contrivances which modern skill and science have occasionally made available for that purpose, the body of the vessel would have passed to the underwriters. If, on the other hand, her value had proved to be more than the estimated value in the policy, the underwriter would have been entitled to the vessel so recovered. But I think it is clear also, where we have, instead of the vessel, the supposed value of the vessel, or so much of it as the delinquent vessel was called upon to contribute for the loss, that so much of that as is recovered must be taken to be recovered in respect of the lost ship and to represent it; and then, just as the underwriter would be entitled to the ship if it could have been bodily got back, so he is entitled to that which is the representative of the vessel in the shape of damages to be paid by the owners of the vessel which caused the collision.

It seems to me further, to be altogether monstrous to say that where there is a case of a valued policy and an open policy, it is to depend upon the question of which party is first sued, whether the underwriter shall or shall not be bound to pay more than the value of the policy. It is conceded by counsel for the defendants that if there were a valued policy and an open policy, and the assured was first to sue upon his open policy and recover his £3,000, taking the figures he has put of £6,000 and £3,000—that he would not be entitled to recover on the valued policy the whole amount of that policy, but only so much as constituted the difference between the amount in the open policy and the amount of the estimated value in the valued policy. So, again, it must be conceded, that if this sum had been recovered first from the owners of the vessel that caused the damage, the underwriter upon the valued policy could not have been compelled to pay the whole of that valued policy, because the value of the vessel as between them must always be taken to be the amount at which it is stated in the policy. Though the proposition certainly startles one a little, that the underwriter who

A has only paid £6,000, the estimated value as stated in the policy and agreed upon between the parties, shall, if the vessel should prove to be equal in value to that amount or worth more than it, get all that can be recovered in respect of the loss of the vessel—still, that is an incident that arises upon this novel form of policy, in which the value of the vessel is taken at a fixed sum agreed upon between the parties. If parties will enter into such policies they must take the consequences, and I do not think we can bend the old rules which exist in respect of marine policies and wrest them from that which was their original position, for the purpose of adapting them to these new-fangled forms of insurance. It has always been considered as a settled rule in insurance law, as I started with observing, that where there is a total loss, the underwriter who pays upon a total loss, whether it is an actual or a constructive total loss, is entitled to anything that remains of the vessel, and to anything which would otherwise have accrued to the owner of the vessel by reason of his ownership. Where the policy is an open policy and simply a policy of indemnity, as to the actual value of the vessel no difficulty would arise in such a case. It is only because we have here a valued policy that these difficulties present themselves. I think we must still apply the old rules, and not make new ones; and if a party chooses to have his vessel or his goods, as the case may be, taken at a fixed value, instead of the contract being one similar to what it is in an ordinary policy, which is simply one of indemnity to the extent of the real value, and any benefit thereby accrues to the underwriter, the underwriter must be held entitled to it. I think, therefore, on the whole of this case, that our judgment must be for the plaintiffs.

MELLOR, J.—I am of the same opinion. Counsel for the defendants says that the question which determines the matter in the present case is, what is the effect of the agreement as to the value of the vessel, and I agree with him that that is so. The basis of the contract is the agreed value of the vessel, and when, to avoid all questions as to the real value, the parties come to an agreement as to the value, which is to be the basis of the contract, it appears to me to follow as a matter of course that all those rights that spring out of such a transaction as the present, must apply to the actual agreed value which is the basis upon which the parties contracted. It appears to me then, without saying more, that that is the determining point of the case; and I really cannot see if the parties do for the sake of avoiding all those questions which would otherwise arise, agree to a particular value, why they should not be held to agree to it for all purposes which spring out of the policy.

LUSH, J.—I am of the same opinion. A person effecting an insurance may either agree with the insurer as to the amount which is to be considered as the sum forming a complete indemnity, or he may leave it open. If he fixes the amount which he is to be paid in the case of a total loss, and the underwriter accepts that amount, that amount must be binding upon both parties. If each of the parties agrees that a certain sum shall be deemed to be the value of the thing insured, the underwriter in the case of a total loss is not to be at liberty to say that the thing is not worth so much; he is bound to pay the amount fixed upon, whether it is the proper amount or not. On the other hand, the party insuring is not at liberty to say that the thing is worth more; he is also bound by the amount agreed upon. It is for the purpose of avoiding all question about the value that the parties have agreed to fix the amount, and therefore for all purposes as to the adjustment of the value under that policy, both the parties are bound by the amount so agreed upon. Counsel for the defendants admits that the underwriter in the present case, having paid the full amount agreed upon in the policy as the value of the thing insured, would be entitled to the wreck if he could get it. If the underwriter here got the wreck up, and if he procured the wrongdoer to repair the vessel, the vessel so repaired would

still belong to the underwriter. What difference can it make whether the wrong-doer repairs the thing in specie, or pays in money the amount that it would take to repair it? In either case the vessel so insured becomes the property of the underwriter, by reason of his having paid that which both parties agree shall be deemed to be the full value of the property. It follows, therefore, that the underwriter is entitled to our judgment.

Appeal dismissed.

THOMAS v. HAYWARD

[COURT OF EXCHEQUER (Bramwell, Channell and Cleasby, BB.), June 23, 1869]

[Reported L.R. 4 Exch. 311; 38 L.J.Ex. 175; 20 L.T. 814]

Landlord and Tenant—Covenant—Covenant running with the land—Covenant not to build or keep similar premises within half a mile of demised premises.

In an indenture of demise of a public-house the lessor covenanted for himself and his assigns that he or they would not build, erect, or keep, or be interested in building, erecting, or keeping a public-house within half a mile of the demised premises.

Held: the covenant did not run with the land, and could not be sued on by an assignee of the lease.

Notes. Distinguished: *Fleetwood v. Hull* (1889), 23 Q.B.D. 35; *Dewar v. Goodman*, [1908] 1 K.B. 94. Considered: *Re Hunter's Lease*, *Giles v. Hutchings*, [1942] Ch. 124. Referred to: *Clegg v. Hands* (1890), 59 L.J.Ch. 477; *County Hotel & Wine Co. v. London and North Western Rail. Co.*, [1918] 2 K.B. 251; *Lewin v. American and Colonial Distributors, Ltd.*, [1945] 1 All E.R. 592.

As to covenants running with the land, see 23 HALSBURY'S LAWS (3rd Edn.) 644 et seq.; and for cases see 31 DIGEST (Repl.) 161 et seq.

Case referred to:

(1) *Spencer's Case* (1583), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, 2907.

Demurrer to the declaration in an action by the plaintiff, the assignee of a lease, against the lessor for breach of a covenant contained in an indenture of demise made between the defendant and William Leader, by which the defendant demised and leased to William Leader a messuage and premises called the Mill Hill Tavern, for a term of twenty-four years; and Leader covenanted for himself, his heirs, executors, administrators, and assigns, that he, his executors, administrators, or assigns should and would at all times during the continuance of the term, use and continue the messuage for the sale of beer and as a public-house for the sale of spirits when a licence for that purpose was obtained, and for no other trade or business whatever; and the defendant, for himself, his executors, administrators, and assigns, covenanted to and with Leader, his executors, administrators, and assigns, "not to build, erect, or keep, or be interested or concerned in building, erecting, or keeping any house for the sale of spirits or beer within the distance of half a mile" of the demised premises. Leader assigned the lease to the plaintiff.

Brown, Q.C., for the defendant.

Ryalls for the plaintiff.

A **BRAMWELL, B.**—I am of opinion that the declaration is bad on the ground that this covenant does not run with the land. It does not touch or concern the thing demised, within the meaning of the authorities on this subject. It does undoubtedly affect the beneficial occupation of the thing demised, but does not actually touch the thing itself. Suppose that, notwithstanding the covenant that the demised premises should be continued as a public-house, the parties had agreed to discharge that covenant, and the premises were applied to some other purpose, it is clear that then this covenant could in no way concern the land. That, I think, is a conclusive test. If it concerns the land, it is only by reason of the mode in which, for the time being, it is occupied, and that is not touching the thing demised in such a sense as to make the covenant run with the land.

C **CHANNELL, B.**—I am of the same opinion. The covenant may indirectly affect the value of the thing demised, but it does not touch or concern it within the meaning of the authorities cited.

D **CLEASBY, B.**—I am of the same opinion. In order that the covenant may run with the land according to *Spencer's Case* (1), it must distinctly and directly touch and concern the thing demised. In this case, it only concerns the trade carried on upon the premises, and is, therefore, collateral.

Judgment for defendant.

E

CRABB v. CRABB

F [COURT OF DIVORCE AND MATRIMONIAL CAUSES (Wilde, J.O.), January 23, March 17, 1868]

[Reported L.R. 1 P. & D. 601; 37 L.J.P. & M. 42; 18 L.T. 153;
16 W.R. 650]

Divorce—Desertion—Separation deed—Breach of provisions by husband.

G A husband and wife, having separated, executed a deed of separation which provided for the payment by the husband of £100 per annum for the maintenance of the son of the marriage and for the abandonment by the husband of all control and supervision over the child. The husband paid the maintenance for only two quarters. On a petition by the wife for the dissolution of her marriage,

H **Held:** although the deed might have been held invalid in a court of equity and although the husband had failed to perform his part of the contract, the separation was voluntary; being an act done under the deed, it could not be treated as if the deed had never existed; accordingly, the husband was not in desertion and the petition failed.

I **Notes.** Considered: *Pardy v. Pardy*, [1939] 3 All E.R. 779. Referred to: *Parkinson v. Parkinson* (1869), L.R. 2 P. & D. 25; *Piper v. Piper*, [1902] P. 198; *Williams v. Williams*, [1921] P. 131.

As to desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 241 et seq.; and for cases see 27 DIGEST (Repl.) 333 et seq.

Petition by the wife for dissolution of marriage on the ground of adultery and desertion.

The marriage took place in 1855, the alleged desertion in September, 1857. The adultery of the husband was clearly established. In the course of inquiry into the charge of desertion it appeared that a regular deed of separation was

executed by the parties in October, 1857, which provided for payment by the husband of £100 a year for the maintenance of the child, and that the husband abandoned all rights which belonged to him as a father. Only two quarters' instalments of the allowance were paid.

Dr. Spinks, Q.C. (with him *Dr. Tristram*) for the wife.
Searle for the husband.

Cur. adv. vult.

Mar. 17, 1868. **WILDE, J.O.**—The broad question raised here is whether a woman who has quitted her husband's house under a bargain to do so, made by a deed of separation, can be said to have been deserted without cause by him. The proposition hardly bears stating, unless, indeed, all separation, voluntary or involuntary, be "desertion," the consent of the complaining parties unimportant, and the person deserted, not he who was left in the common home, but she who quitted it. It was, however, argued that the deed in this case would have been invalid in a court of equity, because its provisions stripped the father of all control and supervision over his child. It is needless to inquire whether this is true or not, because, in this court at least, it has always been held that such deeds are utterly inoperative to abrogate the duty of cohabitation involved in the contract of marriage. And if the mere fact that this deed was impotent to maintain and enforce the permanent separation of the parties be material to this question, that fact may be found in the principle of matrimonial law; for, no doubt, it would have been quite competent to either party, the day after they parted, in obedience to their mutual agreement, to come to this court in defiance of that agreement, and to obtain a decree for restitution of conjugal rights. This separation, therefore, was not only voluntary at first, but has practically continued to be so.

Lastly, it was said that the husband did not fulfil his part of the bargain, and only paid the £100 a year, according to his covenant, for only one half year. This, if a condition precedent to the covenant of the wife's trustee that she should not attempt to enforce cohabitation in this court, might, in another court, be held to relieve him from that covenant. In a word, if the husband's side of the bargain was not adhered to, the wife might have been remitted to her original status, and set free from the prohibition of the deed against enforcing those rights which in this court have never ceased to exist and lie open to her assertion. But the husband's breach of his contract could not by relation back make the actual parting involuntary, which was, in fact, voluntary, though the wife was induced to acquiesce, in reliance on the husband's promises. The separation, it must always be remembered, was an act done under the deed, and, though the deed be void, or its covenants afterwards broken, it would be most unfair to treat that act as if the deed had never existed. Nor can the failure of the deed be held so to react on the separation for which it provided as to impress on that separation a character entirely opposite to that which it bore at this time. If it could, it might as well be said that the wife had deserted her husband as that he had deserted her. But all this presumes the absence of fraud; for if a man, determining to abandon his wife, were to set about fraudulently, by the show of an agreement which he never intended to fulfil, to induce or extort her consent to their mutual separation, covering his true purpose under delusive covenants, and seeking a shield for his design in a consent bought by treachery, the court might well be asked to reject the false face of the transaction, and regard the real objects that lay underneath. The adultery of the husband having been established, the wife is entitled to a judicial separation, but she has not asked for such a decree, and the petition must, therefore, be dismissed.

Petition dismissed.

A

YEATMAN v. YEATMAN

[COURT OF DIVORCE AND MATRIMONIAL CAUSES (Wilde, J.O.), May 5, 1868]

[Reported L.R. 1 P. & D. 489; 37 L.J.P. & M. 37; 18 L.T. 415;
16 W.R. 734]

B

Divorce—Desertion—Husband continuing to support wife—"Reasonable cause"
—Conduct not amounting to offence capable of founding judicial separation.

C

A permanent termination of cohabitation on the part of a spouse against the consent of the other spouse and without the intention of renewing the cohabitation held to be capable of constituting desertion within the meaning of s. 16 of the Matrimonial Causes Act, 1857 [now Matrimonial Causes Act, 1950, s. 14 (1)], even though he continued to support her.

D

Desertion "without cause" or "without reasonable excuse" means "without reasonable cause," and may be constituted by conduct falling short of a matrimonial offence on which a decree of judicial separation could be founded, but the conduct must be grave and weighty. Mere frailty of temper, unless shown in some marked and intolerable excesses, and habits which are distasteful to a husband, will not justify him in depriving his wife of the protection of his home and society.

E

Notes. The Matrimonial Causes Act, 1857, s. 16, has been repealed. See now s. 14 (1) of the Matrimonial Causes Act, 1950.

Considered: *Oldroyd v. Oldroyd*, [1895-9] All E.R. Rep. 372; *Allen v. Allen*, [1951] 1 All E.R. 724. Referred to: *Cowley v. Cowley* (1897), Times, Feb. 3; *Frowd v. Frowd*, [1904] P. 177; *Fisk v. Fisk* (1920), 122 L.T. 803; *Lynch v. Lynch* (1933), 78 Sol. Jo. 30; *Bright v. Bright*, [1953] 2 All E.R. 939; *Timmins v. Timmins*, [1953] 2 All E.R. 187; *Hill v. Hill*, [1954] 1 All E.R. 491.

F

As to defence of just cause for separation, see 12 HALSBURY'S LAWS (3rd Edn.) 256 et seq.; and for cases see 27 DIGEST (Repl.) 365 et seq. For the Matrimonial Causes Act, 1950, s. 14, see 29 HALSBURY'S STATUTES (2nd Edn.) 401.

Case referred to:

G

(1) *Haswell v. Haswell and Sanderson* (1859), 1 Sw. & Tr. 502; Sea. & Sm. 32; 29 L.J.P. & M. 21; 1 L.T. 69; 23 J.P. 825; 8 W.R. 76; 164 E.R. 832; 27 Digest (Repl.) 444, 3759.

H

Petition by the wife for judicial separation on the ground of desertion without cause for two years and upwards. The husband by his answer denied the charge and alleged justification for withdrawing from cohabitation by reason of the wife's conduct.

Price, Q.C. (with him *A. S. Hill*) for the wife.

H. Giffard, Q.C. (with him *A. Miller, M. Williams and H. Purcell*) for the husband.

Cur. adv. vult.

I

May 5, 1868. **WILDE, J.O.**—This is a suit promoted by the wife against the husband for a judicial separation, on the ground of his desertion without cause for two years and upwards. The husband made the acquaintance of his wife shortly before December, 1852, when he induced her to elope with him from her relatives to Gretna Green, where they were married. She was about eighteen years of age, a German by birth, but brought up in England by some German relatives, with whom she was residing at the time when the marriage took place. This union afforded little happiness from the first. The husband complains of his wife's temper and conduct, she of his neglect and harshness;

and in the result, after a cohabitation of something less than four years, the husband took her to Germany, avowedly for a stay of some weeks together; but, after a few days, he left her there with a relation, stating that he had to return to England on business. This was in the month of August, 1856. From that time to the present he has never cohabited with her, and this is the desertion of which his wife complains. It is plain, on the testimony of both parties, that the wife did not acquiesce in this separation, and on many occasions entreated her husband to live with her. It is also plain that, at the time when he left her, the husband had made up his mind that he would not live with her any more. It was, therefore, a permanent abandonment of cohabitation on the husband's part, without end and against the consent of the wife.

But he continued to support her, and the first contention of the husband is that this circumstance is of paramount importance, and precludes his conduct from amounting to "desertion" within the meaning of s. 16 of the Matrimonial Causes Act, 1857. The word "desertion" is found several times in that Act, sometimes coupled with the words "without cause," and sometimes "without reasonable excuse." But in all parts of the Act I think that the word itself must be held to mean and define the same thing. It is true that, in s. 21, providing for the granting of orders protecting the wife's property, it is necessary to show, in addition to "desertion," that "the wife is maintaining herself by her own industry or property." But this rather proves that the word "desertion" alone was intended to carry no such qualification with it than the reverse, and certainly does not aid the argument that in other parts of the Act, where no such qualification is added, the word "desertion" must be construed to mean an abandonment without pecuniary means. Nor could the court, without express words for the purpose, so interpret the meaning of the legislature. A wife is entitled to her husband's society, and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute, or mitigated by a liberal provision for her support; but if the cohabitation is put an end to against the consent of the wife, and without the intention of renewing it, the matrimonial offence of "desertion" is, in my judgment, complete.

The remaining question is whether the husband had "cause," which I think must mean "reasonable cause," for thus deserting his wife. It must be borne in mind that, according to the matrimonial laws of this country, which the Divorce Acts have not affected to touch on this head, nothing will justify a man in refusing to receive his wife, except the commission of some distinct matrimonial offence, such as adultery or cruelty, on which the court could found a decree of judicial separation, and that, in all other cases, no matter what her conduct, she can always claim a decree enforcing cohabitation. Save, then, in cases where some such matrimonial offence has been committed, the law does not justify and support the husband in deserting and living apart from his wife. It may be considered hardly consistent with this to hold that any desertion can be "reasonable," which cannot be justified by proof of such offence, or, in other words, that the law should at the same time hold the desertion of the husband to have been reasonable, and yet, if asked by the wife, decree that her husband must take her back again. The inconsistency, however, is perhaps more apparent than real; for the legislature may have thought it right, in creating the new matrimonial offence of "desertion," to subject the remedy for it to the condition that the conduct of the party complaining should not have led to the result complained of, and, if it should have done so, to deny all remedy for the desertion, without affirming that the parties were legally justified in living apart. However this may be, the inconsistency, if it exists, is the work of the legislature, as interpreted by the full Court of Divorce. For, in *Haswell v. Haswell and Sanderson* (1), it was decided that conduct falling short of a matrimonial

A offence sufficient to found a decree for judicial separation was still sufficient "cause" to bar all remedy to a wife whom her husband had deserted. By this decision I am bound to shape my course.

B Assuming, then, this decision to be correct, it remains to be seen whether the "cause" alleged in this case was sufficient. The charges which the husband brings against his wife, as his reasons for deserting her, resolve themselves into an impeachment of her general conduct throughout the time that he lived with her. One charge, indeed, of a distinct and very different character from the rest, he makes against her. But this she distinctly denies, and, on consideration, I cannot hold that it is proved. I allude to the supposed admission by her that she had been unchaste before marriage. Passing then to her general conduct, C I find the husband complaining in the main of her violence to himself (this he afterwards explained to mean violence of temper), her insulting conduct to other people, her dirty habits, and her cruelty to her child. With regard to her violence of temper, there seems to have been considerable ground for his complaint. She speaks in a letter of being "self-willed, wild, and thoughtless"; and then again of her "unhappy temper," which she excuses by adding, "But I was but a child, and without experience." When asked to explain this, she says D in her evidence that her husband was "neglectful and cruel," that he stayed away from home a great deal, and out till twelve or one at night; "by this," she says, "my temper became irritated." As to insulting other people, the husband does not detail any occasion so as to enable the court to judge, and Dr. Arthur Farr, whom he names in connection with this charge, was not E called to corroborate him. As to her dirty habits, there is evidence from a woman with whom she lodged, and that woman's servant, in support of this charge; but the witnesses seemed to speak with a strong bias against her, and led the court to believe that they were indulging in exaggeration. It is also to be remarked that the wife has never been examined about this herself, no allusion being made to it in the long cross-examination which the husband himself administered. Lastly, as regards the charge of cruelty to her child, it is F admitted by the husband that she was extravagantly fond of it at times, and, although both he and the witnesses before alluded to speak of her beating it, the husband himself admits that the child exhibited no marks or bruises, and she most indignantly repudiates ever having struck it in her life. It is a most significant fact in considering the evidence on all these charges, that no member G of the husband's family, to many of whom she was known, was called to condemn the wife's conduct. If her outbursts of temper had been habitually such that the husband could not have been expected to bear with them, his sister, with whom she stayed for some time in the year 1855, at Holbeach, would surely have experienced it. The same remark applies to her alleged want of cleanliness in her linen and dress. In like manner, though she lived at Dr. Dempsey's H for above six months, and although many witnesses were produced as to her conduct while there (in the cross-suit which the husband instituted for divorce), no witness was called in this suit to prove either passionate temper or uncleanly habits while residing in Dr. Dempsey's establishment.

I On a review of this evidence, and the mutual conduct of both parties, the court cannot find reasonable grounds for the separation which the husband has persistently enforced on his young wife. The difficulty of her temper and such of her habits as were distasteful to him, might reasonably have been expected to disappear with judicious conduct on his part in the course of continued cohabitation. It would be of evil example if this court should hold that mere frailty of temper, unless shown in some marked and intolerable excesses, was reasonable ground to justify a man in throwing a young wife on the world without the protection of his home and society. A woman so placed is open to many temptations. If she fail to resist them, the husband, who has already quitted her, will not be slow to take advantage of her fall, making his own

desertion a first step towards a claim for divorce. True, she may at once A
insist on returning to him, and may obtain a decree obliging him, if within
the jurisdiction of this court, to receive her again, and thus terminate the
desertion. But angry feelings, the promptings of pride, or the advice of others,
may intervene. The wife may not be inclined to protect herself by forcing her
society on a husband bent on casting her off; and if the result is criminality, B
the original fault still lies at the husband's door. If submission is the part of
the wife, protection is no less that of the husband, and he is bound to extend
that protection to his wife, even against herself and her own impulses, so far
as the fences, the restraints, and the inducements of conjugal cohabitation may
serve to that end. It was with no other view than this, I conceive, that the
legislature, in s. 31 of the Act, gave the court power to withhold a divorce C
from the husband after his wife's adultery, if he should be shown to have
"deserted or wilfully separated himself . . . from [his wife] . . . without reasonable
excuse." And whatever is held to constitute "desertion without reasonable
excuse" for this purpose must, I think, be also held "desertion without cause," in
s. 16 on which the present suit is founded. For this reason, then, if for no other,
the "cause" should be grave and weighty which, in the judgment of the court, D
should deprive a deserted wife of her remedy for that desertion, and her right
to set it up as a bar to a divorce for adultery at her husband's suit. I am,
therefore, of opinion that the offence of desertion without cause for two years
and upwards is established.

The remedy prescribed by the legislature is but a very imperfect one.
Judicial separation will give but a legal sanction to the actual separation between E
these parties which has long existed. But it will effect two objects which,
I presume, the wife desires—an allowance from her husband regulated by this
court, and a decree affirming her husband's "desertion," which may protect
her from being harassed by further proceedings at his hands. For he has
already sued her no less than three times—first in the year 1858 for nullity
of marriage because she was insane, and had been so during all the four years F
he had lived with her; next in 1862 for adultery with some person in Germany;
and lastly, in a cross-suit commenced about the same time as the present, for
adultery while at Dr. Dempsey's. To both these charges of adultery the wife
pleaded his desertion, in addition to denying the adultery, but, the proof of
adultery failing in both suits, no decree on the desertion has hitherto been
made. She has now instituted a suit herself for the purpose of obtaining such G
a decree, and, in my judgment, she is entitled to it.

Decree of judicial separation.

A

KELLY v. KELLY

[COURT OF DIVORCE AND MATRIMONIAL CAUSES (Lord Penzance, J.O., Channell, B., and Hannen, J.), February 1, 2, 9, 1870]

B

[Reported L.R. 2 P. & D. 59; 39 L.J.P. & M. 28; 22 L.T. 308; 18 W.R. 767]

Divorce—Cruelty—Injury to health—Physical or moral force to bend wife to husband's authority.

C

If force, whether physical or moral, is systematically exerted against a wife with the view of bending her to her husband's authority in such a manner, to such a degree, and during such length of time, as to break down her health and render a serious malady imminent, it is legal cruelty which entitles the wife to a judicial separation.

D

Notes. Considered: *Russell v. Russell*, [1895-9] All E.R. Rep. 1; *Simpson v. Simpson*, [1951] 1 All E.R. 955. Referred to: *Bethune v. Bethune*, [1891] P. 205; *Walmesley v. Walmesley* (1893), 1 R. 529; *Moss v. Moss*, [1916] P. 155; *Litton v. Litton* (1924), 40 T.L.R. 272; *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; *Eastland v. Eastland*, [1954] 3 All E.R. 159; *Cooper v. Cooper*, [1954] 3 All E.R. 415; *Forbes v. Forbes*, [1955] 2 All E.R. 311; *Waters v. Waters*, [1956] 1 All E.R. 432; *Gollins v. Gollins*, [1962] 2 All E.R. 366.

E

As to cruelty, see 12 HALSBURY'S LAWS (3rd Edn.) 269 et seq.; and for cases see 27 DIGEST (Repl.) 293 et seq.

Appeal by the husband to the Full Court from a decree of judicial separation pronounced by the Judge Ordinary on Dec. 7, 1869, and reported L.R. 2 P. & D. 31.

F

Dr. Deane, Q.C., and Inderwick for the wife.

The husband appeared in person.

Cur. adv. vult.

Feb. 9, 1870. **CHANNELL, B.**—This is an appeal to the Full Court from a decision of the Judge Ordinary. LORD PENZANCE is desirous that **HANNEN, J.**, and myself should first state our views. I proceed, therefore, to deliver our joint opinion.

G

The appeal is by the Rev. James Kelly against a decree whereby the Judge Ordinary, on the petition of the appellant's wife, Frances Kelly, decreed in favour of the wife for a judicial separation from her husband on the ground of cruelty. Mr. and Mrs. Kelly were married in Ireland in the year 1841. There was issue of the marriage a child, deceased, and a son, now living, who was born in 1845. With the exception of a visit made by the wife to Wales and Ireland, she lived under the same roof with the husband from the time of the marriage until January, 1869. Since that time the parties have ceased to cohabit, the wife having left her husband's home, and claimed from this court the decree for judicial separation now appealed against. There is some evidence that, on one or two occasions, the husband laid hands on the wife against her consent. But the evidence is so slight on this head that we think it safer to treat the case (as it was considered by the Judge Ordinary) as one on which there is an absence of any proof of such physical violence towards the wife on the part of the husband as would justify a decree.

I

The question then arises whether the decree is erroneous in holding that, although there was not such actual physical violence on the part of the husband towards the wife, there is shown to be that cruelty which will entitle her to ask this court for a decree for judicial separation. The husband seeks the

reversal of the decree on two grounds. First, that the Judge Ordinary has erred in point of law in the definition which he has given of cruelty; and, secondly, that the evidence does not establish that the husband has been guilty of legal cruelty. The passages in the judgment of the Judge Ordinary in which he has laid down the principles on which his decision is based are the following (L.R. 2 P. & D. at p. 31):

"The peculiar and distinguishing feature of this case is the adoption by the respondent of a deliberate system of conduct towards his wife with the view of bending her to his authority . . . if force, whether physical or moral, is systematically exerted for this purpose, in such a manner, to such a degree, and during such length of time, as to break down her health and render serious malady imminent, the interference of the law cannot be justly withheld by any court which affects to have charge of the wife's personal safety."

He continued (*ibid.* at p. 32):

"Moreover, the decisions of my predecessors have imparted this further proposition as a condition of the court's interference, that the troubles of the wife are not owing to her own misconduct."

We are of opinion that the above cited passages contain an accurate and, so far as was necessary for the determination of the case, a complete statement of the law on the subject.

It would be difficult to frame a definition of legal cruelty which should be applicable to all the cases which may arise. The object of the Matrimonial Court in exercising its jurisdiction in decreeing for judicial separation for cruelty is to free the injured consort from a cohabitation which has been rendered, or which there is imminent reason to believe will be rendered, unsafe by the ill-usage of the party complained of. It is obvious that the modes by which one of two married persons may make the life or the health of the other insecure are infinitely various, but as often as perverse ingenuity may invent a new manner of producing the result, the court must supply the remedy by separating the parties. The most frequent form of ill-usage which amounts to cruelty is that of personal violence; but the courts have never limited their jurisdiction to such cases alone, as will be clearly seen by reference to some of the authorities. [His LORDSHIP cited several decisions on the question of cruelty, and referred in detail to the evidence in the case, which he said had satisfied the court that the acts imputed to the husband as amounting to legal cruelty were established. His LORDSHIP said that he and HANNEN, J., adopted the view of the evidence taken by the Judge Ordinary, and dismissed the appeal.]

LORD PENZANCE, J.O.—The husband has loudly complained that the subordinate facts of this case, and especially the numerous charges made by him against his wife, did not find a place in the judgment now under appeal. It was not needful that they should have done so, and for several reasons. First, these charges of impropriety, or such of them as were established, were, in my judgment, either justified, or at least rendered pardonable, by the husband's own conduct. Secondly, they were wholly insufficient if they had been all true, and without excuse or palliation, to justify the treatment of which the wife complained. And, lastly, because they could not (if the quarrel in reference to the husband's son and to Colonel Thornbury be exempted) have made the cause of the "affectionate discipline," as the husband called it, which he pursued towards his wife, inasmuch as the commencement of that discipline preceded their occurrence. I do not venture to hope that the views of others, however dispassionate, may suggest to the husband that he can possibly be wrong in his estimate of all that his wife did. But after the appeal which

A he has made to the court for the expression of its opinion on this topic, I think it is not right to be wholly silent. [His LORDSHIP referred to the various grounds of complaint alleged by the husband against his wife, and remarked that the husband appeared, from first to last, to have kept out of sight the inevitable results of the course which he was pursuing towards her. His wife had, in his opinion, done wrong, and it was his duty to make her repent; but the question what should happen if repentance did not come seemed never to have disturbed his serenity. He continued:] There never was a case of matrimonial dispute which ultimately depended so little on the truth or falsehood of the evidence of the parties themselves. It is due to the wife, and equally to the husband, to say that, in my opinion, they neither of them willingly deviated from the truth in the account of the facts on which the decision of the court must rest; nor, indeed, on those facts is there any essential contradiction. Thus far on the facts.

B On the legal principles involved in this case I have nothing to add to or withdraw from the expressions used in the judgment under appeal. I forbear to cite cases. In my judgment, the principles of every case in which the court has decreed separation on account of cruelty apply to this case. But as conclusions wide of the truth, and much broader than the judgment warrants, have been sought in argument to be drawn from the words there used, I would add something by way of fuller and further expression. In determining whether a case is made out for the interposition of the court, reliance is not to be placed on any one feature of the case to the exclusion of the rest. It is not to be said from anything which the court has here decided that this or that is denied to the husband or permitted to the wife. The health and safety of the wife is, no doubt, the leading consideration. Still, it is necessary that due regard should be had, not only to the degree in which that safety or health appears to have been compromised or placed in jeopardy, but to the clearness with which this fact is established in evidence. So, again, it is necessary that the acts of the husband, by which the wife's health or safety is said to have been thus threatened, should not only be proved and the alleged consequences plainly deduced from them, but their motives examined and their causes considered.

E And, finally, the conduct of the wife herself, by way of provocation, must not only be taken into the account, but her demeanour under even unmerited oppression or unprovoked cruelty, must be studied by the court. It is on the sum of these considerations that the court can alone decide whether a case is made for a decree. The husband affirms that a new law has been made to meet his case, and that it will form a dangerous precedent. I hope not. To the best of my judgment it is the case which is new, and not the law. I have searched the recorded decisions of the Matrimonial Courts in vain for a case the features of which in any considerable degree resemble the present. H It has no parallel in the past, and as to becoming a precedent it is hardly likely to find one in the future. So much injustice, so much perversion of mind, so much abiding rancour for so trifling a cause, so much deliberate oppression under provocation so slight, moral chastisement so severe administered with so much system, maintained with such tenacity up to the brink of so perilous a danger to health, with so utter a disregard of consequences, and all to extort confession of acts never committed, and force repentance without consciousness of wrong, will probably never be exhibited again. That such a case should recur, it would be necessary that to an inflexible will should be added the power of self-deception in an inordinate degree, so that the promptings of angry resentment should be mistaken for the voice of duty, and that while religion should be put forward to sanction and even enjoin a harsh and cruel retaliation, the leading precepts of religion, humility and forgiveness should be altogether forgotten or but little heeded.

Appeal dismissed.

EARL OF AYLESFORD v. MORRIS

[COURT OF APPEAL IN CHANCERY (Lord Selborne, L.C. and Mellish, L.J.), February 17, 18, 20, March 5, 1873]

[Reported 8 Ch.App. 484; 42 L.J.Ch. 546; 28 L.T. 541;
37 J.P. 227; 21 W.R. 424]

Undue Influence—Expectant heirs and reversioners—Onus of proving dealings therewith fair and reasonable—Money lent at 60 per cent. interest.

There is an onus imposed on all who deal with expectant heirs and reversioners of proving that their dealings have been fair and reasonable and thus rebutting the presumption of fraud which may arise from the nature of a bargain, and the circumstances and conditions of the contracting parties.

Where, therefore, a remainderman, shortly after coming of age, borrowed money, without any independent advice, on his own acceptances, at the rate of 60 per cent. per annum, the court released him from his contract on terms of paying the amount actually advanced, with interest at 5 per cent. per annum.

Notes. Under the Moneylenders Acts, 1900 to 1927 (16 HALSBURY'S STATUTES (2nd Edn.) 370-401), in any transaction which is substantially one of moneylending by a moneylender, the court, if satisfied that the interest charged in respect of the sum actually lent is excessive and the transaction is either harsh or unconscionable or is otherwise such that a court of equity would give relief, will give relief to the borrower. By s. 1 of the Money-Lenders Act, 1900, as amended by s. 10 of the Moneylenders Act, 1927, if the interest charged exceeds 48 per cent per annum the court must presume that the interest charged is excessive and that the transaction is harsh and unconscionable: see 27 HALSBURY'S LAWS (3rd Edn.) 42.

Considered: *Beynon v. Cooke* (1876), 10 Ch.App. 391, n.; *O'Rorke v. Bolingbroke* (1877), 2 App. Cas. 814; *Nevill v. Snelling* (1880), 15 Ch.D. 679. Followed: *Brenchley v. Higgins* (1900), 70 L.J.Ch. 788. Referred to: *Bennett v. Bennett* (1876), 43 L.T. 246, n.; *Re Fry, Fry v. Lane, Whittet v. Bush*, [1886-90] All E.R. Rep. 1084; *James v. Kerr* (1889), 40 Ch.D. 449; *Wilton v. Osborn*, [1901] 2 K.B. 110; *Permanent Trustee Co. of New South Wales, Ltd. v. Bridgewater*, [1936] 3 All E.R. 501.

As to unconscionable bargains, see 17 HALSBURY'S LAWS (3rd Edn.) 682-684, and 14 HALSBURY'S LAWS (3rd Edn.) 480-481; and for cases see 25 DIGEST (Repl.) 287 et seq.

Cases referred to:

- (1) *Earl of Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125; 1 Atk. 301; 1 Wils. 286; 28 E.R. 82, L.C.; 25 Digest (Repl.) 273, 823.
- (2) *Shelly v. Nash* (1818), 3 Madd. 232; 56 E.R. 494; 25 Digest (Repl.) 300, 1072.
- (3) *Smith v. Kay* (1859), 7 H.L.Cas. 750; 30 L.J.Ch. 45; 11 E.R. 299, H.L.; 12 Digest (Repl.) 124, 746.

Also referred to in argument:

- Gwynne v. Heaton* (1778), 1 Bro. C.C. 1; 28 E.R. 949, L.C.; 25 Digest (Repl.) 295, 1006.
- Gowland v. De Faria* (1810), 17 Ves. 20; 34 E.R. 8; 25 Digest (Repl.) 295, 1007.
- Casborne v. Barsham* (1839), 2 Beav. 76; 48 E.R. 1108; 42 Digest 76, 678.
- Barrett v. Hartley* (1866), L.R. 2 Eq. 789; 14 L.T. 474; 12 Jur.N.S. 426; 14 W.R. 684; 36 Digest (Repl.) 532, 946.
- Gartside v. Isherwood* (1783), 1 Bro. C.C. 558; 2 Dick. 612; 28 E.R. 1297; 30 Digest (Repl.) 502, 1440.

- A** *Baker v. Monk* (1864), 33 Beav. 419; 10 L.T. 86; 28 J.P. 407; 10 Jur.N.S. 624; 12 W.R. 521; 55 E.R. 430; affirmed, 4 De G.J. & Sm. 388, L.J.J.; 25 Digest (Repl.) 274, 835.
- Benyon v. Fitch* (1866), 35 Beav. 570; 55 E.R. 1018; 25 Digest (Repl.) 299, 1056.
- Lawley v. Hooper* (1745), 3 Atk. 278; 26 E.R. 962, L.C.; 35 Digest (Repl.) 312, 286.
- Emmet v. Tottenham, Tottenham v. Emmet* (1864), 11 L.T. 404; 13 W.R. 123; affirmed (1865), 12 L.T. 838; 14 W.R. 3, L.C.; 25 Digest (Repl.) 297, 1028.
- B** *Davis v. Duke of Marlborough* (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E.R. 555, L.C.; 25 Digest (Repl.) 295, 1008.
- Tyler v. Yates* (1870), L.R. 11 Eq. 265; 23 L.T. 447; 35 J.P. 325; 19 W.R. 118; affirmed (1871), 6 Ch.App. 665; 40 L.J.Ch. 768; 25 L.T. 284; 36 J.P. 180; 19 W.R. 909, L.C.; 25 Digest (Repl.) 290, 962.
- C** *Croft v. Graham* (1863), 2 De G.J. & Sm. 155; 9 L.T. 589; 46 E.R. 334, L.J.J.; 25 Digest (Repl.) 290, 960.
- Webster v. Cook* (1867), 2 Ch.App. 542; 36 L.J.Ch. 753; 16 L.T. 821; 15 W.R. 1001, L.C.; 25 Digest (Repl.) 292, 972.
- Miller v. Cook* (1870), L.R. 10 Eq. 641; 40 L.J.Ch. 11; 22 L.T. 740; 35 J.P. 245; 18 W.R. 1061; 25 Digest (Repl.) 297, 1025.
- D** *Wyatt v. Cook* (1868), 18 L.T. 12; 16 W.R. 502; 25 Digest (Repl.) 297, 1029.
- Cole v. Gibbons, Martin v. Cole* (1734), 3 P.Wms. 290; 24 E.R. 1070, L.C.; 25 Digest (Repl.) 301, 1085.
- Bromley v. Smith, Boustead v. Bromley, Smith v. Bromley* (1859), 26 Beav. 644; 29 L.J.Ch. 18; 33 L.T.O.S. 363; 5 Jur.N.S. 833; 7 W.R. 557; 53 E.R. 1047; 25 Digest (Repl.) 299, 1060.
- E** *Peacock v. Evans, Evans v. Peacock* (1809-10), 16 Ves. 512; 33 E.R. 1079; 25 Digest (Repl.) 290, 959.
- Bowes v. Heaps* (1814), 3 Ves. & B. 117; 35 E.R. 423; 25 Digest (Repl.) 298, 1033.
- Tottenham v. Green* (1863), 1 New Rep. 466; 32 L.J.Ch. 201; 1 Digest (Repl.) 368, 400.
- F** *Curwyn v. Milner* (1731), 3 P.Wms. 292, n.; 24 E.R. 1071, L.C.; 25 Digest (Repl.) 296, 1013.
- Barnardiston v. Lingood* (1740), 2 Atk. 133; Barn. Ch. 337; 26 E.R. 484, L.C.; 25 Digest (Repl.) 290, 957.
- Tennent v. Tennent's Trustees* (1870), 8 Macph. (Ct. of Sess.) 10; 6 Macph. (Ct. of Sess.) 840; 42 Sc. Jur. 353; L.R. 2 Sc. & Div. 6; 12 Digest (Repl.) 116, *461.
- G** *Earl of Aldborough v. Trye* (1840), 7 Cl. & Fin. 436; West. 221; 4 Jur. 1149; 7 E.R. 1136, H.L.; 25 Digest (Repl.) 299, 1070.
- Waller v. Dale* (1677), Cas. temp. Finch. 295; 1 Cas. in Ch. 276; 1 Dick. 8; 23 E.R. 162; 25 Digest (Repl.) 298, 1037.
- H** *Twisleton v. Griffith* (1716), 1 P.Wms. 310; 24 E.R. 403, L.C.; 25 Digest (Repl.) 292, 977.
- Stewart v. Great Western Rail. Co.* (1865), 2 De G.J. & Sm. 319; 6 New Rep. 325; 13 L.T. 79; 11 Jur.N.S. 627; 13 W.R. 907; 46 E.R. 399, L.C.; 12 Digest (Repl.) 560, 4247.
- Evans v. Llewellyn* (1787), 1 Cox, Eq. Cas. 333; 2 Bro. C.C. 150; 29 E.R. 1191; 25 Digest (Repl.) 288, 939.
- I** *Torrance v. Bolton* (1872), 8 Ch.App. 118; 42 L.J.Ch. 177; 27 L.T. 738; 37 J.P. 164; 21 W.R. 134, L.J.J.; 35 Digest (Repl.) 71, 636.
- Wiseman v. Beake* (1690), 2 Vern. 121; Freem. Ch. 111; 23 E.R. 688; 25 Digest (Repl.) 296, 1019.
- Crowe v. Ballard* (1790), 2 Cox, Eq. Cas. 253; 3 Bro. C.C. 117; 1 Ves. 215; 30 E.R. 118; 1 Digest (Repl.) 536, 1654.
- Preston v. Dania* (1872), L.R. 8 Exch. 19; 42 L.J.Ex. 33; 27 L.T. 612; 21 W.R. 128; 7 Digest (Repl.) 226, 635.

Appeal from a decision of WICKENS, V.-C., reported 27 L.T. 753, releasing the plaintiff from his contract with the defendant on terms of paying the amount actually advanced with interest at 5 per cent. A

Karslake, Q.C., Holl and F. T. White for the defendant.

Dickinson, Q.C., and Jones Bateman for the plaintiff.

Cur. adv. vult. B

Mar. 5, 1873. **LORD SELBORNE, L.C.**, read the following judgment of the court.—There is hardly any older head of equity than that described by LORD HARDWICKE, in *Earl of Chesterfield v. Janssen* (1), as relieving against the fraud “which infects catching bargains, with heirs, reversioners, or expectants, in the life of the fathers,” etc. “These have been generally mixed cases,” he said, and he proceeded to note two characters always found in them (1 Ves. Sen. at p. 157): C

“There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargains.” D

With respect to the first of these two characters he had spoken just before, when he said of that kind of fraud which might be presumed from the circumstances and conditions of the parties contracting (*ibid.* at p. 155):

“This goes further than the rule of law, which is, that it must be proved, not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other.” E

To a certain extent protection against this class of transaction was afforded by the laws against usury, now repealed, which (as LORD HARDWICKE also said, *ibid.* at p. 159) were made F

“not for want of power in this court to give relief in many of these contracts, but to make them void in law, to give the party a short remedy against them.”

Other forms of similar extortion which kept clear of usury were defeated by a fixed rule of this court which grew up out of the general equity. Post-obit securities and sales of reversions, or of annuities, or gross sums charged on reversions, with or without some element of risk, were held redeemable in every case in which the purchaser could not prove that he gave full value for his bargain. SIR JOHN LEACH, V.-C., said in *Shelly v. Nash* (2) (3 Madd. at pp. 235, 236): G

“In the earlier cases it was held necessary to show that undue advantage was actually taken of the situation of such persons; but, in more modern times, it has been considered not only that those who were dealing for vested reversions also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who dealt with expectant heirs and reversioners the onus of proving that they had paid a fair price, and otherwise to undo their bargains, and compel a reconveyance of the property purchased.” H

The usury laws, however, proved to be an inconvenient fetter on the liberty of commercial transactions; and the arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable, as well to unconscionable, bargains. Both have been abolished by the legislature; but the abolition of the usury laws still leaves the nature of the bargain capable of being a note of I

A fraud in the estimation of this court; and the Sales of Reversions Act, 1867, s. 1 [now s. 174 of Law of Property Act, 1925], is carefully limited to purchases "made bona fide, without fraud or unfair dealing," and leaves under-value still a material element in cases in which it is not the sole equitable ground for relief.

B These changes of the law have in no degree whatever altered the onus probandi in these cases which, according to the language of LORD HARDWICKE,

"from the circumstances or conditions of the parties contracting—weakness on one side, extortion and advantage taken of that weakness on the other"

C —raise a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable. This is the rule applied to the analogous cases of voluntary donations obtained for themselves by the donees, and to all other cases where influence, D however acquired, has resulted in gain to the person possessing at the expense of the person subject to it. LORD CRANWORTH, in a recent case in the House of Lords (*Smith v. Kay* (3)), said (7 H.L. Cas. at p. 771) that no influence can be more direct, more intelligible, or more to be guarded against than that of a person who gets hold of a young man of fortune,

E "and takes upon himself to supply him with means, pandering to his gross extravagance during his minority, and extorting from him, or at least obtaining from him, for every advance that he has made, a promise that the moment he comes of age it shall all be satisfied, and the securities made good."

F The circumstances of the particular case in which these words were spoken differed widely from those of the case now before us; the element of personal influence is here wanting. But it is sufficient for the application of the principle, if the parties meet under such circumstances as to give the stronger party dominion over the weaker, in the particular transaction; and such power and influence are generally possessed, in every transaction of this kind, by those G who trade on the follies and vices of unprotected youth, inexperience, and moral imbecility.

In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed, its presence was considered by LORD BROUGHAM to be an indispensable condition of equitable relief, although LORD ST. LEONARDS, with good reason, dissents from that opinion (SUGDEN ON H VENDORS AND PURCHASERS (11th Edn.), p. 316). The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class), excluded, and known to be excluded, by the very motives and circumstances which attract him to it from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, I if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody to take care of him. Great judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud the fortunes of families is a public as well as a private mischief; that it is a sort of indirect fraud on the heads of families from whom these transactions are concealed, and who may be thereby induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for

their own descendants. Whatever weight there may be in any such collateral considerations, they could hardly prevail, if they did not connect themselves with an equity more strictly and directly personal to the plaintiff in each particular case. However, the real truth is, that the ordinary effect of all the circumstances by which these considerations are introduced is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness; and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain on the party who claims the benefit of it.

To apply these observations to the present case: the plaintiff is a young man, who had attained his majority less than six months before the first, and less than nine months before the second, transaction (the second being the sequel of the first) which this bill seeks to set aside. The bill states, and the evidence proves, that he was without any professional advice or assistance. He was the eldest son of a large land-owner, and was entitled as tenant in tail in remainder immediately expectant on the death of his father (a man in ill-health, although not advanced in years) to estates stated to be worth £20,000 a year. He had, however, no income from these estates or from any other source in possession; he was for the most part dependent on his father, who made him only a variable allowance, in no year exceeding £500. This young man while still in his minority had contracted expensive and extravagant habits, and had borrowed money from one Graham, by profession a solicitor (but towards the plaintiff a money-lender only), for which he gave promissory notes at twelve months' date, about nine months before he came of age. The terms of these transactions with Graham (for there were several of them) do not distinctly appear; but in May, 1870, soon after the plaintiff came of age, Graham obtained from him acceptances for £4000, at some very short dates, in lieu of the promissory notes, and on these acceptances coming to maturity he pressed the plaintiff for payment, declined to renew or make any further advance, and recommended him to apply to the defendant Morris, as a money-lender and discount, for him bills amounting to £8000, payable at three months, and bearing after their maturity 60 per cent. interest. To this suggestion the plaintiff acceded, and the transaction was accordingly carried through with Morris by the agency of Graham, himself the person chiefly interested in getting the money for his own benefit, the terms being, of course, arranged between him and Morris. For these bills £6800 only was paid by Morris, the rest being retained by way of discount; so that, if the discount is taken into account, and the rate of interest calculated from the date of the advance on the sum actually advanced, the interest was really much greater than 60 per cent. Out of the £6800 Graham received £3000, remaining a creditor of plaintiff for £1000, in respect of which (he tells us) he "shortly afterwards commenced proceedings in bankruptcy against the plaintiff." The rest of the money went to the supply of the (real or imaginary) wants of the plaintiff.

This first transaction was the parent of the second. The bills for £8000 became due on Oct. 4, 1870, the circumstances of the plaintiff then remaining the same. The usual application for payment was made; and the plaintiff was introduced by Curtis, a hotel-keeper, with whom he was acquainted, and who seems about that time to have been endeavouring to raise money for him, to one Addison, with whom Curtis's own acquaintance appears to have been of the slightest description. Addison, who had formerly been an officer in the army, was at that time a procurer of loans for spendthrifts from money-lenders. He styles himself a "monetary agent," or "the intermediate person bringing the capitalist and the borrower together," expecting for that service a brokerage of 5 per cent. "on the amount of the bills, and not on the money lent"; and so having a direct interest in every such case in swelling the amount of the bills. By this person's agency the terms on which the £8000 bills were to be raised were arranged with

A Morris on Dec. 19, 1870, on which day the plaintiff gave Morris another set of bills for £11,000, bearing that date, and payable three months afterwards, with 60 per cent. interest from maturity; no money passing from Morris for these new bills except a sum of £275, which he paid to Addison, and £207, which went into the plaintiff's pocket. Morris's account of the payment to Addison is in these words:

B "After I had discounted the £11,000 worth of bills, I said, 'I suppose you will want 2½ per cent., Addison'; he said, 'Yes, I am perfectly satisfied.' I then sat down and wrote him a check for £275."

C In this manner the plaintiff, having received in June £6800 (treating the whole payment to Graham as a receipt by the plaintiff), and in December £207—in all, £7007—was made a debtor to Morris within a space of nine months for £11,000, carrying 60 per cent. interest.

All these transactions were carefully concealed from the plaintiff's father. The plaintiff says, in his affidavit in support of the bill, that he "feared to divulge them to his father or any of the members of his family." In his cross-examination he says that he wished to conceal from his father that he was in debt, adding, with respect to the second transaction, that his father was then ill, and on the point of death, and he did not like the fact divulged to him. He states that he asked Addison to get him money at 5 per cent.; but "instead of doing that he went and distributed my bills to Morris and different people," explaining afterwards, not that he was ignorant of the terms imposed, but that he wanted money, and felt obliged to submit to any terms that might be dictated, that he "did not very much care what the rate of interest was." When 5 per cent. was spoken of the object was to obtain an advance on the plaintiff's reversionary interests in the family estates; and with this view the plaintiff seems to have been in communication in November, 1870, through Curtis, with one Bonner, a solicitor, and a friend of Addison. For this purpose, however, access to the title deeds of the estate was necessary, and these were in the possession of Mr. Bennett, the family solicitor. The plaintiff informed Curtis and Addison that he "could not procure the deeds without going to Mr. Bennett," and that he never asked him for them, "being afraid it would come to his father's ears." The plaintiff, therefore, entered into these transactions, not only without any competent and disinterested advice or assistance, but without that accurate information as to his own means and circumstances which could only be obtained if his fears had been overcome and the veil of secrecy between himself and his family removed.

Assuming, as I do assume, and am prepared to decide, that this is a state of circumstances which, coupled with the nature and terms of the bargains themselves (bargains which are in my judgment *prima facie* oppressive and extortionate) casts some onus probandi on the defendant Morris. What evidence has he given to discharge himself of that burden? In my judgment, none whatever. On the contrary, he admits facts from which, if it were necessary, inferences unfavourable to him might be drawn. As to the first transaction, he says, indeed, that he looked on Graham as the plaintiff's adviser. But he admits that neither Graham nor the plaintiff ever told him so. He made no inquiry as to Graham's authority, and he cannot say whether Graham showed him any letter or authority of any kind. He says also that Graham never told him that he was himself a creditor of the plaintiff; and that he did not then know that Graham held the plaintiff's acceptances; and he is certain that Graham did not tell him that the plaintiff's father was then labouring under a fatal disease. The fact appears to be, however, that Morris purposely abstained from making any of those inquiries which every man would have made who was entering into a business transaction fairly and in good faith without either an irrational disregard of his own security or a design to make his market

of another man's weakness. He looked at the Peerage and ascertained the age of the plaintiff's father, and, no doubt, the age of the plaintiff himself also. He said: "I naturally inferred that he would in time succeed to the family estates, but his father was then a young man." However, he expressly says that he asked Graham no question about the plaintiff's prospects, although at the very first interview he made the plaintiff welcome to £8000 or £10,000; and he adds that if Graham had told him that the Earl was suffering under some fatal disease "he should not have taken any notice of it."

Whatever hazard there might be in dealing with the plaintiff, it is clear that it did not present itself as a very substantial risk to the mind of Morris, who did not care even to know whether the plaintiff was in a condition to give anything more than personal security; and he avows in plain terms, "I exacted 60 per cent., because I get the best price I can; we all do that." He admits that the plaintiff had no professional adviser that he knew of in the second transaction; and he also admits, as I have already mentioned, the payment by himself of a bonus or commission of £275 to Addison without, as far as I can see, supposing, or having any reason whatever to suppose, that the plaintiff would ever be informed of that payment, or would derive, directly or indirectly, any benefit therefrom. No attempt has been made to show by any independent evidence (if such a thing could be conceived possible) that the terms thus imposed on the plaintiff were fair and reasonable, having regard to the nature of the risk run by the lender, or to any other criterion. The difficulty of such an attempt, in the face of the admitted facts that there was no real bargaining at all, and that no inquiry was made into the exact nature or value of the plaintiff's expectations, would have been great. It is stated, indeed, by Addison that before arranging with Morris to take the £11,000 in lieu of the £8000 bills he applied to two or three other members of the same fraternity without success: and the project of raising money at 5 per cent. had failed on account of the plaintiff's unwillingness to approach the family solicitor on the subject, although on this latter subject there is no evidence beyond the plaintiff's own statements and a letter from Bonner, proved by Curtis, in which Bonner states that he had procured copies of certain documents of title anterior to the existing family settlement, which was accessible in the Registry of the Court of Probate and the Enrolment Office. However, this does not prove that the transactions with Morris were fair and reasonable; and I agree with what was said in one of the recent cases, that a bargain (even if the terms offered had been shown to be the same, which is not here the case) hawked about among members of the money-lending fraternity, and declined by several of them, is not thereby proved to be one which this court ought to uphold. It may well be that in the circumstances in which the plaintiff's bills were offered it might not suit the interest of those gentlemen to advance money on them on any terms which would be safe in a court of equity, or to run the risk of advancing them on terms which would be unsafe. This caution on the part of others cannot prove the righteousness of the bargain made by the defendant, who was less scrupulous.

It was contended by the defendant's counsel that the equity as to catching bargains with expectant heirs was not applicable to this case, first because the plaintiff was entitled to a vested remainder in the family estates, and had not a mere expectation of succeeding as heir or devisee to his father, and, secondly, because there was no dealing with that estate in remainder. There is in my judgment no weight in either argument. All the cases show that remaindermen and reversioners are expectant heirs within the meaning of the doctrine. And whatever form these transactions might assume the fact was, and it was perfectly well understood by the defendant, that the plaintiff was borrowing on the credit of his expectations, that is, of his prospect of succeeding on the death of his father to the family estates. He had no property in possession, and he had

A this property, or anything besides which he might get from his father, only in prospect. As LORD HARDWICKE said in *Lord Chesterfield v. Janssen* (1) (2 Ves. Sen. at pp. 157, 158):

“The creditor knowing the fund for payment must depend on the debtor’s surviving the father or grandfather, whether it is said so or not.”

B It is suggested that if an immediate security on the estate in remainder had been given the estate might have been foreclosed or forced to sale at an enormous loss while it was still reversionary; but the same thing might have happened in a case like the present (since non-traders have become subject to the law of bankruptcy) by making the debtor bankrupt. The truth is, that such terms imposed on the borrower in the present case are not less, but are more, onerous and unconscionable than if a defined security on the reversionary interest had been taken. It was certain that the debtor would never have any means of his own to make payment till his reversionary interest should fall into possession. By taking from him bills at short dates, with large discount and enormous interest, he was kept under a perpetual pressure as often as his bills might arrive at maturity. He must either be made bankrupt, or be forced to take up money elsewhere in the market (a process which in such a case would be only shifting the burden from one shoulder to another, and in no way alleviating it), or he must renew with the original creditor, in which case the accumulations of the debt would be rapid and enormous. In the present case this was actually done, not at the end of the three months, when the bills for £8000 matured, but after the lapse of more than five months: and yet it was done at a rate which, if repeated at like intervals, would have about doubled the debt in the course of every year. It is, indeed, sufficiently probable that the lender would prefer (as Morris says he should have preferred) to realize his enormous profits and terminate his risk at as early a period as practicable; and that he might use his power over the debtor for that purpose. If, however, the debtor could only pay him off by going through a similar process in some other quarter, the consequences of the transaction would be to him very much the same.

E

F

On the whole case, my judgment is the same as that of WICKENS, V.-C. The form of the decree must be corrected by adding a direction in the usual form for dismissing the bill with costs if the plaintiff does not within a time to be limited after the date of the certificate (I presume it should be one month) pay what may be found due from him; but the defendant must pay the costs of the appeal. I have felt some doubt as to the costs in the court below, but, on the whole, I am not disposed on that point to disturb the decree. The defendant is not alleged or proved to have been guilty of deceit or circumvention, and the plaintiff has no merits of his own to plead. He comes into court to be relieved from the consequences of a course of very wilful and culpable folly and extravagance. I think him entitled to the relief which he asks; but I think it is not unjust that he should obtain it at his own expense.

H

Appeal dismissed.

A

GRANT v. GRANT

[COURT OF EXCHEQUER CHAMBER (Kelly, C.B., Blackburn and Mellor, JJ., Martin, Channell and Cleasby, BB.), June 22, 1870]

[Reported L.R. 5 C.P. 727; 39 L.J.C.P. 272; 22 L.T. 829;
18 W.R. 951]

B

Will—Evidence—Solution of ambiguity—Extrinsic evidence to show testator's intention—Latent ambiguity—"Nephew"—Testator's nephew and testator's wife's nephew having same name.

C

By his will the testator devised real estate to "my nephew Joseph Grant." A son of the testator's brother and a son of the testator's wife's brother were both named Joseph Grant, and each claimed to be the devisee under the will. On the question of admissibility of evidence to show the testator's intention,

Held: as the words "my nephew Joseph Grant" applied equally to both claimants there was a latent ambiguity, and evidence was admissible to show that the testator intended the devise for his wife's brother's son.

D

Notes. Considered: *Sherratt v. Mountford* (1873), 8 Ch. App. 928. Not Followed: *Wells v. Wells* (1874), L.R. 18 Eq. 504; *Merrill v. Merton* (1881), 17 Ch.D. 382. Distinguished: *Re Parker, Bentham v. Wilson* (1881), 17 Ch.D. 255; *Re Taylor, Cloak v. Hammond* (1886), 34 Ch.D. 255. Considered: *Re Gue, Smith v. Gue* (No. 2) (1892), 36 Sol. Jo. 698; *In the Goods of Ashton*, [1892] P. 83. Doubted: *Re Green, Bath v. Cannon*, [1914] 1 Ch. 134. Referred to: *Re Kilvert's Trusts* (1871), 7 Ch.App. 170; *Re Fry's Estate, Matthew v. Greenman* (1874), 31 L.T. 8; *Bank of New Zealand v. Simpson*, [1900] A.C. 182; *Charrington & Co. v. Wooder*, [1914] A.C. 71; *Great Western Rail. Co. and Midland Rail. Co. v. Bristol* (1918), 87 L.J.Ch. 414; *Skelton v. Younghouse*, [1942] 1 All E.R. 650.

E

As to evidence for purposes of identification in the construction of wills, see 39 HALSBURY'S LAWS (3rd Edn.) 963 et seq.; and for cases see 44 DIGEST 822 et seq.

F

Cases referred to:

- (1) *Doe d. Chichester v. Oxenden* (1810), 3 Taunt. 147; 128 E.R. 58; 44 Digest 630, 4611.
- (2) *Miller v. Travers* (1832), 8 Bing. 244; 1 Moo. & S. 342; 1 L.J.Ch. 157; 131 E.R. 395; 44 Digest 625, 4559.
- (3) *Langston v. Pole* (1829), Tambl. 119; affirmed sub nom. *Langston v. Langston* (1834), 2 Cl. & Fin. 194; 8 Bli.N.S. 167; 6 E.R. 1128, H.L.; 44 Digest 849, 7032.
- (4) *Doe d. Gord v. Needs* (1836), 2 M. & W. 129; 2 Gale, 245; 6 L.J.Ex. 59; 150 E.R. 698; 44 Digest 639, 4741.
- (5) *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363; 2 H. & N. 54; 9 L.J.Ex. 27; 3 Jur. 955; 151 E.R. 154; 44 Digest 543, 3609.
- (6) *Doe d. Oxenden v. Chichester* (1816), 4 Dow. 65; 3 E.R. 1091; 44 Digest 630, 4612.

G

H

I

Appeal by the plaintiff from a decision of the Court of Common Pleas (BOVILL, C.J., MONTAGUE SMITH and BRETT, JJ.), reported L.R. 5 C.P. 380, upon a Special Case stated in an action of ejectment. The dispute between the parties turned upon the construction of a will, which had also been discussed in the Court of Probate, L.R. 2 P. & D. 8. LORD PENZANCE came to the same conclusion as the judges of the Common Pleas.

The plaintiff, Joseph Grant, was the son of the testator's brother, and the defendant, Joseph Grant, was the son of the testator's wife's brother, and both

A claimed as the testator's "nephew, Joseph Grant" in the will. The question arose of the admissibility of evidence to show the testator's intention.

Quain, Q.C., and *Grove Chapman* for the plaintiff.

Field, Q.C., and *A. Wills* for the defendant.

B **KELLY, C.B.**—In this case we are all of opinion that the judgment of the Court of Common Pleas should be affirmed. The testator has left two legacies in the following terms :

C "I bequeath to my nephew, Joseph Grant, the sum of £500, and all the stock and household effects in the house where I now live; and I devise to my said nephew Joseph Grant, his heirs and assigns, the said house and premises where I now live. . . . I devise all other my real estate, if any, unto my said nephew, Joseph Grant, his heirs and assigns; I bequeath all the residue of my personal estate unto my said nephew, Joseph Grant, absolutely. I appoint my said nephew, Joseph Grant, executor of this my will."

D Then in the codicil he expresses himself thus, after referring to the will :

"I appoint my nephew, James Grant, an executor of my said will in conjunction with my nephew, Joseph Grant. And I devise all estates in me as trustee or mortgagee unto the said Joseph Grant and James Grant, their heirs and assigns, subject to the equities affecting the same."

E Upon this will and codicil an action of ejectment has been brought to recover the land devised, and the action stands thus. The plaintiff is the nephew of the testator, and his name is Joseph Grant; he claims to be the only person who could be so described by the testator. On the other hand it is alleged by the defendant, whose name is also Joseph Grant, that there are two persons to whom the words in the will "my nephew Joseph Grant," equally apply, and
F that he is one of them. That being so, the defendant tenders evidence to show that it was the intention of the testator to make this devise to him and not to the plaintiff. The testator had a brother, and one of the brother's sons was named Joseph, who is the plaintiff in the action; and it appears also that the testator's wife had a brother of the name of Grant, whose son was called Joseph; this Joseph Grant would come under the terms of the will if another construction
G can be put upon the word "nephew" than the limited one of a blood relation.

There is no doubt that this would be a latent ambiguity, and the question for us is whether we ought to admit evidence to show which of the two nephews the testator meant. It is quite possible, without any reference to dictionaries, to say that either of these persons comes within the terms of the will. It is very true, and perhaps more strictly correct, that the word nephew has always meant
H the son of a brother or sister. Now, however, its popular signification applies as much to the son of a wife's brother or sister, as to a nephew in the stricter sense of the word. It is, therefore, necessary to admit the evidence in order to show the intention of the testator. It has been argued that between the testator and these two persons there are different degrees of affinity, and the word nephew cannot apply to both. Cases have been referred to, which show that where the language of a will may have effective operation without any explanation extrinsic evidence ought not to be admitted; as in *Doe d. Chichester v. Oxenden* (1); there the words of the devise were, "I give my estate of Ashton, in the county of Devon"; and evidence was tendered to show that the testator in giving instructions for his will desired to devise "his Ashton estate," by which words he always spoke of his three estates situated respectively at Ashton, Cadbury, and Sandford; but the court held that the will had an effective operation without the evidence, and that under this devise the first only of these three estates
I passed to the devisee. No doubt we cannot consider evidence tendered to show

that a secondary meaning of a word was intended by a testator, when the ordinary and primary meaning is sufficient to give effective operation to the will; and in the case just alluded to, it would have been impossible to conclude that the testator meant to devise three estates under the words he used, without extrinsic evidence of his intention. But this court, being English, is as capable of determining whether, in the popular sense, the word "nephew" has one or two ordinary meanings, as it is of applying opinions and authorities to the interpretation of the will. In WIGRAM'S EXTRINSIC EVIDENCE (4th Edn.), p. 160, para. 184, it appears

"that the decisions have affirmed the doctrine, that where the description in the will of the person or thing intended is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator."

I think it impossible to deny that the word nephew may with legal certainty be applied to either the brother's son or the wife's brother's son.

Therefore, this word in the will, having two meanings, we are obliged to look at the evidence, in order to see to which of the two persons who might be meant the clause applies. And when we have these two persons before us, the question arises what part of the evidence is admissible? I at once pass over paras. 18 and 19 to which objection has been taken by the plaintiff (L.R. 5 C.P. at p. 383). I am far from desiring to throw doubt upon their admissibility, but sitting here as a member of a Court of Appeal, I forbear to make reference unnecessarily to what may or may not be admissible. The preceding paragraphs (paras. 16 and 17) are sufficient to show the testator's intention; their effect is that the defendant was the son of the testator's wife's brother; that upon the death of his father and mother the defendant was taken, fifteen years ago, to live in the testator's house; that since that time, up to the testator's death, the defendant was brought up by him, lived with him, and assisted him in his business. On the other hand the plaintiff, who was the testator's own brother's son, was absolutely unknown to the testator; the brothers had not been on good terms, and the testator did not know how many children were in his brother's family. Under these circumstances we are called upon by the plaintiff to exclude evidence of a character to show conclusively what the testator intended, on the ground only that the two are not equally nephews of the testator. I know of no authority for saying that there must be an exact equality in the applicability of a description before extrinsic evidence is admissible; it becomes admissible when the description applies with legal certainty to more than one person; that being so, it is clear the defendant was intended by the testator to have this disputed property. Beyond all doubt, I am of opinion that the wife's nephew is within the description in the will. The judgment of the court below will be affirmed.

MARTIN, B.—I am of the same opinion. The devise about which we have to give our decision is "to my nephew, Joseph Grant." It turns out that there are two Joseph Grants, one of whom is the son of the testator's brother, the other of his wife's brother. There can be no doubt that the word nephew applies just as well to one of these two as to the other, according to the common observation and meaning of mankind. The rule is clear that when a will contains a patent ambiguity, extrinsic evidence may not be adduced as to the testator's intention. Here there was a latent ambiguity, which was apparent only when evidence showed the existence of two persons who answered the description. This subject is dealt with by STARKIE (LAW OF EVIDENCE (4th Edn.), p. 652). He says:

"An important distinction has already been adverted to between ambiguities which are apparent or patent on the face of an instrument, and those which arise in the application of an instrument of clear and definite meaning to

A doubtful subject-matter. The general rule of law is that the latter species of ambiguity may be removed by means of parol evidence, the maxim being *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*. On the other hand, such evidence is inadmissible to explain an ambiguity apparent on the face of the instrument."

B STARKIE then proceeds to consider the two varieties of patent ambiguity, and afterwards he refers to the general rule, that a latent ambiguity (that is, an ambiguity arising from extrinsic evidence) may be removed by extrinsic evidence. He says (*ibid.* at p. 679):

C "The illustration most usually given of the operation of this rule is that of a description in a will of a devisee, or of an estate, where it turns out that there are two persons or two estates of the same name and description."

D There cannot be a rule more clear, or an example more applicable, than the present case. This is an unambiguous devise on the face of the will, but a latent ambiguity is discovered by the evidence that there are two nephews of the testator called Joseph Grant. As to the extrinsic evidence, which is, therefore, admissible, it turns out that this is not the case, like many other disputes as to wills, of a man claiming what is not specifically left to anybody; but it is an attempt by the plaintiff to obtain what the testator clearly intended should go to somebody else. In my opinion there could not be a more fraudulent claim.

E The testator never heard of the plaintiff's existence, whilst no one could have doubted that the testator meant the defendant to have the property. The facts found in the case are sufficient to show that a more iniquitous action than this could not be brought before a court, and as there is no rule of law which obliges us to find for the plaintiff, we are glad to have the opportunity to frustrate his claim.

F **CHANNELL, B.**—I am clearly of opinion that the judgments of LORD PENZANCE, and of the Court of Common Pleas should be affirmed. As three courts have unanimously agreed on this point, there ought now to be an end of the matter.

G **BLACKBURN, J.**—I also am of opinion that the judgment of the Court of Common Pleas should be affirmed. I entirely agree with MARTIN, B., that there can be no moral doubt of the propriety of the decision; but I come to the conclusion that the plaintiff is not entitled to recover, according to the rules of law. I would point out in a few words what I conceive to be the ground of the plaintiff's claim.

H Counsel for the plaintiff very properly admitted that the evidence set out in the Case, if admissible, was conclusive against him; but he relied upon the fact of the written will leaving the property unambiguously to the testator's nephew Joseph Grant, and he insisted that no evidence was admissible to show that the testator meant his wife's nephew Joseph Grant. The only authority he quoted for that was the second proposition in SIR JAMES WIGRAM's work on EXTRINSIC EVIDENCE. All the rest has no application whatever. That proposition is as follows:

"Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although

they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered." A

Reading that proposition with reference to the Introductory Observations at pp. 7-9, the phrase "evidence of intention" expresses exactly the opinion which I have always entertained upon this subject. SIR JAMES WIGRAM says: B

"The question in expounding a will, is, not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. And extrinsic evidence in aid of the exposition of his will must be admissible or inadmissible with reference to its bearing upon the issue which this question raises." C

The facts disclosed by the evidence are abundantly sufficient to satisfy any rational person that the testator intended to leave the estate to his wife's nephew. But Counsel for the plaintiff insists that it is an inflexible principle of law that, if the words of a will have a strict primary sense, evidence is not admissible to show that the testator meant to use them in any other sense; and that here "nephew," in its strict primary sense, importing the son of a brother or sister, it was not competent to the defendant to show that the testator intended his wife's nephew. Most if not all the cases cited by Counsel where extrinsic evidence was rejected were cases where it was offered for the purpose of showing what was the intention of the testator. In *Miller v. Travers* (2), the devise was of all the testator's freehold estates in the county of Limerick, and in the city and county of the city of Limerick. The testator had no estates in the county of Limerick, but a small estate in the city of Limerick inadequate to meet the charges in the will, and estates in the county of Clare not mentioned in the will. It was held that the devisee could not be allowed to show by parol evidence that the estates in the county of Clare were devised to him in the draft of the will, that the draft was sent to a conveyancer to make certain alterations not affecting the estates in the county of Clare, that he by mistake erased the words "county of Clare," and that the testator, after keeping the altered will by him for some time, executed it without advertent to the alteration as to the county of Clare. There, proof of the mistake would be evidence of intention, and therefore properly rejected. D E F

There is another case in the House of Lords to the same effect, namely, *Langston v. Langston* (3). There the testator devised his manors, etc., to trustees upon trust to convey the same to the use of I. H. L. (his eldest son) for life, with remainder to the use of the second, third, and all and every other the son and sons of the body of I. H. L. severally and successively, etc., in tail male, remainder to the use of the devisor's second and other sons successively. etc. SIR JOHN LEACH, V.-C., after having sent Cases for the opinions of the Courts of Queen's Bench (9 Dow. & Ry. K.B. 298) and Common Pleas (5 Bing. 228), held, in conformity with the opinion of the last-mentioned court, that, from the whole tenor of the will, the first son of I. H. L. was entitled to have an estate-tail in the demised manors, expectant on the death of his father, limited to him in the conveyance directed to be made to the trustees; and that decree was affirmed by the House of Lords. It appeared in the course of the argument of that case in the House of Lords (2 Cl. & Fin. at p. 240) that a mistake had occurred in the engrossment of the will, the copying-clerk having omitted an entire line in the draft; and I have always entertained a notion that the sight of the draft had something to do with the decision. G H I

Doe d. Gord v. Needs (4) introduces another principle, that if, after having got the explanatory evidence, the will would be void for uncertainty, there evidence of intention may be given to solve the ambiguity. *Doe d. Hiscocks*

A v. *Hiscocks* (5) is another example of that. LORD ABINGER, in delivering the judgment of the court, there says (5 M. & W. at p. 368):

B “There is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator’s words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible; but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devises his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what LORD BACON (BACON’S MAXIMS, p. 25) calls ‘an equivocation,’ i.e. the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and, when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.”

D In *Doe d. Hiscocks v. Hiscocks* (5), evidence of intention was rejected because no proper case was made for its reception: in *Doe d. Gord v. Needs* (4) the evidence was admitted, and properly admitted, for the reason already stated. So, in *Doe d. Oxenham v. Chichester* (6), the evidence which was rejected was evidence of intention, in the sense in which that term is used by SIR JAMES WIGRAM. Apart from certain facts set out in the Case (upon which the court below place some reliance) and other facts as to the admissibility of which I entertain some doubt, as at present advised, there was ample explanatory evidence to warrant the judgment of the court below. I, therefore, agree with the rest of the court in thinking that the judgment should be affirmed.

F MELLOR, J.—I am of the same opinion. I am content to rest my judgment upon the passage read by the Lord Chief Baron from SIR JAMES WIGRAM’S excellent treatise, which seems to me to lay down a clear and sound rule of law. As was said by PARKE, B., in *Doe d. Gord v. Needs* (4) (2 M. & W. at p. 140):

G “The evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the devisor understood to be signified by the description which he used in the will.”

H That appears to me to be consistent equally with plain sense and law.

CLEASBY, B., concurred.

Appeal dismissed.

A

HAWKSWORTH v. HAWKSWORTH

[COURT OF APPEAL IN CHANCERY (James and Mellish, L.JJ.), April 25, 1871]

[Reported 6 Ch. App. 539; 40 L.J.Ch. 534; 25 L.T. 115;
35 J.P. 788; 19 W.R. 735]

B

Infant—Religion—Predominance of father's religion—Deceased father—Inquiry by court as to religious convictions of infant.

A Roman Catholic father who had never shown any indifference to his religion married a Protestant and died leaving an only child by her of six months old which had been baptised when one week old in a Roman Catholic church with Roman Catholic sponsors. The child was brought up by the mother in the principles of the Church of England up to the age of eight and a half years.

C

Held: the rule of the court when dealing with a child was to have the strictest regard to the religion of the father and direct that the child be brought up in the father's faith; the court should not try to ascertain the religious convictions of the infant by examination; and, therefore, this child must be brought up according to the Roman Catholic faith.

D

Notes. Section 4 of the Custody of Children Act, 1891, gives the court power as to a child's religious education, and under s. 1 of the Guardianship of Infants Act, 1925, the welfare of the infant is the paramount principle in deciding upbringing, etc., of infants: see 12 HALSBURY'S STATUTES (2nd Edn.) 948, 955 respectively.

E

Explained: *Andrews v. Salt* (1873), 8 Ch. App. 622. Considered: *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch.D. 49; *Re Clarke* (1882), 21 Ch.D. 817. Explained: *Re Nevin*, [1891] 2 Ch. 299. Considered: *Re McGrath*, [1893] 1 Ch. 143; *Re Collins*, [1950] 1 All E.R. 1057. Referred to: *Re Andrews* (1873), L.R. 8 Q.B. 153; *Re Scanlan* (1888), 40 Ch.D. 200; *Re Carroll*, [1931] 1 K.B. 317; *Lough v. Ward*, [1945] 2 All E.R. 338.

F

As to right to determine religion of infant, see 21 HALSBURY'S LAWS (3rd Edn.) 198; and for cases see 28 DIGEST (Repl.) 647 et seq.

Cases referred to:

- (1) *Stourton v. Stourton* (1857), 8 De G.M. & G. 760; 26 L.J.Ch. 354; 29 L.T.O.S. 33; 21 J.P. 261; 3 Jur.N.S. 527; 5 W.R. 418; 44 E.R. 583, L.JJ.; 28 Digest (Repl.) 658, 1542.
- (2) *Re Austin, Austin v. Austin* (1865), 34 Beav. 257; 5 New Rep. 231; 34 L.J.Ch. 192; 11 L.T. 616; 11 Jur.N.S. 101; 13 W.R. 332; on appeal, 4 De G.J. & Sm. 716; 6 New Rep. 189; 34 L.J.Ch. 499; 12 L.T. 440; 29 J.P. 691; 11 Jur.N.S. 536; 13 W.R. 761; 46 E.R. 1098, L.C.; 28 Digest (Repl.) 645, 1379.

G

Also referred to in argument:

- Witty v. Marshall* (1841), 1 Y. & C.Ch. Cas. 68; 5 Jur. 1079; 62 E.R. 794; 28 Digest (Repl.) 645, 1375.
- Davis v. Davis* (1862), 26 J.P. 260; 10 W.R. 245; 28 Digest (Repl.) 646, 1390.
- Hill v. Hill* (1862), 31 L.J.Ch. 505; 6 L.T. 99; 26 J.P. 420; 8 Jur.N.S. 609; 10 W.R. 400; 28 Digest (Repl.) 646, 1391.
- Talbot v. Earl of Shrewsbury, Doyle v. Wright, Talbot v. Berkeley* (1840), 4 My. & Cr. 672; 9 L.J.Ch. 125; 4 Jur. 380; 41 E.R. 259, L.C.; 28 Digest (Repl.) 648, 1412.

H

Appeal by the defendant, the widow and administratrix of her late husband Thomas Hawksworth, against an order of WICKENS, V.-C., of the Lancaster Court of Chancery, that the infant should be brought up in the Roman Catholic faith.

I

Thomas Hawksworth, who died in March, 1863, intestate, had been married three times, and at his death left him surviving three children by his second

A marriage, of whom the plaintiffs were two. No children of his first marriage survived him. The plaintiffs brought an administrator's suit and the widow was made defendant.

The intestate was throughout his life a member of the Roman Catholic church, and his two first wives were of that faith, in which he caused his children to be baptised and educated. His second wife died in 1857, and on July 16, 1861, he married again, namely, to the defendant, Catherine Hawksworth, then Catherine Close, who was at that time and ever since a member and communicant of the Church of England. No arrangement was made between them as to the faith in which children of their marriage should be brought up. The infant, a daughter, Catherine Hawksworth, was born on Sept. 3, 1862, and was baptised when one week old at a Roman Catholic church, with Roman Catholic sponsors. At her father's death she was about six months old, and from that time she had resided with her mother, and had been brought up and educated as a member of the Church of England, and had, from the age of three years, attended the services of that church. The mother deposed that both at school and at home the child had received religious instruction according to the teaching of the Church of England, and that she was a very intelligent, sensitive, and pious child; that the intestate never intimated any wish as to the religious future of the child; that she, the mother, was aware of the father's intention to have the child christened, and who were to be the sponsors; that she never promised her husband to have the child brought up in the Roman Catholic faith, and that she herself had, during her husband's lifetime, been frequently to Roman Catholic, and frequently to Church of England, services, though more frequently to the latter. The property to which the infant Catherine Hawksworth was entitled was of small value, producing about £20 a year only.

The defendant appealed, and sought a declaration that the infant should be trained up as a member of the Church of England.

Dickinson, Q.C., and *H. M. Jackson* for the defendant.

Yates Lee for the infant.

North for the plaintiffs.

JAMES, L.J.—I am of opinion in this case that the vice-chancellor of the County Palatine, whose judgment has been read to us, has arrived at the right conclusion, and that he was also right in the manner in which, according to his own statement in the judgment, he dealt with the infant in the interview he had with her. We do not think it right, on our part, to pursue that investigation into the state of mind of the infant which the vice-chancellor pursued as far as he thought it was right and proper to do.

The child is a child of eight and a half years of age, and was, I think, a child of eight years and two months at the time the controversy arose. The child was a child of a Roman Catholic father, who, shortly before his death, had the child baptised in his own church, with, of course, Roman Catholic sponsors. He had other children, all of whom had been brought up as Roman Catholics. There is not the slightest trace of any indifference on the part of the father to the religious education of his child. There is nothing to show that he would have acquiesced in the child being brought up as a Protestant if he had been living. The rule of this court, a rule of the highest morality, is, that where the court, or where any persons, have the guardianship of a child after the father's death, the court or such persons who have such charge should have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances indeed, it is the duty of any guardian who has the charge of a child, and it is the duty of this court in controlling the conduct of such guardian, to see that the child is brought up in the religious faith of its father, whatever that religious faith may have been. In this case the child has been brought up by a Protestant mother, and has received such

religious impressions as a child fairly intelligent would receive, has received such religious impressions as a Christian mother would produce in the mind of a carefully educated Christian child. The vice-chancellor was of opinion that there was nothing to lead him to suppose that she had been immaturity inducted into those matters of controversy between the two churches, the Roman Catholic church and the English church, which it would be very difficult to suppose a child of eight years of age could have any reasonable appreciation of. Therefore, the child having been brought up as a religious child, a well educated child—having arrived at this age of eight and a half years, when it is important that the future religious belief of the child should be attended to—the question now is whether any other religion can be adopted as the religion of the child than that which was the religion of the father.

I am of opinion that no other religion can be adopted than the religion of the father. There have been cases in which the impressions produced on the child's mind have been considered to be so great, to be so permanent, as to induce the court to fear lest any attempt at altering them would do more harm than good, would result in unsettling the child's religious faith altogether, and so produce a fatal result in that respect; but there never has been any inquiry as to the impressions, or feelings, or wishes, of a child so young as this, and I certainly am myself not disposed to think that it is desirable to go beyond *Stourton v. Stourton* (1), in which that examination was made with regard to a child nine and a half years of age. I think that was carried to the extreme limit, and that we ought not to extend it; and in truth there it appeared upon the examination, with regard to that poor child of nine and a half years old, that that child had had its intellect prematurely precociously excited with the respect to those matters, and had been prematurely instructed by a proselytising mother in those matters of religious difference between the two churches, which it was certainly most dangerous and most improper to endeavour to introduce into the mind of a child of those tender years; and I for one should be loth to do anything which could operate as the slightest encouragement to persons, whether mothers or others, who obtain access to young children, to begin the task of proselytising when children are of such tender age: I consider that they should be left to general religious impressions and education, without being disturbed by those things by which the outside adult world is so much disturbed.

I, therefore, decline myself to endeavour by probing this child's mind to ascertain that the mother has done what indeed there is no suggestion she has done, that is to say, whether she has violated her duty to the child in the endeavour to impress upon that child the peculiar religious differences between one faith and the other. The child is now a child of eight and a half; she has learnt from her mother that which I have no doubt she has learnt properly from her, her duties as a Christian child, and the ordinary habits and practice of devotion and prayer, and there is no danger, there can be no danger, to a child of that kind, than those religious impressions, or those religious practices, can be disturbed by having added to them the peculiar practices and doctrines which she will learn as those of her deceased father, in whose faith she ought to have been brought up, and ought now to be brought up. It appears to me that in affirming the decision of the vice-chancellor on this subject we are warranted almost to the letter by what was done in *Austin v. Austin* (2). SIR JOHN ROMILLY, M.R., there allowed the child, a Catholic child, to remain in the care of the Protestant mother uncontrolled. LORD WESTBURY, L.C., affirmed that decision, and allowed the Catholic child to remain in the care of the Protestant mother uncontrolled, but with a declaration that at a fitting age she should be instructed in the doctrines of the Roman Catholic church. What that fitting age is he has pointed out himself clearly in the judgment, by declaring that, when that child arrived at seven years of age, then a further application should be made to the court touching the guardianship and the religious education of the child.

A This mother has had the child in the same way that the mother in *Austin v. Austin* (2) would have had up to the age of seven, without any interference on the part of the court with its religious instruction. Then, when the time comes for the religious instruction of the child, it is quite clear, whether the application was made when the child was seven or eight, that this court would be bound to carry into effect that declaration of LORD WESTBURY, L.C., that the infant should be brought up and educated, when capable of receiving religious education, as a member of the Roman Catholic church. I think that in this case the child should be brought up and educated, when capable of receiving religious education, as a member of the Roman Catholic church, and that she cannot now have arrived at such an age, or have acquired such religious impressions, as to render it unfit that that should be done. I think that the vice-chancellor was quite right in everything that he has done.

D MELLISH, L.J.—I am of the same opinion. I agree in the conclusion to which the vice-chancellor came, and I entirely agree in the mode in which he conducted the case, and in the judgment which has been read to us which he gave. I also agree that *Stourton v. Stourton* (1) carried the principle of examining into the feelings and the religious opinions of a child really quite as far as the court could go. There is at any rate this distinction between that case and this—that here the child is, I think, nearly a full year younger; and it certainly appears to me that it is very desirable that the rule of law, which regulates the religion in which children of early years should be educated, should be clearly laid down and enforced; and the rule of law unquestionably is, that, unless the interest of a child interferes so as to make it the duty of the court to make some difference, the child is to be educated in the religion of its father.

F Is there really any reason why that rule should be departed from in this case? I quite conceive that there may be a difference of opinion whether the rule of law is really such as it is desirable to have in a case where the mother is of a different religion from the father, and the father has died without giving any express directions as to the religion in which the child is to be brought up. I can quite conceive that many persons might think that it would be for the interest of the child in such cases that the mother should be allowed to educate it in her own religion; but that is not the rule of law. The rule of law is that G the religion of the father is to prevail over the religion of the mother, even in a case where the father has died and the mother survives, and that rule, of course, we cannot alter; and if we were to reverse the decision in this case, we must reverse it on the ground that the child itself would be prejudiced, from its having formed strong religious opinions which ought not to be disturbed. If one were to regard the opinions of a child at these tender years for that H purpose, it appears to me it would be wholly immaterial how the child had acquired them. Even if a child at that age had been stolen from its parents for the sake of proselytism, and had been brought up in a particular religion or in a particular creed, after a certain age I presume beyond all question that the court would not compel a child to be educated in a different religion from that in which it had been brought up. I do not know that it is necessary, I or that it would be right, to lay down precisely what the age must be. It appears to me it must be a very extraordinary case indeed where the opinions of a child of eight and a half years of age can be so formed that it would be really a serious prejudice to the child, on that ground alone, to have it brought up in a different faith; and I cannot help thinking it would give very great encouragement to those who (very often from very pure religious motives) are desirous to educate children in one particular religion, if we were to say that, if people got hold of a child of such tender years as that, by educating it for a longer or for a shorter period of time in their own religion they would secure

what they would consider a great advantage, namely, that the child should be educated in their own religion instead of the religion of the father. A

The vice-chancellor here saw the child and examined it, to see the general state of its education, and inquired into it; and he came to the conclusion, in which I concur, that it would be useless and futile to go on and continue that investigation, and to make a strict inquiry into its knowledge of the matters in difference between the churches, to see whether the child had received a strong impression upon those subjects. B

Appeal dismissed.

NUGENT v. VETZERA C

[VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), June 12, 1866] D

[Reported L.R. 2 Eq. 704; 35 L.J.Ch. 777; 15 L.T. 33;
30 J.P. 820; 12 Jur.N.S. 781; 14 W.R. 960] E

Infant—Guardian—Alien infant resident in England—Guardian appointed by foreign court—Rights of foreign guardian—Jurisdiction to appoint English guardian. F

Infants, Austrian subjects, had been brought to England for education by their mother who had been appointed their guardian by an Austrian court. Some of the property to which the infants were entitled was invested in English funds, and English guardians were appointed by the court on an ex parte application. The English guardians, believing in the superiority of an English education, were anxious to retain the infants in England against the wishes of a foreign guardian who had been appointed after the death of their mother. On a motion by the foreign guardian to discharge the order of the court appointing the English guardians, G

Held: the Austrian court having decided upon the mode in which it wished its subjects to be educated, the English court would not attempt to form a judgment on this point merely on an allegation that an English education would be better for the children than an Austrian one, and, although the court had jurisdiction to appoint a guardian and would continue the appointment already made, this would be wholly without prejudice to the rights of the guardian appointed by the Austrian court, who was to have the sole and exclusive right to the custody and control of the children, with liberty to apply to remove them out of the jurisdiction. H

Notes. Whatever may have been the position before the Guardianship of Infants Act, 1925, the court is always bound to exercise a judgment of its own when dealing with the custody of an infant. Under s. 1, the court is bound to consider, first, the welfare of the infant and to treat his welfare as the paramount consideration. In so doing, due weight ought to be given to any views formed by the courts of the country of which the infant is a national, but the court is bound in every case, without exception, to treat the welfare of its infant as being the first and paramount consideration, whatever orders may have been made by the court of any other country. If there are any observations in *Nugent v. Vetsera* which state or imply a contrary view, these observations ought not to be followed at the present day: per MORTON, J., in *Re B.'s Settlement*, *B. v. B.*, [1940] 1 Ch. 54 at p. 63. I

A Explained: *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch.D. 49. Considered: *Re Willoughby* (1885), 30 Ch.D. 324. Distinguished: *Re B.'s Settlement, B. v. B.*, [1940] Ch. 54. Applied: *Re D.*, [1943] Ch. 305. Considered: *McKee v. McKee*, [1951] 1 All E.R. 942. Referred to: *Re Luck, Walker v. Luck*, [1940] 3 All E.R. 307.

B As to alien infants and alien guardians, see 1 HALSBURY'S LAWS (3rd Edn.) 505, and 7 HALSBURY'S LAWS (3rd Edn.) 127; as to guardianship generally, see 21 HALSBURY'S LAWS (3rd Edn.) 203 et seq.; and for cases see 28 DIGEST (Repl.) 656-657. For the Guardianship of Infants Act, 1925, s. 1, see 12 HALSBURY'S STATUTES (2nd Edn.) 955.

Cases referred to:

C (1) *Stuart v. Marquis of Bute, Stuart v. Moore* (1861), 9 H.L.Cas. 440; 4 L.T. 382; 7 Jur.N.S. 1129; 9 W.R. 722; 11 E.R. 799, H.L.; 28 Digest (Repl.) 708, 2167.
(2) *Dawson v. Jay, Re Dawson* (1854), 3 De G.M. & G. 764; 23 L.T.O.S. 53; 2 W.R. 366; 43 E.R. 300, L.C.; 28 Digest (Repl.) 709, 2180.

D Also referred to in argument:

Johnstone v. Beattie (1843), 10 Cl. & Fin. 42; 1 L.T.O.S. 250; 7 Jur. 1023; 8 E.R. 657, H.L.; 28 Digest (Repl.) 655, 1504.

Pottinger v. Wightman (1817), 3 Mer. 67; 36 E.R. 26; 11 Digest (Repl.) 354, 236.

Hope v. Hope (1854), 4 De G.M. & G. 328; 2 Eq. Rep. 1047; 26 L.J.Ch. 682; 24 L.T. 29; 2 W.R. 698; 43 E.R. 534, L.C.; 28 Digest (Repl.) 707, 2158.

E *Enohin v. Wylie* (1862), 10 H.L.Cas. 1; 31 L.J.Ch. 402; 6 L.T. 263; 8 Jur.N.S. 897; 10 W.R. 467; 11 E.R. 924, H.L.; 11 Digest (Repl.) 394, 508.

Cookney v. Anderson (1863), 1 De G.J. & Sm. 365; 2 New Rep. 140; 32 L.J.Ch. 427; 8 L.T. 295; 9 Jur.N.S. 736; 11 W.R. 628; 46 E.R. 146, L.C.; 11 Digest (Repl.) 373, 382.

F **Motion** by Albin Vetzera (a guardian appointed by an Austrian court), to discharge an order made in the suit on an ex parte application on Dec. 19, 1865, appointing guardians to certain foreign infants now residing in the country, under the following circumstances.

Signor Baltazzi, the father of the infants in question, was an Austrian subject, and carried on the business of a banker at Constantinople. He married an Englishwoman, who was a Protestant, and had ten children by her. He died on June 2, 1860, at Constantinople, intestate, leaving considerable property. Administration of his real and personal estate was granted by the Austrian consular court at Constantinople to the widow, and to Signor Mavrogordato, who were also appointed guardians of the children. On Feb. 28, 1863, the widow of Signor Baltazzi married Mr. Alison, Her Majesty's envoy in Persia. On July 26, 1863, on the voluntary resignation of Signor Mavrogordato, the consular court appointed the defendant Albin Vetzera guardian in his place. In December, 1863, Mrs. Alison died, and by a decree of the consular court, dated Jan. 26, 1864, Mr. Vetzera was appointed sole curator of the intestate's estate, and appointed guardian of the infant Elizabeth Baltazzi, Aristides Baltazzi was appointed guardian of the infant Helen Baltazzi, and Epaminondas de Baltazzi, by a similar decree, was appointed guardian of the other infants. In accordance with the decree, Epaminondas de Baltazzi undertook to reside in Austria, and to take with him, for their education there, all the infant children of the intestate committed to his care; but, at his request, the court decided this need not be done until the expiration of a year from the date of the decree, and the infant children remained under the care of the persons to whom they had previously been intrusted. On June 10, 1865, Signor Epaminondas de Baltazzi resigned his guardianship, and the consular court appointed the defendant Albin Vetzera (who had married Helen Baltazzi in 1860) guardian of the children in

his place. The widow of Baltazzi had brought over some of the children to England, and placed them at English schools, and the eldest daughter had married the plaintiff in the suit, a gentleman living in London. Some differences appear to have arisen between Mr. Vetsera and Mr. and Mrs. Nugent as to the mode of bringing up the children now in England. A portion of the property of Signor Baltazzi had been invested in the English funds, and the bill in the present suit had been filed on behalf of Mr. and Mrs. Nugent for the purpose of making the infants wards of court, and by the order of Dec. 19, 1865, Mr. and Mrs. Nugent and the Countess of Gifford were appointed guardians of the infants then in England. This order it was now sought to discharge.

In his affidavit filed in support of the present motion, the defendant Vetsera stated that he was dissatisfied with the progress made by the children, and he considered it to be his duty as guardian to obey the directions of the Austrian court, and remove the infants from England. The affidavits on behalf of the plaintiffs, in favour of keeping the children in England, were directed to the superiority of an English public school education, and English associations, over education at Constantinople, or even at Vienna. Attention was also called in the affidavits to the strongly expressed and acted upon wish of the mother that the children should be brought up in England.

Sir Roundell Palmer, Q.C., and Cotton for the defendant Albin Vetsera, in support of the motion.

G. M. Giffard, Q.C., and Cecil Russell for the plaintiffs.

PAGE-WOOD, V.-C.—I think, having regard to the principles of international law, and the course that all courts have taken of recognising the proceedings in other countries of regularly constituted tribunals, provided those courts be courts of civilised communities (especially if they are communities with which we are in amicable connection, as we are with the empire of Austria), it is impossible for me to disregard entirely the appointment by an Austrian court of this guardian to these children, who are Austrian subjects, merely because this guardian has adopted the course which those who preceded him in that office adopted, namely, sending their wards for a certain time over here for education in this country, and because, being desirous of revoking that arrangement, he is impeded by an order made by this court appointing other guardians in this country. Without their concurrence, I am desired now to tell the Austrian court that this gentleman so appointed by them cannot recall his wards whom he has sent to this country for the purpose of education. It appears to me it would be fraught with consequences of very serious difficulty, and with consequences seriously contrary to all right and justice, if this court were to say, that when a parent or a guardian (for a guardian is in exactly the same position as a parent) in a foreign country availing himself of the opportunities afforded by this country for education, for a certain period sends his children or his wards over to this country for the purpose of education, that he must do it at the risk of never being able to recall them if this court should be of opinion that an English education is better for them than the education of the foreign country to which they belong. I cannot conceive anything more startling than the notion that if this court allowed some of its wards to go to a foreign country, to France for instance, to be educated, it would be at the risk of being told by the French courts that because in their opinion a French education was better than an English one, or that the Roman Catholic religion was better than the Protestant, therefore, the guardian should not be allowed to recall his ward or the father his child. Surely, such a state of jurisprudence would put an end to all interchange of friendship between civilised communities.

What I have before me is nothing more nor less than that case. For the case before me is this. There is a family of ten Austrian children. They are at

A Constantinople, but are, by virtue of a convention (such as existed between the Porte and various Christian states), subject to Austrian laws, and an Austrian tribunal at Constantinople, from which there is an appeal to the highest tribunal at Vienna. That Austrian tribunal, finding ten children left by the death of their father, who was an Austrian subject, appointed the mother guardian of the ten children. The mother was an Englishwoman and a Protestant, and the father, who appears to have professed the religion of the Greek Catholic church, consented to the children being brought up as belonging to the English Catholic church. The mother brings five of the children over here to England, leaving the other five at Constantinople (one of them being very soon afterwards married there), and they are educated for four or five years in England; but the mother draws her revenues from her husband's estate under an order of the Austrian court. The Austrian consular court supplies what is allowed for maintenance, and it is through that court that an order is made, and that she is able to maintain them here in England, and they continue to be educated here for a certain period of time. Then she marries a second husband, and upon that it becomes necessary to appoint a co-tutor, and the gentleman was appointed who is now co-tutor. The five children continue in England, and no objection is made either by the court or by the co-tutor, to their remaining here. Then upon the mother's death another gentleman of the name of Epaminondas de Baltazzi is appointed co-tutor, and this gentleman is ordered by the court to send the children to Vienna to be educated, and with a direction that they were to be brought up in the faith of their father.

E We have not any detail of the evidence on which the application for that order was made. Certainly the order was not fully complied with, because they were not sent to Vienna nor brought up in the faith of their father, but continued to remain in England. The guardian sent them here, and maintained them by means of the order of maintenance made by the Austrian court, and he continues to maintain them here. The reason of their going to Vienna is apparent; it was not convenient for him to go then, and the court had directed that he should go there personally to superintend their education. Then he resigned his office on July 24, and the present guardian, who married one of the daughters of the family, was appointed sole guardian. He had been appointed guardian of the property during the tutorship of Mr. Epaminondas de Baltazzi, and now he is appointed sole guardian. Having been appointed sole guardian, it appears to me plain that I must take these children as remaining here with his sanction, and without any interference on the part of the Austrian court. They remain here with his sanction, and he, as manager of the property, supplies the funds by which they are maintained under the authority of the Austrian court; and then, at a proper time, he wishes to recall them from England. If there had been no application to this court, nobody could doubt the course which things would have taken; Mr. Vetzera being sole guardian, when he thought the children had been long enough at school in England, would take them, if he thought fit, from England, and they would be removed.

I It so happens that about £150,000 of the infants' property, which seems to have been very large (between £600,000 and £700,000 altogether) is invested in the English funds; and that being the case, the eldest sister of the five children who are here married an English gentleman. She, by our law, has attained her majority, although she is not at present by the Austrian law of full age, and with her husband joins in filing a bill on behalf of the infants, and in their behalf seeking two things, namely, to deal with this £150,000 which is here, and which forms another part of the case, which I will not dwell upon, and also to have guardians appointed to these children. About the very time that she was filing this bill, she was preparing an application to the proper Austrian court for the purpose of being appointed co-guardian with Mr. Vetzera of her brothers and sisters. On May 19, 1865, she caused the application to be made

at Constantinople before the proper tribunal, and at the same time she obtained an order appointing herself and her husband, and other persons of distinction (very proper persons to be appointed), guardians in England, and certainly no suggestion was then made of the difficulty that existed as to the state of things in Austria. The bill was filed on Nov. 2.

Having been appointed guardians they are desirous of retaining them in this country, and continuing the English education they have hitherto had, and now seek to prevent Mr. Vetzera from removing the children so sent over to this country for education, on the plea that the court has appointed guardians here in England, that it has jurisdiction (which is not to be disputed) to appoint guardians over infants subjects of a foreign country, and that having so appointed them the court will after that do no more than look at what is most for the benefit of the infants. For that purpose *Stuart v. Marquis of Bute* (1) is cited in order to show that, if I can be satisfied it is more for the interest of the infants they should remain here than that they should be sent to their own country and be placed under the control of their guardian, I ought to supersede the authority of the guardian and supersede the authority of the court that has appointed him, and which takes charge of the education of its own subjects and directs how it shall be carried out. It does appear to me that there was no doctrine of that kind in any way propounded in *Stuart v. Marquis of Bute* (1), and certainly the other authority referred to of LORD CRANWORTH in the so-called American case (*Dawson v. Jay* (2)), has no bearing on the subject, because LORD CRANWORTH pointedly puts his decision on this ground, that the child turned out to be a British subject, and that therefore he had no authority to compel a subject of this country to expatriate himself. In *Stuart v. Marquis of Bute* (1), Lord Bute was a subject of the United Kingdom of Great Britain; he had large property in England as well as in Scotland; guardians had been appointed in England and Scotland, and it was only a question to which class of guardians he should be assigned, the Crown as *parens patriæ* having full power to decide.

Can that be compared with a case in which the question is whether I, sitting here as a judge in this court, am to direct that the courts of the empire of Austria have or have not rightly decided upon the mode in which they wish their subjects to be educated? It appears to me that the proposition is entirely beyond all reason, and that this court would be exceeding very largely the judicious exercise of the powers which every tribunal has in every independent country over those who may be within its control and jurisdiction, if it attempted to form a judgment as to whether or not it was more expedient that an Austrian subject should be brought up in an English school, on the ground that the status of an Englishman must be better than the status of the subjects of any other country in the world; and further, because they would form (as counsel for the plaintiffs said) friendships, alliances, and attachments in this country from which it is not right to remove them. It is not to be compared to the case which is nearest to it, namely, the case in which a Roman Catholic abandoning his child to Protestant instruction for several years, the court has said, "We will not allow you to remove your child for the purpose of having it subjected to a different course of instruction, because you have put the child in such a position that you have abandoned your rights over him." But that is not the case here. This is a case in which, with regard to international questions of this sort, I see nothing in the facts to induce me to suppose that either this gentleman as the guardian, or that the Austrian courts of justice in exercising their rights over their own subjects, have at all abandoned their rights over their subjects merely because they have allowed them to be educated for four or five years in this country, where they thought they could best be educated. To hold otherwise would be to say that it would be most unwise for any foreign country to send their subjects to this country for one year, for this court would have said virtually

A that the Crown of England, as *parens patriæ*, can better superintend the education of children than the Emperor of Austria, as *parens patriæ*, can see to the education of his people.

B The same authority which we claim here on behalf of the Crown as *parens patriæ* to look after its own subjects, every other independent state claims the right to exercise, and has a right which should not be interfered with except on some grounds which might arise, but which it is not necessary to suggest, and for which reason we would be sorry to lay down anything which would abdicate the authority of this court to appoint guardians. I hold that the court has the power to appoint guardians to these infants for this simple reason, that it may well happen that foreign children may be found here who are not being looked after or cared for, or the like, or who may even be placed in such a position C that they are likely to be despoiled of their property and robbed by those who ought to protect them, and they would come here and ask for protection, and the court would afford protection; and I continue the guardians already appointed by the court, because, while these children are remaining here (not for any reason such as I have been referring to, for they seem to have met with nothing but kindness from their relations on all sides), it may be desirable that they D should have the protection of guardians living within the jurisdiction, and I make the order in the form I do for the express purpose of saving to this gentleman, appointed as he is by the Austrian court—and out of respect to all that authority I save to him—all such power and control as he might have exercised over these children in their own country if they were there, and had not been sent to this country for a temporary purpose. Taking that view of the case, I have E not asked to see the children, because it would be entirely useless for me to see them. I could not be influenced by anything I might hear from them, for I assume for the purpose of this decision that they are most anxious to remain here; but I have no right to deprive the guardian appointed by the foreign court of the control which he has lawfully and properly acquired, never relinquished, and never abandoned, and under which authority alone they have been supported F and maintained here. It appears to me that the order I shall make, providing that this appointment of guardians here should be wholly without prejudice to the rights of this gentleman appointed by the court of Austria, and declaring that he is entitled by being appointed such guardian to the custody and control of the children, and with liberty to apply as to their removal out of the jurisdiction, G will answer every purpose.

MINUTE.—Direct that the order of Dec. 19 appointing the guardians of the infant plaintiffs, and the appointment of guardians thereby made, is to be wholly without prejudice to the rights of M. Vetzera as guardian appointed by the order of the consular court dated July 24, 1865; and that M. Vetzera, as H guardian appointed by that order, is to have the sole and exclusive right to the custody and control of the said infant plaintiffs. Liberty to M. Vetzera to apply as to the removal out of the jurisdiction of the said infant plaintiffs or otherwise, as he may be advised.

EARL AND COUNTESS OF BECTIVE *v.* HODGSON

[HOUSE OF LORDS (Lord Westbury, L.C., Lord Cranworth and Lord Chelmsford),
March 3, 4, 1864]

B

[Reported 10 H.L.Cas. 656; 3 New Rep. 654; 33 L.J.Ch. 601;
10 L.T. 202; 10 Jur.N.S. 373; 12 W.R. 625; 11 E.R. 1181]

Will—Legacy—Executory bequest—Contingent residuary gift—Right to intermediate income—Direction for investment of personal estate in realty.

C

An executory devise of freehold estate does not carry the intermediate income, but this rule does not apply to bequests of personal estate. Consequently, if by will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must, during the period which the law allows for accumulation, be accumulated and added to the principal. The position is the same where there is a direction that the personal estate, or the residue or part of the residue thereof, should be invested in the purchase of real estate.

D

Notes. In the case of wills coming into operation after 1925, a contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except in so far as such income, or any part thereof, may be otherwise expressly disposed of: see Law of Property Act, 1925, s. 175. The decision in this case as regards freehold estate is, therefore, no longer applicable in the case of wills coming into operation after 1925, but the section does not alter the law relating to contingent or executory residuary bequests of personalty, which, subject to the law relating to accumulations, carry the intermediate income in accordance with the decision in this case.

E

F

As to the statutory provisions relating to accumulations, see the Law of Property Act, 1925, ss. 164-166, as amended by the Perpetuities and Accumulations Act, 1964, s. 13.

G

Considered: *Mathews v. Keble* (1867), L.R. 4 Eq. 467. Applied: *Re Eddels' Trusts* (1871), L.R. 11 Eq. 559. Considered: *A.-G. v. Lomas* (1873), 29 L.T. 749. Applied: *Wade-Gery v. Handley* (1876), 3 Ch.D. 374; *Weatherall v. Thornburgh* (1878), 8 Ch.D. 261. Explained: *Re Dumble, Williams v. Murrell* (1883), 23 Ch.D. 360. Considered: *Re Townsend's Estate, Townsend v. Townsend* (1886), 34 Ch.D. 357. Applied: *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30; *Re Taylor, Smart v. Taylor*, [1901] 2 Ch. 134. Considered: *Re Conyngham, Conyngham v. Conyngham*, [1920] 2 Ch. 495. Applied: *Re Mellor, Alvarez v. Dodgson*, [1922] All E.R. Rep. 735. Considered: *Re Gillett's Will Trusts, Barclays Bank, Ltd. v. Gillett*, [1949] 2 All E.R. 893. Applied: *Re Crossley's Settlement Trusts, Chivers v. Crossley*, [1955] 2 All E.R. 801. Referred to: *Holmes v. Prescott* (1864), 3 New Rep. 559; *Chamberlayne v. Brockett* (1872), ante p. 271; *Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309; *Re Rubbins, Gill v. Worrall* (1898), 78 L.T. 218; *Re Stevens, Stevens v. Stevens*, [1915] 1 Ch. 429; *Re Hatfeild, Hatfeild v. Hatfeild*, [1957] 2 All E.R. 261; *Re Wragg, Hollingsworth v. Wragg*, [1959] 2 All E.R. 717; *Re Geering, Gulliver v. Geering*, [1962] 3 All E.R. 1043.

H

I

As to intermediate income on legacies, see 16 HALSBURY'S LAWS (3rd Edn.) 327-329; and for cases see 23 DIGEST (Repl.) 416-417. For the Law of Property Act, 1925, ss. 164-166, 175, see 20 HALSBURY'S STATUTES (2nd Edn.) 771-777, 789.

A Cases referred to :

- (1) *Hopkins v. Hopkins* (1734), Cas. temp. Talb. 44, L.C.; subsequent proceedings (1738), 1 Atk. 581, L.C.; subsequent proceedings (1749), 1 Ves. Sen. 268, L.C.
- (2) *Ackroyd v. Smithson* (1780), 1 Bro. C.C. 503; 28 E.R. 1262; sub nom. *Akeroid v. Smithson*, 2 Dick, 566; 3 P.Wms. 22, n., L.C.; 44 Digest 423, 2536.

B Also referred to in argument :

Duffield v. Duffield (1829), 3 Bli. N.S. 260; 1 Dow. & Cl. 268, 395; 4 E.R. 1334, H.L.; 44 Digest 1038, 8954.

Wills v. Wills (1841), 1 Dr. & War. 439; 44 Digest 749, 6082ii.

Phipps v. Ackers (1835), 3 Cl. & Fin. 702, H.L.

C *Fullerton v. Martin* (1860), 1 Drew. & Sm. 31; 29 L.J.Ch. 469; 1 L.T. 531; 6 Jur.N.S. 265; 8 W.R. 289; 62 E.R. 290; 44 Digest 757, 6158.

Re Drakeley's Estate (1854), 19 Beav. 395.

Humble v. Shore (1847), 7 Hare, 247; 1 Hem. & M. 550, n.; 33 L.J.Ch. 188, n.; 10 Jur.N.S. 308, n.; 12 W.R. 149, n.; 68 E.R. 101; affirmed, 7 Hare, 249, L.C.; 44 Digest 391, 2250.

D *Wyndham v. Wyndham* (1789), 3 Bro. C.C. 58; 29 E.R. 407, L.C.; 44 Digest 293, 1250.

Shawe v. Cunliffe (1792), 4 Bro. C.C. 144; 29 E.R. 822; 44 Digest 293, 1251.

Turton v. Lambarde, *Lambarde v. Turton* (1860), 1 De G.F. & J. 495; 8 W.R. 355; 45 E.R. 453; sub nom. *Turton v. Lambarde*, 29 L.J.Ch. 361; 2 L.T. 38; 6 Jur.N.S. 233, L.J.J.; 44 Digest 1117, 9678.

E

Appeal by the Earl and Countess of Bective from that part of a decision of PAGE-WOOD, V.-C., reported 1 Hem. & M. 376, holding that there was no intestacy in respect of the income of two-thirds of the residuary personal estate of the testator, Alderman Thompson, during the period until some person should be entitled in possession to the income of the real estate directed to be purchased therewith. The appellants maintained that there was such an intestacy; while the respondents maintained that this intermediate income had been effectually disposed of by the will.

F

At the time of making the will, which bears date Mar. 2, 1853, the state of his family was this: his wife Amelia Thompson was living, and the appellant, the Countess of Bective, was his only child. She had married the appellant Lord Bective in the year 1842. The respondent Lord Kenlis was at the date of the will the only son of the Earl and Countess of Bective. He was born in the year 1844. At the date of the will there were living three daughters of the Earl and Countess of Bective.

G

The testator, by his will, after giving certain bequests to his wife Mrs. Thompson, devised his Underley Hall estate and all his lands in Kirkby Lonsdale and Mansergh, in the county of Westmoreland, to the use of Mrs. Thompson for life, and after her decease to the use of Kirkman Daniel Hodgson, Benjamin Buck Greene, Thomas Harrison, Robert Thompson Crawshay, and Thomas Oliver-son, and their heirs during the life of the Countess of Bective, upon trust to pay the income to her for her separate use, without power of anticipation (subject to determination in case the Earl of Bective should become Marquis of Headfort, or in case Lady Bective should let the mansion-house of Underley, or should not occupy the same as therein directed), and the will then proceeded as follows :

I

"And from and immediately after the decease of my said daughter, or such sooner determination of the estate so limited to the said [trustees] and their heirs during the life and in trust for the separate use of my said daughter as aforesaid, to the use of each of the sons lawfully begotten, who shall be born in the lifetime of my said daughter Amelia Countess of Bective (except my grandson the Honourable Thomas Taylour commonly

called Lord Kenlis, the first and only present son of my said daughter, or the eldest son for the time being of my said daughter, being heir or heir apparent of the said Thomas, Earl of Bective) successively, according to seniority of age and priority of birth, and his assigns, for the life of such son, without impeachment of waste. And from and immediately after his decease to the use of the first and other sons successively, according to seniority of age and priority of birth, in tail male."

And in default of such issue with divers remainders over. The testator then devised certain estates at Greyrigg and Lambrigg for the benefit of his nephews William Thompson and Henry Thompson, with an ultimate gift to the same uses as there declared concerning his Underley Hall estate. The will then contained clauses for management of the devised estates during minority, and powers of leasing, sale and exchange.

The testator then gave to his daughter the Countess of Bective the annuity of £1,000 per annum for her separate use without power of anticipation, and after giving sundry legacies the will contained the following disposition of the testator's residuary real and personal estate :

"And as to, for and concerning all the rest and residue of my real estates, and all my chattels real whatsoever and wheresoever not hereinbefore devised or bequeathed, I give, devise and bequeath the same unto the said Kirkman Daniel Hodgson, Benjamin Buck Greene, Thomas Harrison, Robert Thompson Crawshay, and Thomas Oliverson, their heirs, executors and administrators, nevertheless to, for and upon the uses, trusts, intents and purposes, and with, under and subject to the powers, provisoes, directions and declarations hereinbefore limited, expressed, directed and declared to take effect from and after the decease of my said wife and my said daughter Amelia, Countess of Bective, or the sooner determination of the said estate so limited in use to my said trustees during the life of my said daughter as aforesaid, of and concerning my said hereditaments and estates hereinbefore devised situate in the said townships of Kirkby Lonsdale and Mansergh, but so nevertheless as not to increase or multiply charges under the powers of jointuring or charging with portions. Provided always, and I do hereby expressly direct and declare, that no person who shall take an estate tail by purchase in any chattels real respectively hereinbefore devised or bequeathed in and by this my will shall be entitled to the absolute property therein respectively unless and until he or she shall attain the age of twenty-one years or dying under that age, unless he or she shall leave issue of his or her body inheritable to such entail living at his or her decease or born in due time afterwards.

And as for and concerning all the rest and residue of my personal estate and effects whatsoever and wheresoever (subject to the payment of my debts and my funeral and testamentary expenses, and the expenses of proving this my will, and to the payment of my legacies and annuities hereinbefore bequeathed), I do hereby give and bequeath the same unto the said [trustees] in trust that they or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, shall and do with all convenient speed after my decease sell and convert into money all such parts of my said residuary personal estate and effects as shall not, at my decease, consist of money, &c., and shall and do pay and apply the interest, dividends and annual produce of the said residue of my personal estate, stock, funds and securities upon and for such trusts, intents and purposes, and in such manner as the rents and profits of the real estates in the purchase of which the said residue of my personal estate is hereinafter directed to be invested, would be payable and applicable in case such investment had been actually made.

A And I direct that my said trustees, or the survivors or survivor of them,
or the executors or administrators of such survivor, shall and do at such
time or times as they or he shall in their or his discretion think proper,
and of their or his own proper authority, lay out and invest two equal
third parts of the said residue of my said personal estate, stocks, funds and
securities, or the proceeds thereof, in the purchase of freehold or copyhold
B hereditaments of inheritance, free from incumbrances, to be situate in any
county or counties of England or Wales (the counties of Westmoreland and
North Lancashire, and the West Riding of the county of York being preferred,
but without fettering or controlling the discretion of my said trustees or
trustee as aforesaid), and shall and do settle the same, or cause the same
to be settled; to, for and upon the same uses, trusts, intents and purposes,
C and with, under and subject to the same powers, provisoes, directions and
declarations as are hereinbefore limited, expressed, directed and declared
to take effect from and after the decease of my said wife and of my said
daughter Amelia Countess of Bective, or the sooner determination of the
said estate so limited to my said trustees during her life as aforesaid, of
D and concerning my said hereditaments and estates hereinbefore devised,
situate in the said parishes of Kirkby Lonsdale and Mansergh, but so as
not to increase or multiply charges under the power of jointuring or charging
with portions.

And I direct my said trustees, or the survivors or survivor of them, or
the executors or administrators of such survivor, shall and do, at such
time or times as they or he shall in their discretion think proper, and
E of their or his own proper authority, lay out and invest the remaining
third part of the said residue of my personal estate, stock, funds and
securities, or of the proceeds thereof, in the purchase of freehold or copy-
hold hereditaments of inheritance free from incumbrances, to be situate in
any county or counties of England or Wales (the counties of Westmoreland
F and the West Riding of the County of York and northern division of the
county palatine of Lancashire being preferred, but without fettering or control-
ling the discretion of my said trustees or trustee for the time being),
and shall and do settle the same hereditaments, or cause the same to be
settled, to the use of the said Thomas Lord Kenlis, the said first son of
my said daughter Amelia Countess of Bective, and his assigns for his life
G without impeachment of waste, with an immediate remainder to his first
and other sons successively in tail male; and after the failure or determina-
tion of the said uses and estates, then to, for and upon the same uses,
trusts, intents and purposes, and with, under and subject to the same
powers, provisoes, directions and declarations hereinbefore limited, expressed,
directed and declared to take effect from and after the decease of my said
H wife and my said daughter Amelia Countess of Bective or the sooner
determination of the said estate so limited to my said trustees during her life
as aforesaid and of and concerning my said hereditaments and estates here-
inbefore devised situate in the parishes of Kirkby Lonsdale and Mansergh,
but so as not to increase or multiply charges under the power of jointuring
or charging with portions."

I The testator died on Mar. 10, 1854.

The respondents Kirkman Daniel Hodgson and Benjamin Buck Greene
were the surviving executors and trustees of the will. At the testator's death
the respondent Lord Kenlis still was, as he had been at the date of the
will, the only son of the testator's daughter the Countess of Bective, and no
other son had been born since the death of the testator. The Countess of
Bective was the testator's heiress-at-law and sole next of kin, and she and his
widow Amelia Thompson were the only persons entitled to share any part

of his personal estate undisposed of by the will. The said Amelia Thompson died in 1861. The appellant the Earl of Bective was her executor and proved her will. A

In these circumstances two questions arose: one as to the residuary real estate, the other as to the two-thirds of the residuary personal estate. The appellants the Earl and Countess of Bective, in right of the countess as heiress-at-law, claimed as undisposed of the income of the residuary real estate from the death of the testator and during the life of the countess so long as there was not in existence a son of the countess other than an eldest son for the time being. And the earl and countess, in right of the countess as sole next of kin and the earl as executor of the testator's widow, claimed as undisposed of the income during the same period of two-third parts of the residuary personal estate. The surviving executors and trustees filed their bill in the Court of Chancery on Oct. 11, 1862, against the Earl and Countess of Bective and Lord Kenlis, praying that the rights of the parties might be ascertained and declared. PAGE-WOOD, V.-C., by his decree of May 27, 1863, which was duly enrolled, declared that the Countess of Bective, as heiress-at-law, was entitled to the rents and profits of the residuary real estate until such time as the said real estates should vest beneficially in some person entitled thereto in possession under the devise, and declared that the interim income of the testator's chattels real, until the real estates should vest as aforesaid, fell into the general residue of the personal estate; and declared that two-thirds of the residuary personal estate, including the income therefrom, until some person should be entitled in possession under the devise to the income of the real estate directed to be purchased, ought to be laid out in the purchase of such estates, and that there was no intestacy in respect to the income of the said two-third parts of the testator's residuary personal estate. The Earl and Countess of Bective appealed against so much of the decree as declared that there was no intestacy as to the personal estate. B
C
D
E

Roundell Palmer, Q.C., Hobhouse, Q.C., Burrell and F. V. Hawkins for the appellants. F

Sir Hugh Cairns, Q.C., Giffard, Q.C., and Erskine for Lord Kenlis.

Rolt, Q.C., and Wickens for the executors and trustees.

LORD WESTBURY, L.C.—A point has suggested itself to the House which has not been noticed by the Bar. You will observe that the decree directs the income of the two-third parts to be invested until the time when some person shall be entitled in possession under the limitations of the real estate. The effect of that might be to direct accumulation for more than twenty-one years. The accumulation thus in effect directed by the direction to lay out the income from year to year ought, as we at present think, to be limited to the period allowed by law for accumulation, and then if it should so happen that the property does not vest during the twenty-one years, and the countess shall outlive the twenty-one years, then the countess as next of kin will become entitled to the income of the residue directed to be invested. Have you, Mr. Rolt, no objection to that? G
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Rolt, Q.C.—None; it was a mere oversight in drawing up the decree.

Giffard.—In the court below we all thought that it would be so, and it was a mere oversight in drawing up the decree.

LORD WESTBURY, L.C.—Then my noble and learned friend would propose to put in the second line in the decree, after the words, "the third part," the words "until the expiration of the period of twenty-one years from the death of the testator or." Then after the words in the sixth line, "conveyed to the

A uses therein mentioned," put in the words, "which shall first have happened," to take in the two contingencies of the expiration of the period or the coming into esse; and then, after the words "residuary personal estate" add this declaration, "and it is declared that if under the declarations aforesaid the accumulations shall be continued for twenty-one years from the testator's death, then at the expiration of that time the appellant Lady Bective, as the next of kin of the testator, her executors and administrators, will become entitled to the income of two-thirds of the residuary personal estate and the accumulations thereof, until some person shall become entitled to the corpus thereof under the trusts of the will."

Notwithstanding the ingenious and elaborate arguments to which your Lordships I am sure have listened with pleasure, I think you will agree with me that this case is clearly governed by the rules which have been very long established. It is an indisputable rule of law that if freehold estate be given by way of executory devise there is no disposition of the property until that estate arises and becomes vested, and consequently in the meantime the freehold property descends to the heir-at-law. This is the consequence of the great principle or rule of law that the freehold cannot remain in abeyance, but that rule has no application to bequests of personal estate. Consequently, if by a will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must during the period which the law allows for accumulation be accumulated and added to the principal. Subject to the prohibition against accumulation, the ownership both of the principal and interest of the personal estate so bequeathed may remain in suspense until the executory bequest takes effect, provided it be so given as that it must vest within the time allowed by the rule against perpetuities. In the case of personal estate the policy of the law does not require that there should always be a representative of the beneficial ownership. These are cardinal principles in the law of property. The distinction arises wholly and entirely from the operation of the rule of law that the freehold of real estate cannot be permitted to remain in abeyance.

In the present case, therefore, we have a will clearly coming within the principle of the rule; but it is sought to be taken out of the rule because the residue is given in this manner—that the residue of the personal estate is directed to be applied, first, as to two-thirds, in the investment and purchase of real estate; then the real estate so to be bought is given to the uses to which the particular real estate first devised by the will to the testator's widow, with remainder to his daughter the Countess of Bective, with remainder to her second son, are devised. The distinction that is sought to be raised is founded upon this kind of artificial reasoning, that as the residue must be divided you ascertain the residue before you proceed to the division. It is argued that the two-thirds of the residue directed to be invested must, by reason of the direction for a division, be subjected to a different rule, to which the entirety of the residue, if it had not been thus divided, would clearly have been subjected. There is no substantiality in any such distinction. The rules which are applicable to the gift of the residue will be applicable to the gift of the undivided part of the residue. There cannot be a possibility of any distinction being introduced which should prohibit the rule that clearly applies to the whole being applied to the portion or part of the residue.

But then, we have been told that this matter in truth is governed by authority, and that the conclusion at which the learned vice-chancellor arrived is not a conclusion consistent with that authority, and the authority that has been given for the purpose of the argument is *Hopkins v. Hopkins* (1). That was the case of a gift and devise of real estate, an executory limitation and a direction for the residue of the personal estate, to be invested in land to be

settled to the same uses. It was held, and very rightly held, that during the period of time in which the estate is in suspense between the death of the testator and the arising of the executory use, the property which was real property of necessity descended to the heir, and that proceeded upon the rule of law which I have mentioned. But with regard to the personal estate, the decree was governed by the error which then prevailed, and that error was of this nature, holding that personal property directed to be converted into realty was converted for all purposes whatsoever, not only the purposes of the will, but the purposes of ownership in every form and by every title; and accordingly it was held that that conversion would operate for the benefit of the heir, although the heir claims in default of disposition in consequence of there being no directions given by the will, and cannot by any possibility be made to claim under the will.

That prevalent error was not corrected until the decision of *Ackroyd v. Smithson* (2), which decided the point that of necessity involved this as its consequence, that conversion must be considered in all cases to be directed for the purposes of the will, and it is limited by the purposes and exigencies of the will. If, therefore, the real estate be directed to be sold with a view to a disposition made by a will, and that disposition fails, although the real estate has de facto been sold, yet the proceeds will retain the quality of real estate for the purpose of ascertaining the ownership, that is, the title of the heir, although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land be disposed of by the will, and the money is so invested, but the disposition fails; the investment thus made for the purpose of the will has no effect in altering the quality of the property, but the property, even in the shape of land, retains its pristine and original quality of personal estate for the purpose of determining the ownership. These things, in like manner, are simple cardinal principles, with which we are all familiar. The last principle to which I have adverted had not been settled at the time of the decision of *Hopkins v. Hopkins* (1), in 1734, nor was it distinctly recognised until, I think, the year 1780, when *Ackroyd v. Smithson* (2) was decided. *Hopkins v. Hopkins* (1), therefore, belongs to a period of time when a notion prevailed, the fallacy of which has since been ascertained, and it was to no purpose whatever that *Hopkins v. Hopkins* (1) could in that particular be cited, in order to influence the determination of the case now at the Bar.

I am not aware that there was any other ground in the argument which has been addressed to your Lordships except that to which I have already adverted, namely, that the residue from and after the time when it is to be invested, and when it is to be divided, ceases to retain the character of residue so as that the bequest of the principal will carry with it the accessory, namely, the accruing income. For that position there is neither reason nor authority, and I think, therefore, that your Lordships will agree with me that it is one on which we ought not to rest any distinction, nor to depart from the simple rules which are clearly applicable to a gift of the residue, and which cannot be inapplicable to a gift of residue because that residue is given in shares instead of being given in an entire form. I think, for the reasons I have stated, that *Hopkins v. Hopkins* (1) forms no authority, and, therefore, I think that the decision unquestionably is quite right; although in particular detail it may be wrong, because, as has been already observed, the operation of the decree directing the investment of the corpus of the personal estate and of the accruing income thereof until a child shall come into esse who shall become entitled under the limitations of the estate so directed to be purchased, is a provision that may by possibility enure beyond the period of time allowed by the *Thellusson Act* for accumulation. With that formal addition, therefore, made

A to the decree, I trust that your Lordships will be of opinion that the vice-chancellor was quite right, and that the decree ought to be affirmed; but probably your Lordships will think that, as there has been a necessary correction in the decree, and having regard to the nature of the subject, the costs of the appeal may with propriety be allowed to both parties out of the estate.

B **LORD CRANWORTH.**—The Countess of Bective in this case claims certain interim rents and interest as being entitled to them as the next of kin of the testator. If she is so entitled it can only be because this was part of the testator's personal estate; but if it was part of the testator's personal estate, it is in express words given by the will. None of the authorities referred to appear to me to touch this case, because, if it is to be taken that if there had been a direction to invest the whole, that would have necessarily carried the whole interim profits, I can see no sort of distinction arising from the fact that this is to be in certain proportions, namely, two-thirds and one-third. There is one observation which occurs to me as desirable to make, though it is scarcely necessary to add anything to what has fallen from the Lord Chancellor. I think that the reason why the same rule was not applied to real estate depends mainly upon the ground referred to by the Lord Chancellor; but there is another circumstance which is always to be considered, namely, that up to a very recent period there was no such thing as a residuary devise of real estate. A man might say, after giving his estate Whiteacre and his estate Blackacre, "I give the residue of my real estate"; but that was in truth only a specific devise of any other estates he had at the time of making his will, because we know that up to a recent date the real estate could not be given unless it was real estate of which the testator was seised at the time. That may have operated to create the distinction; but whether that did or did not form any part of the grounds of the distinction, it is well established. Here the rule, that the personal estate carries with it all its accretions must prevail, and therefore the consequence is, that the decree of the vice-chancellor appears to me to be perfectly correct, except as to the point which has been mentioned.

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LORD CHELMSFORD.—I agree entirely with the opinion expressed by my two noble and learned friends, and I shall add nothing at all to what they have said.

Decree affirmed with a variation; costs out of the estate.

BAILY v. DE CRESPIGNY

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Lush, Hannen and Hayes, J.J.), November 10, 1868, January 20, 1869]

[Reported L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98;
19 L.T. 681; 33 J.P. 164; 17 W.R. 494]

Landlord and Tenant—Covenant—Breach—Defence—Observance rendered impossible by statute—Covenant by lessor not to build on adjoining property—Compulsory purchase of land subject to covenant—Building by acquiring railway company.

A lease of premises contained a covenant by the lessor that neither he nor his assigns would, during the term, permit to be built any messuage, etc., on adjoining land. This adjoining land was subsequently acquired compulsorily and built on by a railway company under the Lands Clauses Consolidation Act, 1845. In an action by the lessee against the lessor claiming damages for breach of covenant,

Held: in the absence of clear words showing a contrary intention, parties must always be considered as contracting with the law as existing at the time of the contract, so that, if a person covenanted not to do an act or thing which it was lawful to do, and a subsequent Act of Parliament compelled him to do it, the statute repealed the covenant; accordingly, the lessor was not liable, and it was immaterial whether he himself conveyed the land as required by s. 75 of the Lands Clauses Consolidation Act, 1845, or whether the land was vested by the railway company in itself by deed poll under that section, or whether the act of the railway company in building was an act which they were required to do or whether they were merely permitted by statute to do it.

Notes. Distinguished: *Mills v. East London Union* (1872), L.R. 8 C.P. 79. Applied: *Newington Local Board v. Cottingham Local Board* (1879), 12 Ch.D. 725; *Budd-Scott v. Daniell* (1902), 87 L.T. 392. Considered: *Long Eaton Recreation Grounds v. Midland Rail. Co.*, [1902] 2 K.B. 574; *Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214. Applied: *Re Shipton, Anderson and Harrison's Arbitration*, [1915] 3 K.B. 676; *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, [1916-17] All E.R. Rep. 122. Considered: *Blackburn Bobbin Co. v. Allen*, [1918] 1 K.B. 540; *Matthey v. Curling*, [1922] All E.R. Rep. 1. Distinguished: *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*, [1930] All E.R. Rep. 465. Explained: *Oppenheimer v. Minister of Transport*, [1941] 3 All E.R. 485. Considered: *Eyre v. Johnson*, [1946] 1 All E.R. 719. Referred to: *Re Arthur, Arthur v. Wynne* (1880), 14 Ch.D. 603; *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437; *Manchester, Sheffield and Lincolnshire Rail. Co. v. Anderson*, [1898] 2 Ch. 394; *Nickoll and Knight v. Ashton, Edridge & Co.*, [1901] 2 K.B. 126; *Krell v. Henry*, [1900-3] All E.R. Rep. 20; *Re Bradford Tramways and Omnibus Co., Courtney's Case* (1904), 68 J.P. 362; *Grimsdick v. Sweetman*, [1909] 2 K.B. 740; *Enlayde v. Roberts* (1916), 86 L.J.Ch. 149; *Horlock v. Beal*, [1916-17] All E.R. Rep. 81. *Leiston Gas Co., Ltd. v. Leiston-cum-Sizewell U.D.C.*, [1916-17] All E.R. Rep. 329; *Bank Line, Ltd. v. Arthur Capel & Co.*, [1918-19] All E.R. Rep. 504; *Hulton v. Chadwick, Taylor & Co.* (1919), 122 L.T. 66; *Denholm v. Shipping Controller* (1920), 124 L.T. 378; *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252; *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*, [1951] 2 All E.R. 617; *Marten v. Flight Refuelling, Ltd.*, [1961] 2 All E.R. 696.

As to performance of an agreement rendered impossible by statute, see 8 HALSBURY'S LAWS (3rd Edn.) 184-185; as to persons selling under Lands Clauses Acts, see 10 HALSBURY'S LAWS (3rd Edn.) 56; as to compensation by undertakers for

A breach of restrictive covenants, see *ibid.* 159; and for cases, see 31 DIGEST (Repl.) 516 et seq. For the Lands Clauses Consolidation Act, 1845, s. 75, see 3 HALSBURY'S STATUTES (2nd Edn.) 925.

Cases referred to :

- (1) *Canham v. Barry* (1855), 15 C.B. 597; 3 C.L.R. 487; 24 L.J.C.P. 100; 1 Jur.N.S. 402; 139 E.R. 558; 35 Digest (Repl.) 85, 786.
- (2) *Shelley's Case, Wolfe v. Shelley* (1581), 1 Co. Rep. 93; Moore, K.B. 136; 3 Dyer, 373b; 1 And. 69; Jenk. 249; 76 E.R. 199; 38 Digest (Repl.) 838, 506.
- (3) *Berwick-upon-Tweed Corpn. v. Oswald* (1854), 3 E. & B. 653; 1 Jur.N.S. 395; 118 E.R. 1286; sub nom. *Oswald v. Berwick-upon-Tweed Corpn.*, 23 L.J.Q.B. 321; 23 L.T.O.S. 272; 18 J.P. 566; 2 W.R. 707; 2 C.L.R. 909, Ex. Ch.; on appeal (1856), 5 H.L.Cas. 856; 25 L.J.Q.B. 383; 10 E.R. 1139; sub nom. *Dobie v. Berwick-on-Tweed Corpn.*, *Renton v. Same*, *Oswald v. Same*, 27 L.T.O.S. 311; 20 J.P. 531; 2 Jur.N.S. 743; 4 W.R. 738, H.L.; 17 Digest (Repl.) 273, 780.
- (4) *Brewster v. Kidgell (Kitchell)* (1698), Carth. 438; Comb. 466; Holt, K.B. 175, 669; 1 Ld. Raym. 317; 5 Mod. Rep. 368; 12 Mod. Rep. 166; 1 Salk. 198; 2 Salk. 615; 3 Salk. 340; 90 E.R. 853; 31 Digest (Repl.) 324, 4597.
- (5) *Spencer's Case* (1583), 5 Co. Rep. 16 a; 77 E.R. 72; 31 Digest (Repl.) 338, 4716.

Also referred to in argument :

- Wynn v. Shropshire Union Railways and Canal Co.* (1850), 5 Exch. 420; 15 L.T.O.S. 231; 155 E.R. 183; 12 Digest (Repl.) 334, 2586.
- Barker v. Hodgson* (1814), 3 M. & S. 267; 105 E.R. 612; 12 Digest (Repl.) 333, 2579.
- Atkinson v. Ritchie* (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, 2955.
- Doe d. Mitchinson v. Carter* (1798), 8 Term. Rep. 57; 101 E.R. 1264; 31 Digest (Repl.) 409, 5381.
- Crusoe d. Blencowe v. Bugby* (1771), 3 Wils. 234; 2 Wm. Bl. 766; 95 E.R. 1030; 31 Digest (Repl.) 435, 5630.
- Doe d. Goodbehere v. Bevan* (1815), 3 M. & S. 353; 105 E.R. 644; 31 Digest (Repl.) 435, 5617.
- Goring v. Warner* (1724), 2 Eq. Cas. Abr. 100; 22 E.R. 86, L.C.; 31 Digest (Repl.) 435, 5621.
- Roe d. Gregson v. Harrison* (1788), 2 Term. Rep. 425; 100 E.R. 229; 31 Digest (Repl.) 434, 5603.
- Slipper v. Tottenham and Hampstead Junction Rail. Co.* (1867), L.R. 4 Eq. 112; 36 L.J.Ch. 841; 16 L.T. 446; 15 W.R. 861; 31 Digest (Repl.) 434, 5609.

H **Demurrer** by the defendant, a lessor, in an action in which the plaintiff, the lessee, claimed damages for breach of a covenant by the defendant, that he and his assigns would not build on land adjoining the demised premises, the alleged breach being the building of a railway station by a railway company who had compulsorily acquired the adjoining land from the defendant.

I The declaration alleged that the defendant by deed demised, among other hereditaments, to the plaintiff a certain piece or parcel of ground situate in the parish of St. Giles, Camberwell, in the county of Surrey, and all that messuage or tenement, together with other erections and buildings then recently erected and built thereon by the plaintiff for eighty-nine years from Mar. 25, 1840, at a rent thereby reserved. And the defendant thereby, among other things, covenanted with the plaintiff that neither he, the defendant, his heirs, or his assigns, should or would during the said term permit to be built on the ground or paddock fronting the said premises demised by the said deed as aforesaid towards the north any messuage or dwelling-house, coach-house or stable, or other

erection, save and except summer or pleasure houses, in private garden ground, A
and also a church or chapel at the eastern extremity of the said ground or
paddock, and which said ground or paddock was delineated on the ground plot
or plan drawn in the margin of the said deed, and all conditions were fulfilled, etc.,
necessary to entitle the plaintiff to have the said covenant performed and to
maintain this action for the breaches thereof hereinafter mentioned. Yet after B
making the said demise, and during the said term, the defendant permitted to be
built on the said ground or paddock certain erections other than those by the
said deed excepted, to wit, a railway station, with the appurtenances thereof,
including waterclosets and urinals; and the plaintiff says that by reason of these
premises he has been greatly annoyed and damnified in the enjoyment of the
land, messuage, and hereditaments, demised by the said deed as aforesaid, and C
the value of the said land and messuage, and of the said term, has been much
depreciated, and the amenity and comfort of the said land and messuage as
a residence have been deteriorated by the interference with the prospect therefrom
by reason of the erections aforesaid, and by reason of the smoke proceeding from
the chimneys of the said railway station and premises, and otherwise by reason
of the plaintiff's said messuage being overlooked by the windows of the said D
railway station and premises, and otherwise by reason of the premises the plaintiff
has been prevented from having so beneficial a use and occupation of the said
lands as he otherwise would have had, and has been otherwise damnified. The
plaintiff further alleged that after the making of the said deed and demise as
aforesaid, and during the said term thereby granted, the defendant assigned the
said ground or paddock to the London, Brighton, and South Coast Rail. Co., E
and that the said company, after the said assignment and during the said term,
and while they were possessed of the said ground or paddock by virtue of the
said assignment from the defendant, erected and built the said railway station,
with the appurtenances, on the said ground and paddock, contrary to the said
covenant, to the damage of the plaintiff as above-mentioned.

To this the defendant pleaded that before the committing of the alleged F
breaches, and after the making of the said deed, the London, Brighton, and
South Coast Rail. Co. required to take and purchase the said ground or paddock
under the powers given them by the London, Brighton and South Coast (New
Lines) Act, 1862, and for the purposes for which they were by the said Act
empowered to purchase and take the said ground or paddock. And the defendant
says, that the said ground or paddock was land which the said company were G
empowered by the said Act to purchase and take compulsorily for the purposes
of the undertaking authorised by the said Act. And the defendant says, that
after the making of the said deed, and before the committing of the alleged
breaches, the said company did, under and according to the said powers conferred
upon them by the said Act, and by virtue of the said Act compulsorily purchase
and take the said ground or paddock, and for the completion of the said purchase H
the defendant, by deed, did convey the said ground or paddock to the said
company and their successors, which is the assignment in the declaration
mentioned, whereupon and whereby the said company under and by virtue of
the said Act became seised in their demesne as of fee of the said ground or
paddock, and continued so seised until afterwards they the said company being
so seised built on the said ground or paddock the said erections in the declaration I
mentioned, which were erections reasonably required by them for the purposes
of their undertaking authorised by the said Act, which building by the said
company is the building complained of in the said breaches. And the defendant
says that, except as aforesaid, he did not permit the said erections to be built.

To this plea the plaintiff replied that although reasonable, still it was neither
necessary nor compulsory for the railway company to build the said station on
the land in question. The plaintiff also demurred to the plea. The defendant
demurred to the replication, and joined in demurrer.

A The plaintiff's points for argument were that the plea was bad: (i) because it does not show that the covenant was rendered impossible of performance, or that its performance was illegal; (ii) because there is nothing in the Act to repeal the covenant; (iii) because it is not averred that it was necessary or obligatory on the company to build their station at that particular spot; (iv) because the defendant might have performed his covenant by making terms with the railway company, to induce them to build their station elsewhere; (v) because the covenant is absolute that the assigns would not permit any building to be erected; the railway company are admitted by the plea to be the assigns of the defendant, and it is admitted not only that they have permitted buildings to be erected there, but have themselves erected them; (vi) the plaintiff will also contend that the replication is good, for it supplies the averment that as a matter of fact it was not necessary or obligatory upon the company that the company should build their station there, and therefore shows that there is nothing in the Act of Parliament to repeal the defendant's covenant or to make it illegal, that he should answer in damages for the admitted breach thereof, by his assigns having permitted buildings to be erected contrary to his covenant.

D The defendant's points were: (i) that the record shows no breach of covenant on the part of the defendant; (ii) the legal meaning of the word "assigns" in the defendant's covenant, is assigns by act of the party as contradistinguished from assigns by operation of law; the railway company were and are assigns by operation of law, namely, by their Act of Parliament mentioned in the plea, and therefore are not assigns within the defendant's covenant, and he is not liable under his covenant for their acts; (iii) that the building by a railway company under the powers of an Act of Parliament, obtained after the defendant's covenant was made, was not a building upon the said ground or paddock within the meaning of the defendant's said covenant; (iv) that the defendant's covenant related only to his own acts or to the acts of those who should come in under him by his own voluntary conveyance or assignment, and not to the acts of strangers to whom he was compelled by Act of Parliament to convey and assign the premises.

F. M. White (with him *Wollerstan*) for the plaintiff.

Raymond for the defendant.

Cur. adv. vult.

G Jan. 20, 1869. **HANNEN, J.**, read the following judgment of the court.—This was an action on a covenant contained in a lease of certain premises granted by the defendant to the plaintiff in 1840, for a term of eighty-nine years, whereby the defendant covenanted that neither he nor his assigns should or would during the term permit to be built any messuage, etc., on a paddock fronting the demised premises. The breaches alleged are (i) that the defendant during the term permitted a railway station to be built on the paddock; (ii) that the defendant assigned the paddock to the London and Brighton Rail. Co., who erected the railway station on the paddock. To this declaration the defendant pleaded that after the making of the deed the railway company required to take the said paddock, under powers given them by the London, Brighton and South Coast (New Lines) Act, 1862, for purposes for which they were by the said Act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorised by the Act, and that the company, under the powers conferred, did compulsorily purchase and take the paddock, and that the assignment by defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorised by the Act, and that, except as aforesaid, the defendant did not permit

the said erections to be built. The plaintiff demurred to this plea and also replied that the erections, though reasonable, were not necessary or compulsory for the company to build. To this plea there was a demurrer.

It must be taken on these pleadings that the assignment by the defendant to the railway company was altogether made under the requirements of the Act of Parliament, and without any stipulation introduced into the conveyance by the vendor or the purchaser which would alter its character as an act done by the defendant in obedience to the command of the legislature. Section 75 of the Lands Clauses Consolidation Act, 1845, is imperative that the owner of lands shall, on the performance of the conditions imposed on the company, when required so to do, duly convey the lands to the promoters, or as they should direct, and in default thereof it shall be lawful for the promoters to execute a deed poll, declaring the fact of such default having been made, and thereupon all the estate and interest in such land (capable of being sold and conveyed by such owner) shall vest absolutely in the promoters of the undertaking. We think no distinction can be drawn between the case of an owner of lands who does that which it is his duty to do, namely, convey to the company, and one who, by refusing to convey, obliges the company to obtain a title to the lands by the execution of a deed poll. In the one case as in the other the transfer of the title is compelled by the legislature, and it cannot be supposed that it was intended that the landowner who acts solely in obedience to the law should be in a worse position than one who refuses compliance. In either case the railway company must be regarded as the assignee of the land, not by the voluntary act of the former owner but by compulsion of law.

The substantial question, therefore, raised is whether the defendant is discharged from his covenant by the subsequent Act of Parliament, which put it out of his power to perform it. We are of opinion that he is so discharged, on the principle expressed in the maxim *lex non cogit ad impossibilia*.

We have first to consider what is the covenant which the parties have entered into. There can be no doubt that a man may, by an absolute contract, bind himself to perform things which subsequently become impossible, or to pay damage for their non-performance, and this construction is to be put upon an unqualified undertaking where the event which causes the impossibility was, or might have been, anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is, in some cases, said to excuse the breach of a contract. This is, in fact, an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by MAULE, J., in *Canham v. Barry* (1) (15 C.B. at p. 619), a man might by apt words bind himself that it shall rain tomorrow or that he will pay damages. This is the explanation of the case put by LORD COKE, in *Shelley's Case* (2) (1 Co. Rep. at p. 98):

"If a lessee covenants to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged of his covenant,"

because it was thought that the covenant was intended to relate only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy: see *SHEPHERD'S TOUCHSTONE*, 173. It is on this principle that it has been held that an impossibility arising from an act of the legislature subsequent to the contract, discharges the contractor from liability.

A Again to quote an observation of MAULE, J., in *Berwick-upon-Tweed Corp'n. v. Oswald* (3) (3 E. & B. at p. 665), there is nothing

B "to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law . . . but people in general must always be considered as contracting with the law as existing at the time of the contract . . . and the words showing a contrary intention ought to be pretty clear to rebut that presumption."

C To hold a man liable by words in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made. This is the principle of that which was laid down in *Brewster v. Kitchell* (4) (1 Salk. at p. 198), that,

D "where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant: So if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed."

E To apply the foregoing observations to the present case. The defendant has covenanted that his assigns "shall not build." The word "assigns" is a term of well known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act, of law: *Spencer's Case* (5). The defendant when he contracted used the general word "assigns," knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature by compelling him to part with his land to the railway company, whom he could not bind by any stipulation, as he could not an assignee chosen by himself, has created a new kind of assign such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee, is to make an entirely new contract for the parties. On the other hand, to confine the word assigns to those who take by the voluntary act of the assignor would not as was suggested in argument, limit the operation of the covenant to his immediate grantee, because all those who take from the first assignee do so in consequence of the original voluntary act of the assignor, and it was his own fault that he assigned at all, or that he did not in the original conveyance guard against the acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties to be collected from their words interpreted according to their known ordinary signification.

H It was indeed contended on the argument by the plaintiff's counsel, that the defendant would not be liable for all acts of the railway company as he would have been for the acts of any other assign; but it was contended that the defendant was relieved from liability on his covenant as to those acts only which the company was required by the Act of Parliament to do, and not as to those which the company was merely empowered to do. We do not think that this distinction is well founded. The rule laid down in *Brewster v. Kitchell* (4) rests upon the ground that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling; but the covenantor in this case is equally disabled from preventing the railway company from doing those things which it is empowered to do as those which it is required to do. Why then should there be a difference in the liability of the covenantor with respect to the one and the other?

But assuming that the imposing on the defendant by the legislature of assigns whom he could not control would, without more, free him from the engagements which he entered into with reference to assigns whom he could control, it remains necessary to deal with the argument that though the company was empowered to take the lands free from the restrictions upon building, this was only on condition of paying full compensation for what they got, and that it must be supposed that the defendant obtained from the company not only the value of the land as he held it, encumbered with a covenant not to build, but also what was deemed a fair consideration for the right to build. It appears to be assumed in this argument that the difference between the price of the land encumbered with the covenant not to build, and the price of it, freed from that covenant, would be the amount of damages to be paid by the defendant to the plaintiff in the present action. But that is not so. The plaintiff, if entitled to recover at all in this action, would be entitled to the damage he had sustained by the breach of the covenant, even if those damages should exceed the whole value of the land taken. The argument in favour of the plaintiff to be derived from the enactments relating to compensation is no doubt this. The legislature had, in express terms, or by necessary implication from its language, given to persons in the defendant's situation a remedy over against the railway company in respect of acts done by the company: this would here indicate that the legislature did not intend that the defendant should be freed from liability on his covenant, although he was disabled from performing it. But we cannot find in the railway Acts any express or implied enactment to this effect. It has already been pointed out that there is no relation between the compensation which the defendant would be entitled to for his land and the damages for which he would be liable to the plaintiff. How would it be possible for the defendant to lay before the compensation jury evidence of the extent of his liability on such a covenant as that under consideration? How could he, in an inquiry to which the plaintiff was no party, offer evidence of the injury which the plaintiff might by any possibility sustain in the uncertain event of the company erecting a station or other building on the land taken? Further, if the covenant of the defendant is to be considered as broken by the act of the railway company, so as to entitle the plaintiff to damages, it might be deemed to carry with it the other consequences of a breach of contract. Thus, if the relation of the plaintiff and the defendant in this case had been reversed, and the covenant not to build on land adjoining the demised premises had been entered into by a lessee with the usual proviso for re-entry in the event of breach of any covenant, the lessee would have been liable to forfeiture of his whole interest by reason of an act over which he had no control; and the railway company would be liable, if the plaintiff's contention be correct, to pay by way of compensation for a piece of land taken, the whole value of the interest of the lessee in the adjoining estate.

The solution of the case appears to be this. The plaintiff is one of a numerous class of persons injured by the construction of a railway for whom the legislature has not provided compensation. This may be illustrated by reference to the special damage claimed in the declaration. It is there alleged that the amenity and comfort of the land demised has been diminished by reason of the prospect therefrom being interfered with, and by being overlooked by the windows of the station with the appurtenances, including water-closets and urinals. These are heads of damage which railway companies are not, in ordinary circumstances, bound to give compensation for, but for which the defendant would be liable in an action on his covenant. We do not think that it was the intention of the legislature to make a railway company liable for such damages in the exceptional case of a person in the position of the plaintiff having taken a covenant from the lessor in the terms of that under consideration; or that if such had been the intention of the legislature so peculiar a head of compensation as that now suggested, namely, for liability to damages for breach of collateral covenants

A resulting from the taking of land, would have been left to be conjectured from the vague language of the Lands Clauses Consolidation Act, 1845. For these reasons we are of opinion that our judgment ought to be for the defendant.

Judgment for defendant.

B

C

BRITISH COLUMBIA AND VANCOUVER'S ISLAND SPAR,
LUMBER AND SAW MILL CO., LTD. v. NETTLESHIP

[COURT OF COMMON PLEAS (BOVILL, C.J., WILLES AND BYLES, JJ.), June 2, 1868]

[Reported L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604;
16 W.R. 1046]

D

Carriage of Goods—Loss in transit—Damages—Measure—Knowledge by carrier of use to which article lost to be put.

Mere knowledge on the part of the carrier of the use to which an article carried by him is to be put cannot per se increase his liability in the event of the article being lost. There must have been knowledge under such circumstances as would raise the presumption that he intended to make himself liable for special consequences of the loss.

E

The plaintiffs delivered to the defendant, a shipowner, machinery to be carried from the United Kingdom to Vancouver Island. The machinery was to be used in a mill which was to be erected in Vancouver Island for the purpose of the plaintiff's sawmilling business. A box containing part of the machinery, without which the rest could not be worked, was lost in transit. The defendant knew that the box contained a part of the machinery and for what purpose the machinery was to be used by the plaintiffs, but he did not know that the part was essential to the working of the machinery. The missing part could not be replaced for eleven months and during that time the machinery could not be worked and the mill was idle.

F

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Held: the defendant's liability for the loss was limited to the actual value of the box of machinery together with interest thereon until payment, and he was not liable for any loss sustained by the plaintiffs by reason of their not being able to work the machinery.

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Notes. Considered: *The Northumbria* (1869), L.R. 3 A. & E. 6; *Simon v. Pawson and Leafs, Ltd.* (1932), 148 L.T. 154. Distinguished: *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997. Referred to: *Horne v. Midland Rail. Co.* (1873), L.R. 8 C.P. 131; *Wagstaff v. Anderson* (1879), 4 C.P.D. 283; *Searamanga, Manoussin v. English* (1895), 1 Com. Cas. 99; *The Crathic*, [1897] P. 178; *Bostock v. Nicholson*, [1904] 1 K.B. 725; *Slater v. Hoyle and Smith*, [1920] 2 K.B. 11; *Montevideo Gas and Dry Dock Co. v. Clan Line Steamers* (1921), 37 T.L.R. 544; *Patrick v. Russo-British Grain Export Co.*, [1927] All E.R. Rep. 692; *The Edison*, [1933] All E.R. Rep. 144; *The Arpad*, [1934] All E.R. Rep. 326; *Monarch Steamship Co. v. A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1.

As to measure of damages and remoteness, see 4 HALSBURY'S LAWS (3rd Edn.) 151-154, 11 *ibid.*, 225 et seq., 241 et seq., 274-277; and for cases see 8 DIGEST (Repl.) 150 et seq. As to shipowners' responsibility, see 35 HALSBURY'S LAWS (3rd Edn.) 391, 477, 478; and for cases see 41 DIGEST 465, 556.

Case referred to:

(1) *The Columbus* (1849), 3 Wm. Rob. 158; 6 Notes of Cases, 671; 13 Jur. 285; 166 E.R. 922; 41 Digest 804, 6642.

Also referred to in argument :

- Cory v. Thames Ironworks Co.* (1868), L.R. 3 Q.B. 181; 37 L.J.Q.B. 68; 17 L.T. 495; 16 W.R. 456; 17 Digest (Repl.) 117, 287. A
- Ogle v. Lord Vane* (1868), L.R. 3 Q.B. 272; 9 B. & S. 182; 37 L.J.Q.B. 77; 16 W.R. 463, Ex. Ch.; 12 Digest (Repl.) 401, 3109.
- Wood v. Bell* (1856), 6 E. & B. 355; 25 L.J.Q.B. 321; 2 Jur.N.S. 664; 4 W.R. 602; 119 E.R. 897, Ex. Ch.; 39 Digest 499, 1162. B
- Fletcher v. Tayleur* (1855), 17 C.B. 21; 25 L.J.C.P. 65; 26 L.T.O.S. 60; 139 E.R. 973; 39 Digest 672, 2589.
- Russell v. Viscount of Sa Da Bandiera* (1862), 13 C.B.N.S. 149; 32 L.J.C.P. 68; 7 L.T. 804; 9 Jur.N.S. 718; 143 E.R. 59; 7 Digest (Repl.) 355, 77.
- Rice v. Barendale* (1861), 7 H. & N. 96; 30 L.J.Ex. 371; 158 E.R. 407; 8 Digest (Repl.) 150, 949. C
- Smeed v. Ford* (1859), 1 E. & E. 602; 28 L.J.Q.B. 178; 32 L.T.O.S. 314; 5 Jur.N.S. 291; 7 W.R. 266; 120 E.R. 1035; 17 Digest (Repl.) 128, 360.
- Wilson v. Lancashire and Yorkshire Rail. Co.* (1861), 9 C.B.N.S. 632; 30 L.J.C.P. 232; 3 L.T. 859; 7 Jur.N.S. 862; 9 W.R. 635; 142 E.R. 248; 17 Digest (Repl.) 181, 767. D
- O'Hanlan v. Great Western Rail. Co.* (1865), 6 B. & S. 484; 6 New Rep. 147; 34 L.J.Q.B. 154; 12 L.T. 490; 30 J.P. 710; 11 Jur.N.S. 797; 13 W.R. 741; 122 E.R. 1274; 8 Digest (Repl.) 150, 950.
- Gee v. Lancashire and Yorkshire Rail. Co.* (1860), 6 H. & N. 211; 30 L.J.Ex. 11; 3 L.T. 328; 6 Jur.N.S. 1118; 9 W.R. 103; 158 E.R. 87; 8 Digest (Repl.) 152, 960. E
- Hadley v. Barendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 8 Digest (Repl.) 151, 956.

Rule Nisi to determine the amount of damages due to the plaintiffs in an action against the defendant shipowner for loss of a box containing part of the plaintiffs' machinery while in transit on the defendant's ship. F

The plaintiffs delivered to the master of the ship *Kent*, of which the defendant was part owner, certain machinery which was intended for a mill which was to be erected and used in British Columbia for the purpose of the plaintiffs' business in cutting and sawing timber. The machinery was packed in boxes. On the voyage from Glasgow to Vancouver Island, British Columbia, a box containing part of the machinery was lost. The machinery could not be worked without this part. G

The master of the ship, who was also part owner, knew when he agreed to carry the goods referred to in the charter-party and bill of lading sued upon, the purposes for which the machinery was intended, and knew that the missing box contained part of the machinery. The defendant had no personal knowledge as to the contents of the box, or the nature of the cargo, save that it consisted of machinery. The actual cost to the plaintiffs of replacing the missing machinery, including freight to British Columbia, was £353 17s. 9d. The time occupied in replacing it was between eleven and twelve months, during which time the whole of the mill of which the missing portion formed part was stopped and useless. H

The plaintiffs claimed the actual costs of replacing the machinery, and also a rental, or use and occupation value of the whole of the machinery, or of such part as the court might think them entitled to, from the time the missing portion ought to have been delivered until it was replaced. I

The action was tried by BOVILL, C.J., when a verdict was entered for the plaintiffs for the full amount claimed, the damages to be assessed by an arbitrator. It was agreed that it should be left to the arbitrator to ascertain the amounts in accordance with the opinion of the court, and also to ascertain any other

A amounts or facts which, according to the opinion of the court, might be decided to be material in determining the amount of damages.

A rule nisi was obtained to reduce the damages to £353 17s. 9d., the actual cost of replacing the machinery.

C. Pollock, Q.C., and Watkin Williams showed cause.

B *Sir George Honyman, Q.C., and Lanyon* in support of the rule.

BOVILL, C.J.—The parties are agreed that the verdict shall stand for £353 17s. 9d., the value of the goods lost and their freight. The difficulty has arisen in respect of the delay for the period of eleven months before the contents of the lost box could be replaced. Are the plaintiffs entitled to recover damages for this delay, and if they are, to what amount? It is to be observed that the defendant is a carrier and not a manufacturer; he is liable only for the damages which may be taken to have been contemplated at the time when the contract was entered into, to which he assented. The defendant admits that he is liable for the mere value of the articles lost, but denies any further liability. It is to be remembered that the failure to pay a debt gives the creditor no right of action for damages resulting therefrom, although he may thereby become a bankrupt. A reasonable compensation is all that can be allowed, and here interest on the value of the articles lost may be recovered. The plaintiffs claim as damages the losses which they allege arise from their inability to work the mill; it is to be taken that the defendant knew that machinery would be sent out; but he did not know that the box lost contained an essential portion of it; it cannot be assumed that he even knew what it contained. Upon the statement submitted to us it does not appear whether the mill could be erected immediately on the arrival of the machinery. If all the cargo had been lost by perils of the sea, the plaintiff would not have been able to make any profit thereby, even if the defendant had not lost the box. Damages resulting from fraud are estimated in a different manner. My brother **WILLES** has handed to me a case in point, *The Columbus* (1), in which **DR. LUSHINGTON** held that where a vessel was sunk in a collision, and compensation was awarded to the full value of her as for a total loss, the plaintiff will not be entitled to recover anything in the nature of demurrage for the loss of the employment of his vessel or his own earnings in consequence of the collision. This rule, which exists even when a wrongful act has been committed, applies much more strongly when a contract has been broken. Compensation must be given to the plaintiffs by allowing interest on the value of the contents of the lost box.

WILLES, J.—I am of the same opinion. There have been various cases on this subject, and in one a man was going to be married, and his horse cast a shoe, and the smith having injured the horse in putting it on the man was late, and the lady refused to marry him; and it was held that the smith was liable for the damages resulting from the loss of the marriage. We shall fall into a like absurdity unless we restrict the liability of a man for breach of contract within proper limits.

The rule of the civil law, as stated by **POTHIER, TRAITE DES OBLIGATIONS**, Part 1, c. 2, s. 164, was that, in the case of a contract relating to a chattel, the damages for breach of it could not, in the absence of fraud, be greater than double the value of the chattel. What, then, is the rule here? I think that an extraordinary loss suffered by one of two contracting parties ought not to be borne by the other unless the former has given some consideration for the greater risk. We ought not to fix on the shipowner a liability for all the supposed profit which the mill would have made if it had been built and had turned out successful. If such a proposal had been made to the shipowner when the contract was entered into as the basis of his liability, it must

be presumed that he would not have made himself liable for such a claim unless he received an additional amount of freight. Mere knowledge on the part of the carrier of the use to which the article is to be put cannot, per se, increase his liability; there must have been knowledge under such circumstances as would raise the presumption that he intended to make himself liable for the special consequences, and that the person contracting with him believed, and had reasonable grounds for believing, that he intended to undertake such liability, and unless there was a special payment it would be very difficult to get a jury to come to such a conclusion. A B

In the present case there are several circumstances which seem to show that there was no such knowledge as could lead to the conclusion which is contended for by the plaintiffs. The defendants did not know that the whole machinery would be useless without the part, or that it could not be replaced in British Columbia, and if he did know it it does not appear that it was brought to his knowledge under circumstances which would lead to the conclusion that it was intended he should be liable for all the consequences of the loss. Suppose he had learned it from a stranger, that would not make him liable. Knowledge of itself is not sufficient; it can only be used as evidence of fraud or of an undertaking forming the basis of the contract. Assuming that the defendant was liable, how would the damages be ascertained? It would be a matter of the wildest speculation. The mill was to be built and the trade to be set up for the first time, and it would be impossible to calculate the profits even approximately. The court would be making a guess to fix consequences upon the carrier which the law declines to fix upon a wrongdoer. Suppose the case of a barrister going out to practise in Calcutta with the expectation of large profits. Though the carrier might know what his intention was, it cannot be contended that he could recover all the supposed profits he would have made if the ship had not been detained on her voyage by the default of the carrier. I agree that the plaintiff cannot recover more than the value of the goods lost, with interest up to the time of payment. C D E F

BYLES, J.—I am of the same opinion. I have nothing to add, and it is only necessary to say that it is unnecessary for the case to go before the arbitrator.

Rule discharged.

A BURROWS v. MARCH GAS AND COKE CO.

[COURT OF EXCHEQUER CHAMBER (Sir Alexander Cockburn, C.J., Willes, Blackburn, Mellor, Brett and Grove, JJ.), February 1, 1872]

[Reported L.R. 7 Exch. 96; 41 L.J.Ex. 46; 26 L.T. 318;
36 J.P. 517; 20 W.R. 493]

Negligence—Independent contractor—Gas—Escape from service pipe laid by company—Defective pipe—Explosion caused by negligent act of independent contractor—Damage to plaintiff's property—Liability of gas company.

The defendants, a gas company, contracted to supply the plaintiff with a proper and sufficient service pipe for the conveyance of gas from their main in the street outside to the gas meter inside the plaintiff's shop. The service pipe, which was laid by the defendants' workmen, was defective, there was an escape of gas, and an employee of a gasfitter who was employed by the plaintiff to lay pipes in other parts of the shop heard the escaping gas and tried to find the source of the escape. He had a lighted candle in his hand and an explosion occurred, as a result of which the plaintiff's shop and stock were damaged.

Held: by supplying a defective service pipe and not testing the pipe before the supply of gas was turned on the defendants were in breach of their contract to supply the plaintiff with a proper and sufficient service pipe, and the negligence of the employee of the gasfitter did not relieve them from liability.

Notes. Considered: *Clark v. Chambers* (1878), 3 Q.B.D. 327. Distinguished: *Henderson v. Newcastle and Gateshead Gas Co.* (1893), 37 Sol. Jo. 403. Referred to: *Lilley v. Doubleday*, [1881-5] All E.R. Rep. 406; *Re Polemis and Furness, Withy*, [1921] All E.R. Rep. 40.

As to dual causation and intervening acts by third party, see 11 HALSBURY'S LAWS (3rd Edn.) 281, and *ibid.*, vol. 28, p. 32; and for cases, see 36 DIGEST (Repl.) 33 et seq. As to liability of gas company, see 18 HALSBURY'S LAWS (3rd Edn.) 350 et seq.; and for cases see 25 DIGEST (Repl.) 538 et seq.

Cases referred to in argument:

Thorogood v. Bryan, Cattlin v. Hills (1849), 8 C.B. 115; 18 L.J.C.P. 336; 13 L.T.O.S. 284; 137 E.R. 452; 36 Digest (Repl.) 193, 1020.

Wilson v. Newport Dock Co. (1866), L.R. 1 Exch. 177; 4 H. & C. 232; 35 L.J.Ex. 97; 14 L.T. 230; 12 Jur.N.S. 233; 14 W.R. 558; 2 Mar. L.C. 313; 36 Digest (Repl.) 127, 640.

Harrison v. Great Northern Rail. Co. (1864), 3 H. & C. 231; 5 New Rep. 93; 33 L.J.Ex. 266; 10 L.T. 621; 10 Jur.N.S. 992; 12 W.R. 1081; 159 E.R. 518; 36 Digest (Repl.) 44, 236.

Appeal by the defendants from a decision of the Court of Exchequer (KELLY, C.B., MARTIN, CHANNELL and PIGOTT, BB.), reported L.R. 5 Exch. 67, discharging a rule to enter a verdict for them in an action to recover damages as a compensation for loss and injury accruing to the plaintiff from an explosion of gas on his premises, alleged to have occurred in consequence of the breach by the defendants of their agreement to supply gas to the plaintiff's premises by negligently laying down a defective service-pipe on his premises.

The plaintiff employed a gasfitter named Bates to make certain alterations in the gas fittings in his shop. In the course of the alterations it became necessary for a new service-pipe, leading from the defendants' main in the public street to the gas meter inside the plaintiff's premises, to be laid down. The plaintiff was informed by Bates that it was customary for the defendants themselves to supply and fix all service-pipes, and the plaintiff therefore requested

Bates to arrange with the defendants for the supply of such new pipe. Bates did so, and the defendants thereupon supplied the new service-pipe which was laid down by a workman of their own. The pipe supplied by the defendants was defective, and had a leak in it. The gas had been turned on from the main before the new service-pipe had been tested by the defendants and an escape of gas through the leak was the consequence. A workman in the employ of Bates, named Sharrott, who was working in another part of the plaintiff's premises at the time, heard the escape of gas and went into the shop where the escape was taking place in order to see where it came from. He had a lighted candle in his hand and an explosion of gas took place the moment he entered the shop.

The plaintiff brought an action against the defendants alleging that the service-pipes were not "well and sufficiently" laid and the defendants did not supply "proper and sufficient communication and proper and sufficient service pipes" in accordance with the agreement whereby the defendants agreed to supply gas to the plaintiff's premises and the defendants were negligent in laying a defective pipe. The jury found, first, that the escape of gas was owing to a defect in the service-pipe existing therein at the time it was supplied by the defendants; and, secondly, that there was negligence on the part of the gasfitter's workman in taking a lighted candle into the shop to discover the leak in the pipe; and they also further expressed an opinion that the defendants were negligent in not sending their own foreman to test the new "pipes. A verdict was thereupon entered for the plaintiff for £400, and a rule was afterwards, in Michaelmas Term, 1869, obtained by the defendants, pursuant to leave reserved, to set that verdict aside, and to enter a verdict for the defendants, on the ground that upon the evidence it ought to have been entered for them, or to reduce the damages to a nominal sum on the ground that the damage resulted from the negligence of Bates, the gasfitter's workman, and not from the defendants' breach of contract. After argument, in Hilary Term, 1870, that rule was discharged by the COURT OF EXCHEQUER, and from that decision the defendants appealed.

O'Malley, Q.C. (with him *W. Graham*) for the defendants.

Holker, Q.C. (with him *C. G. Merewether*) for the plaintiff.

COCKBURN, C.J.—I am of opinion that our judgment in this case should be for the plaintiff, and that the judgment of the court below should be affirmed. It is true that the action is not an action of tort for negligence, in the ordinary sense of that word, but is an action against the defendants for the alleged breach of a contract, whereby they promised and agreed to supply the plaintiff with a proper and sufficient communication and service-pipe, from their mains in the street to a gas meter within the plaintiff's premises, for the purpose of providing him with a supply of gas. The plaintiff alleges in his declaration that the defendants broke their contract; and the question is whether they have broken it or not? That they did break it there can, I think, be no possible doubt. I cannot adopt the view which has been submitted to us on their behalf by Mr. O'Malley, that their contract was to supply a pipe which might or might not be defective, until it was tested, and which should be capable of being made good and sufficient after it had been tested. This contract was to supply a service-pipe which should be reasonably sufficient for the purpose for which it was to be used, which purpose was, of course, well known to the defendants at the time. It turned out that they failed to supply such a pipe. The service-pipe which they did supply was, unfortunately, defective, and had a leak in it which had escaped observation, and the consequence, the probable, it may be said, the natural and necessary consequence of their supplying such a defective pipe was that there was an escape of gas through the leak. Then a further natural and necessary consequence of the escape of gas into a room or

A any confined space was that there should be first, an accumulation of gas, and, secondly, in all probability, an accident by ignition and explosion of the accumulated gas, unless its escape should be discovered in time, and proper means be taken to prevent the accident.

Under those circumstances, what is the answer of the defendants to the plaintiff's action? It is, as I gather from the contention on the part of the learned counsel who has argued the case on their behalf, that they are not liable in this action, because the explosion which caused the injury to the plaintiff's premises was caused by the gasfitter, employed by the plaintiff to test the pipe and the gas fittings, negligently using a lighted candle whilst he was endeavouring to ascertain whether the pipe was or was not defective, and where the leak existed through which it was evident the gas was escaping. This man, being on the premises, became at once aware that an escape of gas had occurred and was still going on, and very properly he at once proceeded to ascertain from what part of the pipes or fittings this escape was taking place. Unfortunately, and improvidently, he took with him a lighted candle, which it is said he had in his hand at the moment, and, stooping down over the pipe, the accumulated gas ignited and exploded. The jury found, and we must take their finding to be right, that this man was guilty of negligence in so acting; and the defendants would ask the court to hold that the negligence of this man, the servant of Bates, the gasfitter who was employed by the plaintiff, is the negligence of the plaintiff himself. But I cannot assent to that proposition. Neither Bates, nor this man, his servant, was in the plaintiff's employment. Bates was an independent tradesman, and a proper person to be employed for the purpose, and, as such, was employed by the plaintiff to do work with respect to the gas fittings and apparatus on his premises, which fittings and apparatus, so far at least as the service pipe is concerned, had been supplied by the gas company, the defendants. Where a person employs a proper tradesman to furnish him with materials, upon which materials another and independent person is employed to do some work, I do not think that, because the second person employed is guilty of some negligence which causes an accident from which injury results, the first person employed is therefore to escape from liability for the consequences of his conduct, in having committed a breach of contract in supplying materials which turned out not to be such as he had contracted to supply.

But there is another way in which the case may be put, and another ground on which, as it appears to me, the defendants are liable, namely, that, having supplied this service-pipe for the purpose of effecting a communication between their own mains and the gas meter upon the plaintiff's premises, they ought, before turning on their gas into the new pipe in the plaintiff's house, in quantities sufficient to work mischief in case of an escape, to have taken care to see that the entire apparatus, of which this service-pipe supplied by them formed so important a part, was in a safe and suitable condition. This they did not do, and were thus guilty of a double default, and a two-fold negligence: First, in supplying a defective pipe; and secondly, in turning on and sending the gas through it in quantities sufficiently large to produce this catastrophe, without having previously taken care to see or ascertain that the pipes and fittings were all right. There was, therefore, a breach of contract on their part, and although that alone would not, apart from the negligence of a third person, have brought about the accident which occurred, yet, inasmuch as an escape of gas is necessarily dangerous, and the escape was the necessary consequence of the defective pipe which the defendants supplied, I am of opinion that the action is maintainable, and that the plaintiff is entitled to recover substantial damages.

WILLES, J.—I am of the same opinion.

BLACKBURN, J.—I am of the same opinion. It is unnecessary to go further in the present case than to say that there was, at all events, ample evidence for the jury that the defendants supplied a service-pipe to the plaintiff, and that, in so supplying it, they were bound to supply one reasonably fit and capable to retain the gas within it; and that, as the jury have found that the pipe was defective, it is clear that it was not fit. It being the most natural and probable consequence of letting gas pass through a defective pipe that an escape and an explosion of gas should take place, the jury were well warranted in finding, as they did, that the explosion and damage resulting therefrom were the necessary consequence of the defective pipe supplied by the defendants.

MELLOR, BRETT and GROVE, JJ., concurred.

Appeal dismissed.

WARD AND OTHERS v. M'CORKILL AND OTHERS.
THE MINNEHAHA

[PRIVY COUNCIL (Lord Kingsdown, Sir Edward Ryan and Sir John Coleridge), July 12, 15, 16, August 2, 1861]

[Reported 15 Moo. P.C.C. 133; 1 Lush. 335; 30 L.J.P.M. & A. 211;
4 L.T. 810; 7 Jur.N.S. 1257; 9 W.R. 925; 1 Mar.L.C. 111;
167 E.R. 149]

Shipping—Salvage—Warranty by tug—Competent skill and equipment—Vis major—Unforeseen difficulties—Additional remuneration for additional services—Obedience to pilot's orders.

When a steamboat engages to tow a vessel for a certain remuneration from one point to another she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards, but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill and such a crew, tackle, and equipment as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by vis major, by accidents which were not contemplated and may render the fulfilment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task or the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if in the discharge of this task, by sudden violence of wind and waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor instead of being restricted to the sum stipulated to be paid for mere towage. If, however, the danger from which the ship has been rescued is attributable to the fault of the tug, if the tug, whether by wilful misconduct, negligence, or the want of that reasonable skill or equipment which are implied in the towage contract, has occasioned or materially contributed to the danger, she can have no claim to salvage.

A It is a general rule that where tugs come to the assistance of a vessel in charge of a pilot to render salvage services, they must obey the orders of the pilot.

Notes. Applied: *The Annapolis*, *The Golden Light*, *The H.M. Hayes* (1861), Lush. 455; *General Steam Navigation Co. v. De Jersey*, *The Edward Hawkins* (1862), 15 Moo. P.C.C. 486; *Thé Lady Egidia* (1862), Lush. 513. Followed: *The White Star* (1866), L.R. 1 A. & E. 68. Considered: *The I. C. Potter* (1870), L.R. 3 A. & E. 292; *Yeo v. Tatam*, *The Orient* (1871), L.R. 3 P.C. 696. Followed: *The Robert Dixon* (1879), 5 P.D. 54; *The Westbourne* (1889), 58 L.J.P. 78. Applied: *The Liverpool*, [1893] P. 154. Considered: *The Duc d'Aumale*, [1900-3] All E.R. Rep. 510; *The Aboukir* (1905), 21 T.L.R. 200; *The Leon Blum*, [1915] P. 90. Referred to: *Grindley v. Stevens*, *The Falkland and Navigator* (1863), 1 Moo. P.C.C.N.S. 379; *The Philadelphia* (1863), Brown. & Lush. 28; *The Waverley* (1871), L.R. 3 A. & E. 369; *The West Cock*, [1911] P. 208; *The Maréchal Suchet*, [1911] P. 1; *The Refrigerant*, [1925] P. 130; *The Kafiristan*, [1937] 3 All E.R. 747; *The Troilus*, [1950] 1 All E.R. 103.

As to towage, see 35 HALSBURY'S LAWS (3rd Edn.) 589-592; as to salvage, see generally *ibid.* 731 et seq.; as to conversion of towage into salvage, see *ibid.* 742-743; and for cases see 41 DIGEST 674-685, 834-838.

D Case referred to:

(1) *Bland v. Ross*, *The Julia* (1861), 14 Moo. P.C.C. 210; Lush. 224; 15 E.R. 284, P.C.; 41 Digest 681, 5114.

E **Appeal** by the owners, masters and crews of the steam-tugs the *Storm King* and the *United Kingdom* from a sentence of the High Court of Admiralty holding that they were not entitled to salvage for services rendered to the *Minnehaha* on Mar. 6, 1861.

A cause of salvage was brought by the *United Kingdom* and the *Storm King*, two steam-tugs of Liverpool, against the *Minnehaha*, a vessel of 1127 tons register, of Londonderry, which was in peril when entering the Mersey by the Crosby channel, with a cargo of cotton from New Orleans. She was anchored at the place in question when the two tugs approached her in quest of employment. The *United Kingdom* was engaged for thirty guineas to tow the vessel into the Liverpool docks, and the *Storm King's* services were declined, but the latter tug continued near the spot. A hawser of the vessel was made fast to the *United Kingdom*, but after the anchor was hove up, owing to the violent weather, the hawser broke. The vessel then drifted about and knocked violently on Taylor's Bank. The vessel then hailed the *Storm King* to assist, and the two tugs used great exertions during the increasing gale to keep the vessel from the danger of getting into Formby Hole; and ultimately, with the assistance of a third tug, she was taken into Liverpool. Both tugs were much strained and injured in the service, and they made claims for salvage. The learned Judge of the Admiralty Court, Dr. LUSHINGTON, pronounced against the claim for salvage; whereupon the present appeal was brought.

Brett, Q.C., and *Pritchard* for the appellants.

Dr. Phillimore, Q.C., and *Aspinall* for the respondents.

I **LORD KINGSDOWN.**—This is an appeal from a decision of the Court of Admiralty respecting a claim of salvage brought by the owners of the steam-tugs *Storm King* and *United Kingdom* against the owners of the ship *Minnehaha* and of the cargo on board of her. The steam-tugs both belong to the port of Liverpool. The *Minnehaha* is a ship of 1127 tons register, and belongs to the port of Londonderry. On Mar. 11, 1861, she was bound from New Orleans to Liverpool, with a valuable cargo of cotton and other goods, and on entering the mouth of the river Mersey, had brought up at anchor in Crosby Channel, being unable to continue her voyage to Liverpool by reason of the tide, which was

ebbing, and the wind which was blowing strong south-west down the river. It is not in doubt that at this time the ship was lying in safety; but she was anxious to get into dock at Liverpool, which was distant about seven miles, without waiting for a turn of the tide, and about nine o'clock in the morning she made an agreement with the master of the *United Kingdom* to tow her to Liverpool and dock her for thirty guineas. The *Storm King*, at the same time, offered her services for the same purpose. Her assistance was considered by the master of the *Minnehaha* as unnecessary, and he rejected it; but the *Storm King* still remained near for the purpose of rendering assistance if it should be required. The hawser of the *Minnehaha* was made fast to the *United Kingdom*, and the *Minnehaha* was towed up to her anchor, which was hove up, but soon afterwards the hawser broke. How this interval was employed, and what was the cause of the breaking of the hawser, are two important points in dispute in this case. After the hawser broke, the ship, of course, drifted: how far she drifted is another important question. She let go both her anchors, but it is said by the appellants that they were unable to hold her. The *United Kingdom*, on being relieved from the weight of the *Minnehaha* by the breaking of the hawser, of course started a-head, but she returned and got her own hawser on board the *Minnehaha*, which was attached to the ship. The *Storm King* again came up and offered her services, which were accepted. Another steam-tug, called the *Enterprise*, joined the other two, and finally the three boats, the tide having changed, and the flood-tide set in, towed the ship to Liverpool.

Claims for salvage were made by the three boats. Those of the first two boats, the *United Kingdom* and the *Storm King*, are alone before us. The cases of these two boats differ in some material points. We will deal first with that of the *United Kingdom*. In her case it is admitted that a contract for towage was first entered into, but she alleges that by reason of the danger in which, as she insists, the *Minnehaha* was afterwards placed, and from which she was rescued by the exertions of the *United Kingdom*, the original towage contract was superseded and she became entitled to claim salvage. On the part of the *Minnehaha* it is contended that she never was in any danger at all, but that if she was, such danger was occasioned entirely by the fault of the *United Kingdom*, and that the *United Kingdom* cannot, therefore, be entitled to any reward for rescuing her from such danger; that, in fact, the *United Kingdom*, performed none but towage services, and performed those services very ill.

So much discussion has taken place at the Bar on the rules of law by which this case is to be governed, and so much doubt has been supposed to exist with respect to principles which we had imagined to be entirely settled, that it may be advisable for us, before considering the evidence, to state our view of the law. When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so, and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle and equipments as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by vis major, by accidents which were not contemplated and which may render the fulfilment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being

A restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered as in addition to, or in substitution for the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it.

B In the cases on this subject, the towage contract is generally spoken of as superseded by the right to salvage. It is not disputed that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles. The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, C but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a different rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate. To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself, to take the ship D to her destination; or, on the other, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate, would be alike inconsistent with the public interests. The rule, as it is established, guards against both inconveniences, and provides, at the same time, for the safety of the ship and the just remuneration of the tug. The rule has been long settled; parties enter into towage E contracts on the faith of it; and we should be extremely sorry that any doubt should be supposed to exist upon it. It is said that it has never been brought before us for decision. If so, considering how often the rule has been acted upon, the necessary inference is, that it has never been made the subject of appeal because it has been universally acquiesced in. Whether the circumstances in F each particular case are sufficient to turn towage into salvage must often be a subject of great doubt, as it is in the present case.

There is, however, one point upon which their Lordships can entertain no doubt, and upon which they are surprised that any doubt should have been thrown at the bar. If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct, or G by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She never can be permitted to profit by her own wrong or default. When it is remembered how much in all cases—how entirely in many H cases—a ship in tow is at the mercy of the tug; how easily, with the knowledge which the crews of such boats usually have of the waters on which they ply, they may place a ship in their charge in great real or apparent peril; how difficult of detection such a crime must be, and how strong the temptation to commit it, their Lordships are of opinion that such cases require to be watched with the closest attention, and not without some degree of jealousy.

I In applying these principles to the claim of the *United Kingdom*, the first point for consideration is whether the *Minnehaha* was ever in danger, and if she were, whether the court below was warranted in finding, as it has found, that the danger was owing to the misconduct of the tug. There seems to be no reason for thinking that there was any danger till the hawser broke; but when it broke, and the ship drifted, the question is whether she did not then drift into a position in which she was in very serious danger. She was originally at anchor, in the fair way of the Crosby Channel. It appears by the charts that this fair way is bordered on the north-north-east by a long ridge or shoal, beyond which lie two sand-banks, called "Taylor's Bank" and "Formby Bank," and between these

banks there is a narrow channel. The two banks shelve down towards each other, but in the midway there is a space of comparatively deep water called "Formby Hole." This channel is stated to be about a mile and a-half long, was not more than from twenty to thirty fathoms across, from shallow to shallow. That a large ship, in rough weather, getting into Formby Hole must be in great danger, appears to their Lordships to be clear from circumstances of which even landmen can form an opinion; that the fact is so, is proved by many witnesses in this case; and the nautical gentlemen who assist their Lordships entertain no doubt whatever that, in the then state of the wind and tide, the *Minnehaha*, which drew nineteen feet of water, if she got into Formby Hole, was in imminent danger of wreck. If, on the other hand, she did not drift across the ridge to which we have referred, but only, as is alleged by the respondents, touched the ridge with her stern, there was no such danger as would justify a demand by the *United Kingdom* for anything beyond her stipulated hire.

The question then is one of evidence. The pilot, who ought to be well acquainted with the facts, no doubt, swears that the ship was never in Formby Hole. But upon this point their Lordships think that the evidence of the appellants is quite conclusive. Not only is there the evidence of the claimants themselves, but there is the testimony of two wholly independent witnesses, the masters of the two lightships; and the evidence of the master of the ship rather confirms their statement. In addition to this evidence, there is a fact proved which is decisive. The ship when she drifted let go both her anchors. The ship would of course drift beyond the anchors. If, therefore, the anchors were beyond the ridge, the ship would be still further beyond the ridge. When she was towed away by the three tugs she slipped her anchors, and after she got to Liverpool sent an anchor-boat to get them up and bring them to her. It is proved by Rodriguez the master, and Hudson the mate of the anchor-boat, that these anchors were found beyond the ridge inside of Taylor's Bank, or, in other words, on the bank forming one side of Formby Hole.

Their Lordships being satisfied that the ship was in danger, the next question is whether she was brought into such danger by the misconduct, wilful or otherwise, of the *United Kingdom*. The first charge brought against her by the respondents is one which, if properly alleged and proved, would make it fit that those who were guilty of it, instead of appearing in the Court of Admiralty as claimants, should stand in the dock at Liverpool as criminals. It is nothing less than this: that the persons in charge of the steam-tug, with a view to their own advantage, purposely put in peril this valuable ship and cargo, and the lives of those on board of her. It is contended that after the tug was attached to the ship she purposely forbore to exert her full power for the performance of her contract, and that when she was compelled to go a-head she did so with a sudden jerk, with the intention of breaking the ship's hawser, and succeeded in doing so. No such charge is contained in the answer of the respondents, and their Lordships agree with the learned judge below, that if it were intended to be made, it should have been brought forward in the pleadings. There does not appear to be anything in the evidence to warrant such an accusation, and it is unnecessary to consider it further.

It is then contended by the appellants that as to negligence or error in judgment, there is no case brought forward by the answer, and that the court is precluded from inquiry into that matter. We are not prepared to go that length. The claimants must prove their own case; they must show that the ship being in danger from no fault of theirs, they performed services which were not covered by their towage contract, and did all they could to prevent the danger. If entitled to salvage at all, the amount must in a great degree depend on the promptness and efficiency of the services rendered. If the court below was right in holding that after the hawser broke the *United Kingdom* did not come up so soon as she might reasonably have done, and ought to have done, in order

A to repair the mischief, then we think it was properly decided that she could make no claim to salvage. It has been found by the Trinity Masters, in the court below, that the hawser was broken by the erroneous conduct of the alleged salvors, and that the *United Kingdom* and *Storm King* might have rescued the ship from her position at an earlier period without risk to their own safety. If these findings are warranted by the evidence, the judgment is right. But we have great difficulty in arriving at these conclusions. As to the first, and much the most important point, the breaking of the hawser. It is found to have been done "by the erroneous conduct of the alleged salvors." But the alleged salvors were the *United Kingdom* and *Storm King*; and what could the *Storm King* possibly have to do with it?

C Again, we have looked in vain for any sufficient evidence to justify the finding with respect to the *United Kingdom*. Our nautical assessors are of opinion that the accident was caused by the failure of the hawser, which was unequal to bear the heavy strain to which it was exposed between a large ship drawing nineteen feet of water and a powerful tug pulling her against a strong tide and squalls of wind in a rough sea. The other complaint made against the *United Kingdom* is, that she ought to have come up sooner after the hawser broke, and that she might have done so by backing under the bows of the *Minnehaha*. Upon this point there is no distinct finding in the court below. It is sworn by the witnesses for the *United Kingdom* that by reason of the hawser of the *Minnehaha* having broken close to the ship and dragging in the water, it was impossible for the tug, in the position in which the ship was, to have backed under the bows of the ship. Our nautical assistants are of that opinion; they think that the course which the tug actually adopted was that which in the circumstances of the case was proper; and that, considering what was to be done in getting out their own large hawser to supply the place of that which was broken, there was no want of promptitude or nautical skill on the part of the crew of the *United Kingdom*. Though we think that the appellants must make out their own case, and that the objections to which we have referred are open to the respondents, still in F judging of the effects of evidence we must have regard to the degree of notice which was given by the respondents to the appellants of the nature of the objections on which it was intended to rely. Certainly the defence here is so framed that, although it puts in issue all the facts alleged by the appellants, it does not give them notice of any particular point to which their evidence G should be especially directed. Notwithstanding the strong impression which we entertain as to the result of the evidence, yet if it depended in any material degree upon the demeanour of the witnesses and the mode in which their evidence was given, and if it appeared to us that the finding of the Trinity Masters was consistent with what we hold to be certain facts, we should, probably, yield to the authority of the court below, however it might differ from the advice H given to us. But there are in the finding below conclusions which we are satisfied are mistaken. It is found among other things that the ship never was in danger, a fact with respect to which we can entertain no doubt. Thus much as to the case of the *United Kingdom*.

I The case of the *Storm King* is different. After her services had been rejected she came up again after the *Minnehaha* was in Formby Hole, and when the danger had occurred. If in this state of things she made a towage contract she can claim nothing more; for nothing supervened afterwards to change the character of the services. And with respect to her, the main question is whether she entered into any engagement or not. Upon this point we do not observe any finding in the court below. It seems to have been assumed that whether there was a contract or not, yet if the ship was rescued from danger without any default of the tug she would be entitled to claim salvage, notwithstanding the contract. We cannot, for the reasons already assigned, agree in this view, for the danger, whatever it was, had been incurred before the contract had been

entered into. The evidence as to the contract is quite contradictory; it is for the respondents to prove such an agreement, and we think they have failed to establish it. There appears to be, as it was likely there should be in the confusion which prevailed, some misunderstanding. The utmost extent to which the evidence could be carried (and we do not think it goes even to that length) appears to us to be that the *Storm King* insisted on being placed on the same terms as the *United Kingdom*, i.e., not receiving thirty guineas, but being on the same footing as the *United Kingdom*, whatever that might be.

Then, were any services rendered by these vessels which could be properly termed salvage? On the assumption that the ship was in the position in which we have no doubt that she was, we think such services were rendered. The attempt to tow the ship across the shoal at first failed. It became necessary so to manœuvre that, till the tide turned, the ship should be kept from getting on the bank, and this, we are advised, required considerable skill, and we think it is made out that, in endeavouring to tug the ship out of the shoal, the *United Kingdom* suffered some injury by straining.

With respect to the alleged disobedience by the *Storm King* of the orders of the pilot as to the mode in which he should attach himself to the ship, the general rule is not disputed, that the directions of the pilot are to be obeyed. But in such cases there may well be a difference of opinion as to the most advisable mode of proceeding, and we think, upon the result of the evidence, that the pilot acquiesced in the course taken by the tug. Upon the whole, notwithstanding the extreme reluctance which we always feel, for the reasons assigned in *The Julia* (1), to disturb judgments in the Admiralty Court upon grounds such as those upon which we must proceed in this case, we feel ourselves compelled to advise her Majesty to reverse the present sentence as to both vessels. We are satisfied that the breaking of the ship's hawser placed the ship in danger; that when she drifted over the shoal into Formby Hole, and as long as she lay there, such danger continued; that she was rescued from such danger by the exertions of the steam-tugs; that as to the *United Kingdom*, the towage contract was so far suspended as to entitle her to a larger remuneration under the head of salvage; and that as to the *Storm King*, no towage contract at a fixed price is established. We think the evidence does not warrant a finding that, as to both or either of the steam-tugs, there was any default in the performance of their duty.

With respect to the amount of remuneration, we are in considerable difficulty. The *United Kingdom* was by no means relieved from the performance of her towage contract by the accident of the rope breaking. She was bound to do what she could to repair the mischief by throwing on board her own hawser, and, when circumstances made it possible, to tow the ship to Liverpool. And, in estimating the amount to be awarded, we think this must be taken into account. We shall advise her Majesty to award a sum of £300 to the *United Kingdom*, to cover all her claims. As to the *Storm King*, the services which she rendered were little more than towage, and we think they will be amply remunerated by a sum of £50. Both vessels must have their costs, both in the court below and in this court. We think that the circumstances of this case made it fit to be tried in a superior court.

Appeal allowed.

A

PEASE v. GLOAHEC. THE MARIE JOSEPH

[PRIVY COUNCIL (Lord Chelmsford, L.C., Knight-Bruce and Turner, L.JJ., Sir John Coleridge and Sir Edward Vaughan Williams), June 15, 16, 23, August 4, 1866]

B

[Reported L.R. 1 P.C. 219; Brown. & Lush. 449; 3 Moo. P.C.C. N.S. 556; 35 L.J.P.C. 66; 15 L.T. 6; 12 Jur.N.S. 677; 15 W.R. 201; 2 Mar. L.C. 394]

C

Shipping—Carriage of goods by sea—Stoppage in transitu—Bill of lading obtained by consignee by fraud—Transfer to bona fide transferee—Right of consignor to stop goods.

D

M. shipped goods which he had sold to S., and sent a bill of lading (which was endorsed to order and assigns) to his agent A., who endorsed the same to S., taking the acceptance of S. in consideration thereof, and also getting back the bill of lading from S. to hold as security till the vessel arrived. S. by fraud got back the bill of lading from A., and endorsed the same to P. for value and without notice of the fraud, after which M. claimed to stop the goods in transitu.

E

Held: a bill of lading for the delivery of goods to order and assigns was a negotiable instrument, which, by endorsement and delivery, passed the property in the goods to the endorsee, subject only to the right of an unpaid vendor to stop them in transitu; the endorsee might deprive the vendor of this right by endorsing the bill of lading to a third person for valuable consideration, although the goods had not been paid for, or bills had been given for their price which were certain to be dishonoured, provided the endorsee for value had acted bona fide and without notice; accordingly, as S. had transferred the bill of lading for value to an innocent transferee, the right of M. to stop the goods was gone, and it made no difference that S. had got back the bill of lading from M.'s agents by fraud.

F

Notes. For sales under a voidable title, see now the Sale of Goods Act, 1893, s. 23.

Referred to: *The Argentina* (1867), L.R. 1 A. & E. 370; *Cundy v. Lindsay* (1878), 26 W.R. 406.

G

As to sale or pledge under voidable title, see 34 HALSBURY'S LAWS (3rd Edn.) 81 et seq.; as to stoppage in transitu, see *ibid.* 127 et seq.; as to transfer of documents of title, see *ibid.* 138-140; as to bills of lading, see 35 HALSBURY'S LAWS (3rd Edn.) 328 et seq.; as to transfer of bills of lading, see *ibid.* 344-349; and for cases see 39 DIGEST 633-636; 41 DIGEST 400. For the Sale of Goods Act, 1893, s. 23, see 22 HALSBURY'S STATUTES (2nd Edn.) 1001.

H

Cases referred to:

- (1) *Gurney v. Behrend* (1854), 3 E. & B. 622; 23 L.J.Q.B. 265; 23 L.T.O.S. 89; 18 Jur. 856; 2 W.R. 425; 118 E.R. 1275; 39 Digest 635, 2314.
- (2) *Dyer v. Pearson* (1824), 3 B. & C. 38; 4 Dow. & Ry.K.B. 648; 107 E.R. 648; 1 Digest (Repl.) 429, 852.
- (3) *Kingsford v. Merry* (1856), 11 Ex. 577; 25 L.J.Ex. 166; 4 W.R. 253; reversed, 1 H. & N. 503; 26 L.J.Ex. 83; 28 L.T.O.S. 236; 3 Jur.N.S. 68; 5 W.R. 151; 156 E.R. 1299, Ex. Ch.; 37 Digest (Repl.) 17, 146.

I

Also referred to in argument:

Lickbarrow v. Mason (1794), 5 Term Rep. 683; 39 Digest 614, 2115.

Patten v. Thompson (1816), 5 M. & S. 350; 105 E.R. 1079; 30 Digest 635, 2311.

Spalding v. Ruding (1843), 6 Beav. 376; 12 L.J.Ch. 503; 1 L.T.O.S. 384; 7 Jur. 733; 49 E.R. 871; on appeal (1846), 15 L.J.Ch. 374, L.C.; 39 Digest 634, 2305.

Re West Zinthus (1833), 5 B. & Ad. 817; 2 Nev. & M.K.B. 644; 3 L.J.K.B. 56; 110 E.R. 992; 39 Digest 633, 2304. A

Van Casteel v. Booker (1848), 2 Exch. 691; 18 L.J.Ex. 9; 12 L.T.O.S. 65; 154 E.R. 668; 39 Digest 512, 1305.

Appeal from an interlocutory decree of the High Court of Admiralty of England, in a cause instituted on behalf of the appellants, Pease, Hoare, and Pease, of Hull, the assignees and owners of a bill of lading of the cargo laden on board the vessel *Marie Joseph*, against the said vessel, her tackle, apparel, and furniture, and against Jean Marie Gloahec, the master and owner of the vessel *Marie Joseph* intervening, which decree pronounced against the damage proceeded for, dismissed Jean Marie Gloahec and his bail from the suit, and condemned Messrs. Pease in costs. B C

On Feb. 11, 1864, Messrs. Maxwell and Dreossi, of Bordeaux, having sold to Messrs. Scarborough and Tadman, of Kingston-upon-Hull, sixty tons of linseed cake, shipped the same at Bordeaux, for conveyance to Hull, on board the *Marie Joseph*; and Jean Marie Gloahec, the master and owner of the said vessel, by bill of lading made on the same day, promised to deliver the same at Hull unto order or assigns, he or they paying freight. Messrs. Maxwell and Dreossi endorsed the bill of lading to Messrs. Scarborough and Tadman, who subsequently endorsed the bill of lading to the appellants, to whom (as alleged by the appellants) the property in the said cargo passed. D

On April 5, 1864, the *Marie Joseph*, with the said sixty tons of linseed cake on board, arrived at the port of Hull, and the appellants (as alleged by them) gave the respondent notice that they were entitled to have the linseed cake delivered to them, and demanded the delivery thereof, which was refused by Jean Marie Gloahec, though the appellants offered to pay the freight, etc. E

The respondent admitted his refusal to deliver the cargo to the appellants, and justified such refusal by reason of the following facts.—In February, 1864, Walter Stericker, of Kingston-upon-Hull, as agent for Messrs. Maxwell and Dreossi, agreed with Messrs. Scarborough and Tadman for the sale to them of sixty tons of linseed cake, they paying for the same by their acceptance at three months' date. The linseed cake was accordingly shipped, as before stated, and the bill of lading endorsed by Maxwell and Dreossi to Scarborough and Tadman. Subsequently Scarborough and Tadman deposited the bill of lading with Walter Stericker, and agreed with him that he should hold the same as security for the payment of their acceptance until they had sold the linseed cake, or the ship should have arrived. On or about Feb. 18, 1864, Mr. Tadman, one of the firm of Scarborough and Tadman, by falsely and fraudulently (as alleged by the defendant) representing to Walter Stericker that they had sold the linseed cake to a Mr. Croysdale, and should draw a bill on him for the price, and should, therefore, be enabled to pay for the linseed cakes, or to meet their acceptance for the price thereof, obtained possession of the bill of lading from Walter Stericker. Thereupon Scarborough and Tadman handed over the bill of lading to the appellants, who were the bankers of Scarborough and Tadman, as security for the balance then due by them to the appellants. When Scarborough and Tadman so obtained possession of the bill of lading and handed the same to the appellants, Scarborough and Tadman were insolvent, which fact was well known to the appellants. On Mar. 7, 1864, Scarborough and Tadman stopped payment. The *Marie Joseph*, with her cargo, arrived at the port of Hull on April 5, 1864, and Walter Stericker, as the agent of Maxwell and Dreossi, lawfully claimed and received the linseed cakes, at which time the same had not come into the possession of, nor been lawfully claimed by, any other person. F G H I

The reply of the appellants, among other averments, denied that, when they received the bill of lading, they were aware or had had any notice of the

A insolvency of Scarborough and Tadman, or that, till after Scarborough and Tadman stopped payment, they had any knowledge of the transaction between Scarborough and Tadman and Stericker in respect of the bill of lading. Dr. LUSHINGTON pronounced against the claim of Messrs. Pease, on the ground that the bill of lading for the linseed cake having been obtained back from Stericker by Tadman by false representations, it was negotiated without Stericker's consent
B or the consent of the vendors of the cake, and contrary to the understanding between Scarborough and Stericker, and that the fraudulent conduct of Tadman invalidated the endorsement of the bill of lading to Pease & Co., though they were unaware of the acts of Tadman: see 12 L.T. 235.

Mellish, Q.C., and Clarkson for the appellants.

C *Deane, Q.C., and Swabey* for the respondent.

LORD CHELMSFORD, L.C.—This is an appeal from a decree of the judge of the High Court of Admiralty in a cause instituted on behalf of the appellants, the assignees and owners of a bill of lading of certain linseed cake laden on board a vessel called the *Marie Joseph*, against the vessel and against the respondent, the master and owner of the vessel, pronouncing against the damage proceeded
D for, dismissing the respondent from the suit, and condemning the appellants in costs.

The question raised by the suit is the right of the shippers of the linseed cake to stop the same in transitu under the following circumstances:—In February, 1864, Messrs. Maxwell and Dreossi, of Bordeaux, through their agent,
E Walter Stericker, sold to Messrs. Scarborough and Tadman, of Hull, sixty tons of linseed cake at £7 12s. 6d. per ton, payable by bill at three months from the date of the bill of lading. On Feb. 11, the goods were shipped on board the *Marie Joseph* at Bordeaux by Maxwell and Dreossi, and a bill of lading for the same was signed by the respondent, the master. Maxwell and Dreossi endorsed the bill of lading to order and assigns, and drew a bill of exchange for
F the price on Messrs. Scarborough and Tadman, and sent the bill of lading and bill of exchange to their agent, Stericker. On Feb. 16, Stericker took the bill of lading and the bill of exchange to Scarborough and Tadman, when the bill was accepted by Scarborough, and Stericker thereupon endorsed the bill of lading, and delivered it to Scarborough, together with a policy of insurance which had been effected upon the goods. A conversation then ensued between Stericker
G and Scarborough respecting the dealings of Scarborough and Tadman with a person named Moore, whose circumstances were supposed to be embarrassed, and Stericker asked Scarborough whether he had any objection to his holding the bill of lading. Scarborough told Stericker to take it, and delivered back the bill of lading to Stericker, who thereupon signed the following memorandum:

H “Hull, Feb. 16, 1864. Memorandum that I have received of Messrs. Scarborough and Tadman, of Hull, a bill of lading and policy of insurance for about sixty tons linseed cake, shipped *Marie Joseph*, dated at Bordeaux Feb. 11, 1864, and which I hold as security against their acceptance of Messrs. Maxwell and Dreossi's draft for £427 1s. 7d., due May 14, 1864, until the cakes are sold or vessel arrives.—Walter Stericker.”

I On Feb. 18 Tadman, the other partner in the firm of Scarborough and Tadman, called upon Stericker and stated to him that his firm had sold the linseed cake to a Mr. Croysdale, who would accept a draft against the bill of lading. The linseed cake had not been sold to Croysdale, nor to any other person. Trusting to this misrepresentation, Stericker returned the bill of lading and the policy of insurance to Tadman. On the same day, after thus obtaining the bill of lading, in consequence of a message received from the appellants, Messrs. Pease & Co., bankers in Hull, to whom Scarborough and Tadman were largely indebted, Tadman went to the bank, and Mr. Pease called his attention to

the state of his account and to the amount of bills under discount, and asked him for security. Tadman thereupon endorsed the bill of lading in the name of his firm, and delivered it, together with the policy of insurance, to Mr. Pease, and gave Messrs. Pease & Co. an unsigned memorandum authorising them to sell the linseed cake and to place the proceeds to the credit of Scarborough and Tadman on account. Moore, in whose transactions Scarborough and Tadman were supposed to be involved, became bankrupt on Mar. 4, and on Mar. 7 Scarborough and Tadman stopped payment. On Mar. 5 a telegram was sent from Maxwell and Dreossi to Stericker directing him to stop the delivery of the linseed cake, and on Mar. 7 he received from Maxwell and Dreossi a bill of lading endorsed to himself. The *Marie Joseph* arrived at Hull on April 5. The linseed cake was demanded on behalf of the appellants upon the bill of lading endorsed to them, but Stericker afterwards went on board and presented his bill of lading and obtained possession of the goods under an indemnity from Maxwell and Dreossi to the respondent. Upon these facts the learned judge of the Court of Admiralty was of opinion that the bill of lading having been obtained from Stericker by the false representations and fraud of Tadman, and having been afterwards negotiated without the consent of Stericker or of his principals, and contrary to the understanding between Stericker and Tadman, the fraudulent conduct of Tadman invalidated the endorsement to Pease & Co., and he accordingly pronounced against them.

The question is one of nicety and difficulty, and, as was stated by the counsel in argument, no direct authority is to be found by which it can be decided. Principles, however, may be extracted from previous decisions, which will serve as guides to its right determination. A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by endorsement and delivery passes the property in the goods to the endorsee, subject only to the right of an unpaid vendor to stop them in transitu. The endorsee may deprive the vendor of this right by endorsing the bill of lading for valuable consideration, although the goods are not paid for, or bills have been given for the price of them which are certain to be dishonoured, provided the endorsee for value has acted bona fide, and without notice. Although a bill of lading is a negotiable instrument, it is so only as a symbol of the goods named in it, and as was said by LORD CAMPBELL in *Gurney v. Behrend* (1) (3 E. & B. at p. 634):

“Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority, and if it be stolen from him or transferred without his authority a subsequent bona fide transferee for value cannot make title under it as against the shipper of the goods.”

This dictum is very carefully confined in its terms to the original transfer of a bill of lading deliverable to the assigns of the shipper. In the cases which it supposes there could be no lawful assigns of the shipper, and consequently the bill of lading could have no existence as a negotiable instrument. But in the present case the shippers of the goods having obtained a bill of lading endorsed it to order and assigns, and forwarded it to Stericker for the express purpose of its being endorsed by him, and handed over to Scarborough and Tadman. By the endorsement and delivery to Scarborough and Tadman they acquired the complete property in the goods and control over the bill of lading, subject only to the right of Maxwell and Dreossi to stop in transitu as long as it remained in their hands. This is not denied by the respondent, but his case is that Scarborough and Tadman having, after the endorsement and delivery of the bill of lading, returned it to Stericker to retain as a security for the payment of the bill of exchange accepted for the price of the goods, and having afterwards obtained it from him by a misrepresentation, they had no power to pass a title in it to Pease & Co., at least without being subject to the lien created by

A the deposit with Stericker, and consequently that the right to stop in transitu against Pease & Co., though bona fide endorsees for valuable consideration, still subsisted.

B There can be no doubt that although the vendors had parted with the property in the bill of lading by the endorsement to Scarborough and Tadman, they acquired a title to hold it by the terms of the agreement under which it was deposited with Stericker. These terms do not include any stipulation that the vendees should not so deal with the bill of lading as would in the event of the vendees' insolvency defeat the right to stop in transitu. It is not even stipulated that the vendors should hold the bill of lading till the sub-vendees should give them a bill of exchange or other security for payment. The bill of lading was not made subject to any new condition or limitation, but was merely deposited with the vendors till the arrival of the ship or the sale of the goods. Scarborough and Tadman had power to sell, not by reason of any authority arising out of the agreement, but by virtue of their ownership in the goods. The power to sell of course included a power to pledge. The vendors by keeping the bill of lading in their hands might have prevented Scarborough and Tadman from dealing with it. They chose to deliver it back to them, induced to do so indeed by the fraudulent representation of Tadman, but still consenting to their possession of it. The endorsees acquired no new title from the vendors by the fraud which Tadman practised, but merely obtained their own property and the means of effectually disposing of it. The vendors had not, strictly speaking, a lien, which means a right to retain property against the will of the owner of it, and which is lost when the possession is parted with. They had, by the agreement of the endorsees and owners, a right to hold the bill of lading as a security. As in the case of lien so in this case, as long as the bill of lading remained with the parties who had fraudulently obtained it, the vendors who had been cheated out of the possession might have reclaimed and recovered it. But the moment it passed into the hands of Pease & Co., to whom it was pledged and endorsed for valuable consideration without notice, the right of the vendors to follow it was taken away.

This is a much stronger case than that put by ABBOTT, C.J., in *Dyer v. Pearson* (2), of the real owner of goods who suffers another to have possession of his property and of those documents which are the evidence of property, being bound by a sale which he has thus enabled the other person to make; for here the person entitled to retain the possession of the instrument which represented the goods against the real owners, relinquished the possession of it to them, and enabled them to deal with the property in their true character of owners. In *Kingsford v. Merry* (3), it was held (11 Exch. at p. 579) that,

H "When a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction, and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

I Although this case was reversed in the Exchequer Chamber, yet it was upon a ground which did not affect the rule of law above laid down, but made it inapplicable, because in the judgment of the court the relation of vendor and vendee did not exist between the owner of the goods and the fraudulent possessor. Here the possession was not only united to the previous ownership, with the consent (however obtained) of the person temporarily entitled to it, but transferred for the express purpose of giving to the owner absolute dominion over his own property. An ownership, which was at the time perfect at law though

voidable as to part, viz., the possession, cannot in principle be treated differently from an ownership voidable as to the whole, but in the interim protected by the interposition of a bona fide purchaser for valuable consideration. For these reasons their Lordships will humbly recommend to Her Majesty that the decree appealed from be reversed, with costs.

Appeal allowed.

STIRLING v. MAITLAND AND ANOTHER

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Crompton, Mellor and Shee, JJ.), November 15, 1864]

[Reported 5 B. & S. 840; 5 New Rep. 46; 34 L.J.Q.B. 1;
11 L.T. 337; 29 J.P. 115; 11 Jur.N.S. 218; 13 W.R. 76;
122 E.R. 1043]

Contract—Implied term—Continuance of existing circumstances—Circumstances ended by act of promisor—Company to pay sum of money to plaintiff if it “displaced” its named agent—Voluntary liquidation of company.

Agent—Agency—Termination—Voluntary liquidation of principal—Transfer of business to another company.

A. B. S., who was agent at Glasgow of the United Kingdom Assurance Co., having become indebted to them in the sum of £1,449 10s. 9d., W. S., the plaintiff, agreed to pay off the amount upon terms which were embodied in a deed between all the parties. The deed was executed by trustees for the insurance company, one of the covenants providing “that in case the said company should at any time thereafter displace the said A. B. S. from his employment as agent of the said company at Glasgow, then the said company should and would forthwith repay unto the said W. S., his executors, administrators and assigns, the said sum of £1,449 10s. 9d., or so much thereof as should not have been previously repaid to the said W. S., or otherwise recovered or received by him.” The company subsequently transferred their business to another insurance company and were dissolved, and A. B. S. was not continued in his office by the new company. The debt of £1,449 10s. 9d. still remaining unpaid to the plaintiff, he brought an action to recover the amount against the surviving trustees of the old company.

Held: the covenant extended to any voluntary act by the old company; by transferring its business to another company and dissolving, it had displaced A. B. S. within the meaning of the covenant; and, accordingly, the plaintiff was entitled to recover.

Notes. Considered: *Rhodes v. Forwood* (1876), 1 App. Cas. 256; *Re Railway and Electric Appliances Co.* (1888), 38 Ch.D. 597; *Hamlyn & Co. v. Wood & Co.*, [1891-4] All E.R. Rep. 168; *Ogdens v. Nelson*, *Ogdens v. Telford*, [1903] 2 K.B. 287; *City of Dublin Steam Packet Co. v. R.* (1908), 24 T.L.R. 657; *Shindler v. Northern Raincoat Co., Ltd.*, [1960] 2 All E.R. 239. Referred to: *Brace v. Calder* (1895), 64 L.J.Q.B. 592; *Southern Foundries (1926), Ltd. v. Shirlaw*, [1940] 2 All E.R. 445; *Greenhalgh v. Mallard*, [1943] 2 All E.R. 234.

As to termination of principal's business, see 1 HALSBURY'S LAWS (3rd Edn.) 243; as to implied terms in contracts generally, see 8 HALSBURY'S LAWS (3rd Edn.) 121; as to implied covenant for continuation of business, see 11 HALSBURY'S LAWS (3rd Edn.) 444; and for cases see 1 DIGEST (Repl.) 631-633; 12 DIGEST (Repl.) 693-698.

A Cases referred to in argument :

Tasker v. Shepherd (1861), 6 H. & N. 575; 30 L.J.Ex. 207; 4 L.T. 19; 9 W.R. 476; 158 E.R. 237; 1 Digest (Repl.) 630, 2113.

M'Intyre v. Belcher (1863), 14 C.B.N.S. 654; 2 New Rep. 324; 32 L.J.C.P. 254; 8 L.T. 461; 10 Jur.N.S. 239; 11 W.R. 889; 143 E.R. 602; 12 Digest (Repl.) 387, 3010.

B

Action by which the plaintiff William Stirling sought to recover from the defendants, the surviving trustees of the United Kingdom Assurance Co. the sum of £1449 10s. 9d. and interest.

At the trial before SIR ALEXANDER COCKBURN, C.J., at Guildhall, a verdict was entered for the plaintiff subject to the opinion of the court on a Special Case.

The United Kingdom Life Assurance Co. was established under a deed of settlement in 1834, and in 1844 the company registered itself under s. 58 of the 7 & 8 Vict., c. 110. In 1842 the company appointed Mr. A. B. Seton to be its sole agent at Glasgow. His business was to procure persons to effect policies with the said company, and otherwise to bring business to the office. By way of remuneration, he was to receive and did receive 10 per cent. upon the first premiums, and 5 per cent. upon the succeeding premiums in respect of all policies effected with the said company, through his introduction, and 5 per cent. upon all premiums which, by the direction of the company, he might collect for them, and also an annual allowance of £130 for office rent; in addition to which the company paid the rates and taxes, etc., connected with the office.

In 1847 the company made him a further allowance of £250 per annum for clerks, etc. In 1848 the company advanced on loan to A. B. Seton the sum of £2000, on the security of the joint and several promissory note of A. B. Seton and his son, Mr. Seton, jun., the plaintiff, and a Mr. James Dixon, and upon the deposit of policies of insurance on the life of A. B. Seton for £2000, and of policies of insurance on the life of Mr. Seton, jun., for the like amount.

In December, 1852, A. B. Seton became indebted to the company in the further sum of £1449 10s. 9d. in respect of premiums and other moneys received by him on account of the company. The company pressing for payment of these amounts, and A. B. Seton not being himself able to discharge them, an arrangement was made that the plaintiff should pay off not only the said sum of £2000,

for which he was surety as above mentioned, but also the said further sum of £1449 10s. 9d., upon the terms and conditions which were embodied in the deed next hereinbefore mentioned; and in pursuance of such arrangement the plaintiff, on or about Dec. 7, 1852, paid to the company the two sums of £2000 and £1449 10s. 9d., the company appointed the plaintiff their agent at Glasgow jointly with A. B. Seton, and a deed of covenant, dated Dec. 7, 1852, was made and entered into between the defendants and two other persons, since deceased, as trustees of the company of the first part, A. B. Seton of the second part, and the plaintiff of the third part (hereafter mentioned). From that time the business of the company was carried on at Glasgow by the plaintiff and A. B. Seton as the agents of the company, at the remuneration as before.

In July, 1862, certain heads of agreement were entered into between the United Kingdom Life Assurance Co. and the North British and Mercantile Insurance Co., subject to the sanction of the shareholders of the former company, for the sale and transfer of the business, goodwill and property of the United Kingdom Life Assurance Co. to the North British and Mercantile Insurance Co. The heads of agreement were afterwards confirmed, and the directors were authorised to execute them, and resolutions were passed for the winding-up and dissolution of the company. This agreement was then duly executed by both parties. The North British and Mercantile Insurance Co. was a fire and life office in Scotland, having its chief office in Edinburgh, but with a branch office

at Glasgow. (The Special Case set out a long correspondence between Messrs. A Seton and Stirling and the two companies, which has no material bearing upon the case, but which showed that the reason for the transfer of the business was the unsatisfactory position of the United Kingdom office.) On Oct. 20, 1862, the transfer of the business became complete, and from that day the United Kingdom Assurance Co. ceased to carry on business, and were afterwards dissolved. The amount at that time due from A. B. Seton to the plaintiff was the said sum of £1449 10s. 9d., no part thereof having been paid. The North British and Mercantile Insurance Co. had not employed A. B. Seton as their agent at Glasgow, but upon an application of Mr. A. B. Seton, in the name of Messrs. Seton and Stirling, but without the consent or knowledge of the plaintiff, the board of directors of that company, on Feb. 12, 1863, passed the following resolution :

"The directors having fully considered Messrs. Seton and Stirling's proposal of Feb. 9, 1863, and the critical state of Mr. A. B. Seton's health, recommend the Edinburgh board to make him a retiring allowance of £500 per annum for three years, commencing the first day of March next, and £400 per annum afterwards during the remainder of his life. The directors also recommend that Mr. James Seton be appointed an agent of the company, under the branch, with the usual commission on any new business he may bring to it, on the understanding that he acts for the company in both the fire and life departments, and that Messrs. Seton and Stirling accept these arrangements in lieu of the commission referred to in their proposal, and all other claims they may have on this company."

The proposal above alluded to was the application of Mr. A. B. Seton, in the name of Messrs. Seton and Stirling before mentioned. Thereupon Mr. A. B. Seton, without the knowledge of Mr. Stirling, wrote a letter accepting the terms. The partnership between Messrs. Seton and Stirling was dissolved in January, 1863, as of December, 1862, and notice thereof was given to the North British and Mercantile Insurance Co. on Feb. 11, 1863.

By the deed of covenant of Dec. 7, 1852, hereinbefore mentioned, the two defendants, as trustees of the United Kingdom Life Assurance Co. (together with others, since deceased), covenanted with the plaintiff that in case the company should at any time thereafter displace A. B. Seton from his employment of agent of the company at Glasgow, then the company should and would forthwith thereafter repay unto William Stirling (the plaintiff), his executors, administrators, or assigns, the sum of £1449 10s. 9d., or so much thereof as should not have been previously repaid to William Stirling, or otherwise recovered or received by him.

Montague Smith, Q.C. (Murray with him) for the plaintiff.

Bovill, Q.C. (H. Lloyd with him) for the defendants.

SIR ALEXANDER COCKBURN, C.J.—I am of opinion that our judgment should be for the plaintiff. When we come to look at the terms of the deed, we find that Mr. Seton, being the agent of the company, had become indebted to them in the sum of £1449 10s. 9d., and that Mr. Stirling, the plaintiff, agreed to pay it off upon being appointed joint agent. The deed, after reciting all the facts, provides that Mr. Stirling shall be appointed co-agent with Mr. Seton, thus enabling him to control the receipt of money by Mr. Seton, and then, as he would lose his security if Mr. Seton were to be removed, a covenant is entered into not to displace him. Then, after a time it appears that the company are not in a very prosperous condition, and an arrangement is made that the interest of the company is to be transferred to the North British and Mercantile Insurance Co. As soon as that was effected there was an end to defendants' company, and of course an end to the agency.

A Then the question arises whether that comes within the terms of the covenant. I think that it does. Practically the agreement is this. Here is Mr. Seton the agent indebted to the company, and, in order to pay them, Mr. Stirling comes forward and offers to discharge the debt, upon condition that Mr. Seton shall retain his office, and that when the company do anything to deprive him of his office they will refund Mr. Stirling the money he has paid. I take it, as
B put by counsel for the defendants, that the company undertake to retain him as their agent as long as they continue a company, which means that they will do nothing to put an end to their status as a company. I take it, that if they enter into a contract to do a thing which they can only do as a company, they imply that they will do nothing of their own motion to put an end to the company. I agree with counsel that if the company had come to an end by some act not
C their own, the defendants would not be liable under this covenant, but if on the other hand the company come to an end by their own voluntary act they are still bound by it. This disposition was the act of the company itself, and they put a voluntary end to the offices under it. Without, therefore, considering how parties may stand affected by what has occurred in other respects, I am of opinion that the plaintiff is entitled to recover.

D
CROMPTON, J.—I am of the same opinion. The plaintiff declares upon a covenant to pay a sum of money in a certain contingency, that contingency being the displacement of Mr. Seton. To this the defendants only plead that they did not displace him. The damages are agreed upon, and the only point
E is whether or not this was a displacement. I am of opinion that it was. Looking fairly at the covenant, it is clear that they did an act which had the effect of displacing the party. It need not be an actual displacement; if it indirectly displaces, it is the same thing. Here we have no technical words, their meaning clearly is, "put out of his place," and whether he is put out of his place, or his place is put out of him, it is, to my mind, the same thing. The plain meaning
F of the covenant is, that the plaintiff will take Mr. Seton's debt upon himself, on condition of the defendants undertaking not to put an end to his office. I think he is displaced as soon as his office is put an end to. It is said that the parties might have anticipated that the company would have come to an end. So it might with regard to any common firm, and it could hardly be said that contracts with such would be put an end to in consequence. I think, upon the
G words of this covenant, that the company did displace Mr. Seton by transferring their business to another company.

MELLOR, J.—I am also of the same opinion. Counsel for the defendants contends that the meaning of this covenant is merely that the company will not displace so long as they carry on their business; and I was certainly somewhat
H struck by the argument; but looking at the obvious purpose of the covenant that he should not be displaced, I think it far more reasonable to hold that it was meant that he should not be put out of office by their own voluntary act. They have in fact done so, for upon looking at their affairs, they see that they are not in a condition to carry on their business prosperously, and, therefore, they transfer it to another company.

I
SHEE, J.—I entirely agree in this opinion, for although I entertained some doubt at first, it seems to me that the covenant does extend to any voluntary act of the defendants whereby this party loses his office.

Judgment for plaintiff.

POWELL v. POWELL

[COURT OF PROBATE (Wilde, J.O.), June 19, July 24, 1866]

[Reported L.R. 1 P. & D. 209; 35 L.J.P. & M. 100; 14 L.T. 800]

Will—Revocation—Dependent relative revocation—Will destroyed with intention to revive earlier will—Sufficiency of evidence.

A testator, having made a will, executed a second will by which he revoked the first. A year afterwards he destroyed the second will, intending thereby to revive the first, and stating at the time that he wished his first will to be kept.

Held: the doctrine of dependent relative revocation applied, and, as the intention to revoke implied in the act of destruction was conditional, the condition being the validation of the first will, and as that condition remained unfulfilled, there was no revocation, and the second will was entitled to probate.

Per WILDE, J.O.: The doctrine of dependent relative revocation is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied.

Notes. This case should be contrasted with *In the Goods of Weston* (p. 364 post.).

Distinguished: *Eckersley v. Platt* (1866), L.R. 1 P. & D. 281; *In the Goods of Weston* (1869), post p. 364. Applied: *Cossey v. Cossey* (1900), 69 L.J.P. 17. Considered: *In the Estate of Zimmer* (1924), 40 T.L.R. 502; *Re Southerden*, *Adams v. Southerden*, [1925] All E.R. Rep. 398. Considered: *In the Estate of Botting*, *Botting v. Botting*, [1951] 2 All E.R. 997. Referred to: *In the Goods of Andrew*, [1893] P. 14; *In the Estate of Bromham*, *Wass v. Treasury Solicitor*, [1952] 1 All E.R. 110.

As to dependent relative revocation, see 39 HALSBURY'S LAWS (3rd Edn.) 899-901; and for cases see 44 DIGEST 361-365.

Case referred to:

- (1) *Dickinson v. Swatman* (1860), 4 Sw. & Tr. 205; 30 L.J.P.M. & A. 84; 24 J.P. 792; 6 Jur.N.S. 831; 164 E.R. 1495; 44 Digest 366, 1990.

Also referred to in argument:

- Ex parte Earl of Ilchester* (1803), 7 Ves. 348; 32 E.R. 142; 44 Digest 361, 1947.
Perrott v. Perrott (1811), 14 East, 423; 104 E.R. 665; 44 Digest 526, 3441.
Major and Mundy v. Williams and Iles (1843), 3 Curt. 432; 2 Notes of Cases, 196; 163 E.R. 781; sub nom. *Major v. Iles*, 7 Jur. 219; 44 Digest 365, 1985.
Hale v. Tokelove (1850), 2 Rob. Eccl. 318; 16 L.T.O.S. 85; 14 Jur. 817; 163 E.R. 1331; 44 Digest 341, 1714.
Newton v. Newton (1861), 12 I.Ch.R. 118, 128; 44 Digest 353, 1850i.
Rogers and Andrews v. Goodenough and Rogers (1862), 2 Sw. & Tr. 342; 31 L.J.P.M. & A. 49; 5 L.T. 719; 26 J.P. 119; 8 Jur.N.S. 391; 164 E.R. 1028; 44 Digest 365, 1980.
Lord John Thynne v. Stanhope (1822), 1 Add. 52; 162 E.R. 19; 44 Digest 354, 1855.
Onions v. Tyrer (1716), 1 P.Wms. 343; 2 Vern. 741; 24 E.R. 418; sub nom. *Onyons v. Tryers*, Prec. Ch. 459; Gilb. Ch. 130, L.C.; 44 Digest 354, 1852.
Burtenshaw v. Gilbert (1774), 1 Cowp. 49; 98 E.R. 750; sub nom. *Berkenshaw v. Gilbert*, Lofft, 465; 44 Digest 359, 1919.

A **Probate Motion** by which the plaintiff William Burfoot Powell propounded a will of Walter Powell deceased dated Mar. 3, 1862. An intervener, also called Walter Powell, propounded a will of the deceased dated Mar. 29, 1864, and the defendant Elizabeth Charlotte Powell sought to establish an intestacy.

B Walter Powell, late of 30, Park Walk, King's Road, Chelsea, died on June 18, 1865. On Mar. 3, 1862, he duly executed a will, in which he appointed his grandson, William Burfoot Powell, the plaintiff, sole executor and residuary legatee. On Mar. 29, 1864, he executed another will, in which he appointed his nephew, Walter Powell, executor and residuary legatee, and revoked all previous wills.

C The plaintiff, William Burfoot Powell, propounded the will of 1862, and probate was resisted by the defendant, Elizabeth Charlotte Powell, one of the next of kin, who sought to establish an intestacy.

D The cause came on for hearing before WILDE, J.O., when the due execution of the will of 1862 was proved. Evidence was likewise given of the due execution of the will of 1864, a draft copy of which was produced, and it was also proved by two other witnesses that on a particular day in March, 1865, the deceased said to one of them that his mind was ill at ease at having made the will of 1864, and that he wished it to be destroyed; that thereupon the other witness was called into the room; that, after reading the will to the testator, she put it in the fire in his presence; that he at the time said he wished the will (1862) in favour of his grandson to be kept; that he placed it in his drawer, repeating that he wished it to remain, and that when all was done he declared

E that his mind was at ease, and that he was at peace with the world.

All the facts having been disclosed to the court, leave was given to Walter Powell, the legatee under the will of 1864, to intervene, and the cause stood over for argument, the question being whether or not the will of 1864 was entitled to probate in accordance with the doctrine of dependent relative revocation.

F *Bayford* for the plaintiff and at the adjourned hearing for the intervener.
Dr. Tristram for the defendant.

Cur. adv. vult.

G July 24, 1866. **WILDE, J.O.**—The testator in this case made a will on Mar. 3, 1862, and a second will revoking the first on Mar. 29, 1864. In 1865 he destroyed the will of 1864; and the question is whether by that act of destruction the will of 1864 has been legally revoked, seeing that his object in the act of destruction was to set up the will of 1862? It is not contended that effect could be given by law to this object, but failing that, it is argued that effect ought not to be given to the destruction of the will of 1864 as an act of revocation.

H I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied; for, unless it be done *animo revocandi*, it is no revocation. What, then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper for which the destruction of the paper in question was only designed to make way? It is clear that in such case the *animus revocandi* had only a conditional existence, the condition being the validity of the paper intended to be substituted. And such has been the course of decision in the various cases quoted in argument. But then it is said that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution of the instrument

intended in substitution, and that no decided case can be found in which the instrument intended to be established has been a long previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say: "I tear this will of 1860, because I have this day (Jan. 1, 1861) executed another designed to replace it"; or: "I tear this will of 1860, because I desire and expect that the effect of my so doing will be to set up my old will of 1840"? In either case the revocatory act is based on a condition which the testator imagines is fulfilled. In both cases the act is referable not to any abstract intention to revoke, but to an intention to validate another paper. And if in neither case is the sole condition upon which its revocation was intended fulfilled, in neither is the *animus revocandi* present.

It is only necessary to add that in the above observations it has been assumed that the act of destruction was referable wholly and solely to the intention of setting up some other testamentary paper. Such was, I think, upon the evidence given in this case, the reasonable conclusion of fact. The only case cited that requires special mention is that of *Dickinson v. Swatman* (1). But SIR CRESSWELL CRESSWELL in that case does not appear to have been satisfied that the sole intention in destroying was to set up the previous will. He is reported to have said :

"At all events, to make it a case of dependent relative revocation, you would have to show that he did not intend to revoke the second will, unless by doing so the first would have been revived."

Cases may and probably will arise, in which the intention is either mixed or ambiguous, and such are for future consideration.

The court pronounces, therefore, for the will of Mar. 29, 1864, as contained in the draft thereof produced and sworn to by Mr. Newman, the attorney who made it. The costs of all parties must be out of the estate.

IN THE GOODS OF WESTON

[COURT OF PROBATE (Wilde, J.O.), February 16, 1869]

[Reported L.R. 1 P. & D. 633; 38 L.J.P. & M. 53; 20 L.T. 330;
33 J.P. 312]

Will—Revocation—Dependent relative revocation—Will destroyed in belief that earlier will thereby revived—Sufficiency of evidence.

A testatrix, having made two wills just before her death, destroyed the second. After she had destroyed the second will, she stated that she intended her first will to take effect.

Held: as the act of destruction was not accompanied by a declaration of intention, there was not sufficient evidence to show that the destruction was intended to be conditional, and probate of the second will would be refused.

Notes. Considered: *In the Estate of Botting, Botting v. Botting*, [1951] 2 All E.R. 997. Referred to: *In the Goods of Andrews*, [1893] P. 14; *Cossey v. Cossey* (1900), 69 L.J.P. 17; *In the Estate of Bromham, Wass v. Treasury Solicitor*, [1952] 1 All E.R. 110.

As to dependent relative revocation, see 39 HALSBURY'S LAWS (3rd Edn.) 899-901; and for cases see 44 DIGEST 361-365.

A Case referred to :

(1) *Powell v. Powell* (1866), ante p. 362; L.R. 1 P. & D. 209; 35 L.J.P. & M. 100; 14 L.T. 800; 44 Digest 361, 1944.

Probate Motion by which the plaintiff propounded a will of Emma K. Weston deceased dated August, 1863.

B Emma K. Weston died April 22, 1868. In August, 1863, she executed a will by which she devised all her property to trustees for the sole benefit of her only daughter. In March, 1866, she made a second will, by which she left all her property to her daughter absolutely, and constituted her sole executrix. In February, 1868, she destroyed her second will, and there was an affidavit from the daughter who came into the testatrix's room one day and saw the will lying torn in the fire-place. The testatrix then told her daughter that she intended her first will to take effect.

C There was in existence a draft of the second will, which had been compared with the original after execution. The daughter was the sole next-of-kin of the testatrix.

D *Dr. Middleton* now moved for probate of the second will, and relied on *Powell v. Powell* (1).

WILDE, J.O.—In *Powell v. Powell* (1) it was proved that when the testator destroyed the will he accompanied the act with a declaration that he did so in order that the earlier will should prevail. There is no such declaration here; **E** no declaration was made at the time the testatrix destroyed the second will. The daughter of the testatrix may propound the draft.

Motion refused.

F

FINNEY v. FINNEY

[COURT OF DIVORCE AND MATRIMONIAL CAUSES (Wilde, J.O.), April 28, May 22, 1868]

G

[Reported L.R. 1 P. & D. 483; 37 L.J.P. & M. 43; 18 L.T. 489]

Divorce—Estoppel—Res judicata—Same charges of cruelty in previous petition for judicial separation—Previous petition dismissed.

H The wife petitioned for dissolution of her marriage on the ground of cruelty, the cruelty alleged being the same as that alleged in a previous petition for judicial separation which had been dismissed.

Held: the wife was estopped from setting up the same charges of cruelty.

Notes. Considered: *Harriman v. Harriman*, [1908-10] All E.R. Rep. 85; *Winnan v. Winnan*, [1948] 2 All E.R. 862; *Dixon v. Dixon*, [1953] 1 All E.R. 910. Distinguished: *Thompson v. Thompson*, [1957] 1 All E.R. 161. Referred to: *Stokes v. Stokes*, [1911] P. 195; *Hudson v. Hudson*, [1948] 1 All E.R. 773; *James v. James*, [1948] 1 All E.R. 214; *Bright v. Bright*, [1953] 2 All E.R. 939; *Hull v. Hull*, [1960] 1 All E.R. 378.

As to absolute bars, see 12 HALSBURY'S LAWS (3rd Edn.) 293 et seq.; and for cases see 27 DIGEST (Repl.) 375 et seq.

Cases referred to in argument :

Evans v. Evans and Robinson (1858), 1 Sw. & Tr. 173; 27 L.J.P. & M. 57; 31 L.T.O.S. 170; 6 W.R. 640; 164 E.R. 680; 27 Digest (Repl.) 375, 3089.

Barrs v. Jackson (1842), 1 Y. & C.Ch. Cas. 585; 7 Jur. 54; 62 E.R. 1028; on appeal (1845), 1 Ph. 582; 14 L.J.Ch. 433; 5 L.T.O.S. 365; 9 Jur. 609; 41 E.R. 754. L.C.; 21 Digest (Repl.) 231, 250. A

Duchess of Kingston's Case (1776), 1 Leach 146; 1 East P.C. 468; 20 State Tr. 355; 168 E.R. 175; 27 Digest (Repl.) 692, 6623.

Petition by the wife for dissolution of her marriage on the ground of the husband's adultery, coupled with cruelty. B

The husband, in his answer, traversed the adultery, and as to the charges of cruelty alleged that, on Jan. 12, 1867, the wife filed a petition for judicial separation on the ground of cruelty, and that the allegations of cruelty contained in that petition were the same as those set out in the present petition; that on Feb. 2, 1867, the husband filed an answer traversing the allegations, and that the issue raised by the petition and answer was tried by the Judge Ordinary on oral evidence on Nov. 13 and 14, 1867, and that, after hearing the evidence of the wife and the husband, and of other witnesses, and after hearing counsel for the wife and the husband respectively, the Judge Ordinary, by a decree of Nov. 26, 1857, found that the husband was not guilty of the cruelty alleged in the petition, and dismissed the petition. The husband submitted that he was not bound to make any further answer to the allegations of cruelty contained in the present petition. To this answer the wife demurred. C

Dr. Spinks, Q.C. (with him *Dr. Swabey*) for the wife.
Searle for the husband. D

WILDE, J.O.—I am clear that this demurrer cannot be allowed. It is simply trying the same question over again, with a new charge added. The cases referred to were cases involving the question to what extent one court is concluded by the judgment of another, and to what extent a court should give effect to a decision on certain facts, which conclusion of fact was come to in some other suit, the nature of the suit being also wholly different. These were the two classes of cases discussed. But in this case the question is one which has been gone into in this very court. The wife charged her husband with the offence of cruelty. That has been tried and found in the husband's favour. She now, having added a charge of adultery, wants to try the same charges of cruelty over again, but that cannot be allowed on any ground. Take the case of common law. A fact once put in issue between the same parties, the judgment is conclusive, and the parties would be allowed to plead it in estoppel at all times. But, even if that were not so, there is abundant reason in this court why the same matter should not be allowed to be tried over again. All these matters are tried at the expense of the husband, and it would be persecuting him if what is here attempted to be done by the wife were allowed. The charges of cruelty must be struck out of the petition. She is entitled, of course, to proceed on the adultery. E

Demurrer disallowed. F

TOWNSEND v. TOWNSEND

[COURT OF DIVORCE AND MATRIMONIAL CAUSES (Hannen, J.O.), April 26, May 24, August 5, 1873]

[Reported L.R. 3 P. & D. 129; 42 J.P. & M. 71; 29 L.T. 254; 21 W.R. 934]

Divorce—Desertion—Withdrawal by husband from matrimonial home with knowledge and consent of wife—Husband thereafter frequently imprisoned—Wife's refusal to resume cohabitation.

The husband, having committed several thefts, separated from his wife with her knowledge and consent for the purpose of avoiding arrest. He was later arrested and imprisoned, and he was thereafter imprisoned on several occasions for larceny. While he was in prison he frequently wrote to his wife and between his terms of imprisonment he made repeated endeavours to resume cohabitation with her, but she refused. On a petition by the wife for dissolution of her marriage on the grounds of the husband's adultery, coupled with desertion.

Held: there was no desertion on the part of the husband.

Notes. Distinguished: *Drew v. Drew* (1888), 58 L.T. 923. Considered: *Williams v. Williams*, [1939] 3 All E.R. 825.

As to the defence of consent to separation, see 12 HALSBURY'S LAWS (3rd Edn.) 251 et seq.; and for cases see 27 DIGEST (Repl.) 343, 344.

Case referred to:

(1) *Lawrence v. Lawrence* (1862), 2 Sw. & Tr. 575; 31 L.J.P.M. & A. 145; 6 L.T. 550; 8 Jur.N.S. 972; 164 E.R. 1120; 27 Digest (Repl.) 341, 2835.

Petition by the wife for the dissolution of her marriage on the ground of her husband's adultery, coupled with desertion for two years and upwards.

Inderwick for the wife.

The husband did not appear.

Cur. adv. vult.

Aug. 5, 1873. **HANNEN, J.O.**, read the following judgment.—The wife was married to the husband in March, 1864. The husband was then in a fair way of business as a draper, but he appears soon to have got into difficulties through betting, and he committed several thefts to supply himself with money. His father-in-law, whom he had robbed on one or two occasions, settled some of the charges against him by payment, but at length, in November, 1866, in consequence of a fresh theft, the husband left his home to avoid arrest. Before leaving he confessed his guilt to the wife, and informed her of the necessity he was under of concealing himself.

On Nov. 15, he had been arrested, and wrote to the wife a penitent letter from Manchester Gaol. He was shortly afterwards tried and convicted, and sentenced to a term of imprisonment which expired on April 5, 1867. While in prison he wrote several affectionate letters to his wife, who returned to reside with her parents at Birkenhead. Immediately on his release he went to Birkenhead, saw his wife, and begged her to return to him. This, by the advice of her friends, she refused to do until he was in a position to support her. He thereupon obtained employment in Liverpool. He continued to correspond with the wife, and renewed his request that she would return to him. This, however, she would not consent to, but she frequently visited him and took their son to see him. In June, 1867, he was again found guilty of larceny, and was sentenced to two years' imprisonment. While in prison he frequently

wrote to his wife, but she did not answer his letters. His term of imprisonment expired on June 30, 1869. In July, he wrote to her, giving her an account of his doings and prospects, and reminding her of her promises to return to him if he found her a home, and in October he went to Birkenhead for the purpose of inducing her to resume cohabitation with him. She, however, refused to have any interview with him, and conveyed to him by her mother her determination not to live with him. In June, 1871, he was again convicted of larceny, and sentenced to seven years' penal servitude. It was proved that he committed adultery with a prostitute immediately before his arrest.

In these circumstances, it was contended that the husband was guilty of adultery, coupled with desertion without reasonable excuse, for two years and upwards. I have considered the case with a great desire to afford the wife the relief she seeks, if I could do so consistently with the decisions by which a judicial interpretation has been put on the term desertion, but I have found myself unable to do so. It is essential to the constitution of desertion that there should be a voluntary abandonment by the husband of the society of the wife against her will. In the present case, the original withdrawal of the husband from his home was with the knowledge and consent of the wife for the purpose of concealment from those in search of him. He never afterwards voluntarily absented himself from her, but was prevented rejoining her either by his imprisonment or by her refusal to resume cohabitation. That refusal was certainly morally justifiable, but, as it was not founded on any matrimonial misconduct of the husband, the separation which resulted cannot be regarded as voluntary on his part. If he had been living in adultery with another woman, his persistence in such a connection would have been the strongest evidence of an intention to abandon his wife, but the relapses of the husband into a criminal course of life do not in themselves afford such evidence.

The case which in its circumstances most resembles the present is that of *Lawrence v. Lawrence* (1), where the husband, having accepted employment abroad, afterwards led an extravagant life, and was found guilty of embezzlement. The court in that case came to the conclusion, from the husband's conduct, and from a letter which he wrote to a woman with whom he had formed an adulterous connection, that he had the intention never to return to his wife. In the present case, the letters of the husband and his repeated endeavours to resume cohabitation with his wife lead to the conclusion that he never intended to desert her, but, on the contrary, always desired to live with her. I am, therefore, constrained to hold that the charge of desertion has not been established, and the court can only grant, if that be desired, a decree of judicial separation.

Decree of dissolution refused. Decree of judicial separation granted.

TWEDDLE v. ATKINSON

[COURT OF QUEEN'S BENCH (Wightman, Crompton and Blackburn, J.J.), June 7, 1861]

[Reported 1 B. & S. 393; 30 L.J.Q.B. 265; 4 L.T. 468; 25 J.P. 517; 8 Jur.N.S. 332; 9 W.R. 781; 121 E.R. 762]

Contract—Enforcement—Action by stranger to the consideration—Competency.

The parents of the contracting parties to a marriage mutually agreed in writing after the marriage, as a mode of giving effect to verbal promises made before the marriage and to provide a marriage portion, that the father of the wife would pay £200 to his son-in-law, and the father of the husband would pay £100 to his son. In an action by the husband claiming the sum of £200 which his father-in-law had not paid,

Held: notwithstanding the relationship of the parties, the husband was unable to sue on the agreement since he was a stranger to the consideration for the contract which must move from the party entitled to sue upon the contract.

Notes. In *Drive Yourself Car Hire Co. (London), Ltd. v. Strutt*, [1953] 2 All E.R. 1475, LORD DENNING suggested that the principle in *Tweddle v. Atkinson* was "greatly modified" by s. 56 of the Law of Property Act, 1925 which provides (sub-s. (1)) that "a person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument." The principle was however applied by the House of Lords in *Scruttons, Ltd. v. Midland Silicones, Ltd.*, [1962] 1 All E.R. 1, in which LORD DENNING was the sole dissident.

Considered: *Gandy v. Gandy* (1885), 30 Ch.D. 57; *Drive Yourself Hire Co. (London), Ltd. v. Strutt*, [1953] 2 All E.R. 1475. Referred to: *McGruther v. Pitcher*, [1904] 2 Ch. 306; *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335; *West Yorkshire Darracq Agency v. Coleridge*, [1911] 2 K.B. 326; *Barker v. Stickney*, [1918] 2 K.B. 356; *Re Pinto Leite, Ex parte Visconde Des Oliveira*, [1928] All E.R. Rep. 371; *Vandepitte v. Preferred Accident Insurance Corp. of New York*, [1932] All E.R. Rep. 527; *Harmer v. Armstrong*, [1933] All E.R. Rep. 778; *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; *Scruttons, Ltd. v. Midland Silicones, Ltd.*, [1962] 1 All E.R. 1.

As to position of strangers to a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 66 et seq.; as to consideration, see *ibid.* 113 et seq.; and for cases see 12 DIGEST (Repl.) 45-47, 233-235. For the Law of Property Act, 1925, s. 56, see 20 HALSBURY'S STATUTES (2nd Edn.) 554.

Case referred to:

(1) *Bourne v. Mason* (1669), 1 Vent. 6; 2 Keb. 454, 457, 527; 86 E.R. 5; 12 Digest (Repl.) 45, 236.

Also referred to in argument:

Price v. Easton (1833), 4 B. & Ad. 433; 1 Nev. & M.K.B. 303; 2 L.J.K.B. 51; 110 E.R. 518; 12 Digest (Repl.) 45, 238.

Dutton v. Poole (1678), 1 Freem. K.B. 471; T.Jo. 102; 1 Vent. 332; 3 Keb. 786, 814, 830, 836; 2 Lev. 210; T. Raym. 302; 89 E.R. 352, Ex. Ch.; 12 Digest (Repl.) 47, 251.

Rippon v. Norton (1602), Cro. Eliz. 881; 78 E.R. 1106; 12 Digest (Repl.) 222, 1649.

Demurrer to the declaration in an action by the plaintiff, William Tweddle, against the defendant, Atkinson, as executor of William Guy deceased, the

plaintiff's late father-in-law, claiming the sum of £200, which sum William Guy A had agreed with the plaintiff's father to pay to the plaintiff.

The declaration stated that the plaintiff was the son of one John Tweddle, deceased, and before the making the agreement hereinafter mentioned married the daughter of William Guy, deceased, and before the marriage of the plaintiff William Guy, in consideration of the intended marriage, promised the plaintiff B to give to his daughter a marriage portion, but the promise was verbal, and at the time of the making of the agreement had not been performed; and before the marriage William Tweddle, in consideration of the intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the agreement had not been performed. After the marriage, and in the lifetime of William Guy and of John Tweddle, they, William Guy and John Tweddle, entering into the agreement hereinafter mentioned C as a mode of giving effect to their verbal promises, and William Guy also entering into the agreement, in order to provide for his daughter a marriage portion, and to procure a further provision to be made by John Tweddle, by means of the agreement, for his daughter, and acting for the benefit of his daughter; and John Tweddle also entering into the agreement, in order to provide for the D plaintiff a marriage portion, and to procure a further provision to be made by William Guy, by means of the agreement for the plaintiff, and acting for the benefit of the plaintiff, they, William Guy and John Tweddle, entered into an agreement in writing in the words following, that is to say :

"High Coniscliffe, July 15, 1855. Memorandum of an agreement made this day, between William Guy, platelayer, of Gainford, in the county of Durham, of the one part, and John Tweddle, relieving officer, of Darlington, in the county of Durham, aforesaid, of the other part. Whereas, it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle, his son-in-law, railway inspector, residing at Thornton, in the county of Eife, in Scotland; and the said John Tweddle, father to the said William Tweddle, shall and will pay the sum of £100 to the said William Tweddle, each and severally the said sums on or before Aug. 21, 1855. And it is hereby further agreed by the aforesaid William Guy and the said John Tweddle, that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sums hereby promised and specified."

Afterwards, and before this suit, the plaintiff and his wife, who is still living, ratified and assented to the agreement, and that the plaintiff is the William Tweddle therein mentioned; and that the said Aug. 21, 1855, elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the sum of £200 paid by William Guy or his executor, yet neither William Guy nor his executors, has paid the same, and the same is in arrear and unpaid, contrary H to the said agreement.

Edward James (Henderson with him) for the defendant.
Mellish for the plaintiff.

WIGHTMAN, J.—No doubt there are some old decisions which appear to support the proposition that a stranger to the consideration for the contract, who stands in the relation of child to one of the contracting parties, and for whose benefit the contract is made, may sue upon it. The strongest case of that kind is *Bourne v. Mason* (1), relating to the daughter of a physician. But there is no modern case of the kind, and, on the contrary, it is now well established that at law no stranger to the consideration can take advantage of the contract though made for his benefit. If it were otherwise a child might sue his own father in such a case as this. It is admitted that if the relationship of parent and child did not exist, the plaintiff would have no right to sue.

A Here there is no consideration moving from the plaintiff, for the marriage was before the contract sued on, and according to the modern cases the plaintiff cannot sue.

B **CROMPTON, J.**—The old cases are inapplicable to the modern action of assumpsit. At the time of those cases the law was not settled as it now is, that natural love and affection are not sufficient to support a contract, and that a stranger to the consideration of a contract cannot sue upon it. The modern cases have in effect overruled the old decisions, and it is now clear law that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to make a child a party to the contract for one purpose, viz. to sue for his own advantage, and not for another to bear the liability.

D **BLACKBURN, J.**—The contract cannot be supported as a memorandum of a contract in consideration of marriage. Then there has been a uniform course of decisions for very many years past, which in effect overrule the old cases cited by counsel for the plaintiff. The rule that a voluntary debt incurred by deed of settlement after marriage is void as against purchasers is quite sufficient to establish that.

Judgment for defendant.

WHITE v. CHITTY

F [VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), January 24, 25, 1866]

[Reported L.R. 1 Eq. 372; 35 L.J.Ch. 343; 13 L.T. 750;
12 Jur.N.S. 181; 14 W.R. 366]

G *Bankruptcy—Forfeiture clause—Annulment of bankruptcy—Effect—Bankruptcy of beneficiary under will during testator's lifetime—Annulment after testator's death—Beneficiary in possession from testator's death until annulment.*

H A testator by his will devised certain real estate to his son for life, with remainder to the son's child. The will contained a clause providing for forfeiture in the case of bankruptcy. The son had become bankrupt in the lifetime of the testator, and before the date of the will. At the death of the testator the bankruptcy was in force, but subsequently thereto it was annulled by order on the bankrupt's application. The official assignee had taken no proceedings to recover possession of the property of which the son had himself been in occupation; no money had accrued to the official assignee, and no creditors' assignee had been appointed.

I **Held:** the son had not forfeited his life-interest.

Notes. Distinguished: *Cox v. Fonblanque* (1868), 16 W.R. 1032. Considered: *Trappes v. Meredith* (1871), 7 Ch.App. 248. Doubted but Followed: *Re Parnham's Trusts* (1876), 46 L.J.Ch. 80. Applied: *Ancona v. Waddell* (1878), 10 Ch.D. 157. Considered: *Samuel v. Samuel* (1879), 12 Ch.D. 152. Distinguished: *Robertson v. Richardson* (1885), 30 Ch.D. 623. Considered: *Re Broughton, Peat v. Broughton* (1887), 57 L.T. 8. Distinguished: *Metcalfe v. Metcalfe*, [1891] 3 Ch. 1. Considered: *Re Loftus-Otway, Otway v. Otway*, [1895] 2 Ch. 235; *Re Forder, Forder v. Forder*, [1927] All E.R. Rep. 324; *Re Walker, Public Trustee v. Walker*, [1939]

3 All E.R. 902; *Re Baring's Settlement Trusts, Baring Bros. & Co., Ltd. v. Liddell*, [1940] 3 All E.R. 20. Referred to: *Re Spearman, Spearman v. Lowndes* (1900), 82 L.T. 302; *Re Evans, Public Trustee v. Evans*, [1920] 2 Ch. 304. A

As to the effect of annulment on forfeitures under a will, see 2 HALSBURY'S LAWS (3rd Edn.) 357; as to construction of forfeiture clauses, see *ibid.* 415; and for cases see 5 DIGEST (Repl.) 710-722. B

Cases referred to:

- (1) *Manning v. Chambers* (1847), 1 De G. & Sm. 282; 16 L.J.Ch. 245; 9 L.T.O.S. 146; 11 Jur. 466; 63 E.R. 1069; 5 Digest (Repl.) 719, 6248.
- (2) *Seymour v. Lucas* (1860), 1 Drew. & Sm. 177; 29 L.J.Ch. 841; 3 L.T. 10; 8 W.R. 599; 62 E.R. 345; 5 Digest (Repl.) 719, 6251.
- (3) *Smallcombe v. Olivier* (1844), 13 M. & W. 77; 2 Dow. & L. 217; 1 New Pract. Cas. 37; 13 L.J.Ex. 305; 3 L.T.O.S. 222; 8 Jur. 606; 153 E.R. 32; 4 Digest (Repl.) 212, 1903. C

Also referred to in argument:

Ex parte Edwards (1804), 10 Ves. 104. D

Action by which the plaintiffs, the executors of the testator Richard Chitty, prayed for a declaration as to the rights of the parties under the will of the testator, and thereby raised the question whether the testator's son, the defendant, Charles Chitty, had forfeited the life-interest given to him by the testator's will.

Richard Chitty, by his last will and testament, dated July 1, 1864, devised as follows: E

"I devise all that my freehold house, land, and premises, situate and being in West Street, Dorking, aforesaid, now in my own occupation, with the rights, easements, and appurtenances thereunto, belonging or therewith held or enjoyed, unto and to the use of my son Charles Chitty, for his life, and after his decease, to the use of my grandson Richard Chitty, son of my said son Charles Chitty, for his life." F

In the latter part of the will was the following provision:

"Provided always, and I hereby declare, that if my said sons or grandsons, or any or either of them, shall respectively be outlawed or declared bankrupt, or shall assign, charge, or encumber, or attempt or effect to assign, charge, or encumber, his or their respective life-interest or life-interests in the said trust premises respectively, or any part or parts thereof respectively, or shall do or suffer anything whereby the same, or any part thereof respectively, would through his or their act or default, or by operation or process of law, or otherwise, if belonging absolutely to him or them, become vested in or payable to some other person or persons, then and thenceforth the rents to which, but for this provision, he or they respectively would be entitled shall, during the remainder of his or their life-interests therein respectively, from time to time sink into, and be added to, and from part of my general personal estate." G

Charles Chitty became bankrupt on Oct. 13, 1863, in the testator's lifetime, and at the time of testator's decease he had not obtained his order of discharge, nor had he since obtained it, but no creditors' assignee was ever appointed under the bankruptcy, and the bankruptcy was on Mar. 22, 1865, annulled on the bankrupt's application by an order of Mr. Commissioner Goulburn. The testator died seised of the property devised. The official assignee had taken no proceedings to recover possession of the property, of which the son had himself been in occupation; no money had accrued to the official assignee, and no creditor's assignee had been appointed. H

A The bill was filed by executors against the son as tenant for life, and his son, an infant, the remainderman. It prayed that the trusts of the will might be executed and the rights of the parties declared.

Haddan for the plaintiffs.

Swanston for the defendant Charles Chitty.

B

C **PAGE-WOOD, V.-C.**—This case is somewhat novel. The executors come here seeking to execute the trusts of this will, and they ask the court for a direction whether they are at liberty to proceed by way of ejectment, which would be the proper course if the parties' contention be right for the recovery of the rents of the estate devised by the will of the father, the devises being all of legal estates, but accompanied by this proviso: [His Honour read the words of the clause of forfeiture in case of bankruptcy, etc.]

D These words certainly, so far as they go, would oblige the court to hold, as in *Manning v. Chambers* (1) before KNIGHT-BRUCE, V.-C., and *Seymour v. Lucas* (2) before KINDERSLEY, V.-C., that this bankruptcy, though having taken place anterior to the date of the will, was such a bankruptcy as, if it were continuing, would authorise the court in declaring that a forfeiture had taken place, if the estate were an equitable one, and consequently in this case in directing the executors to institute proceedings, although the words of future gift in this case are rather stronger than those which occurred in the cases referred to. I apprehend the ground of those decisions to be this: the testator's intention is clearly not directed to the declaration of bankruptcy, or to the period when the declaration may take place; but only to this, that the property intended for the objects of his bounty should not pass to a stranger. He does not wish that the gift should be a benefit to be conferred upon creditors or upon anybody else. The true intention of his will, therefore, requires that the words of futurity should be stretched so as to include a bankruptcy existing at the date of his death. In this case the bankruptcy which existed at the death of the testator never proceeded beyond this. It seems that there was such an official assignee appointed, and that the estate of the son, the bankrupt, vested in him; but that no creditors' assignee was appointed; that nothing was in fact done; that the official assignee took no proceedings by ejectment or otherwise to recover possession; and that before the official assignee obtained possession, and before any rents had accrued or could possibly accrue, the bankruptcy was annulled.

I No doubt that annulment could not affect the rights of the plaintiffs if a forfeiture had accrued. But the question is, has a forfeiture accrued, when, before any actual demand made or possession taken by the official assignee, before one sixpence could possibly have accrued to him, the bankrupt, by his H diligence and activity, has obtained an annulment of the bankruptcy, so that at the time when the first rents accrued there is no hand but his to receive the rents? That involves to some degree the question of the effect of the annulment, and of the effect of what appears to be the state of the authorities on the subject. Down to *Smallcombe v. Olivier* (3), it seems to have been thought that the effect of annulling a bankruptcy was to render the state of things such as if it had never taken place. But the Court of Exchequer held not only that there was or ought to be an indemnity for all acts done, but that before and up to the annulling of the fiat, everything remained as it was by force of the bankruptcy; that up to that period the bankruptcy operated entirely; and according to that ratio decidendi, although the bankruptcy may have been most improper, the return of the sheriff would have been right; because, until the order for annulling was made, the sheriff could know no better, and therefore made a proper return of nulla bona. The Bankrupt Law Consolidation Act, 1849, says that everything is to be protected except in the case where the bankruptcy

was fraudulent from the beginning; very properly leaving the point in dispute as to how far the annulling related back to the whole transaction. In that state of the authorities, there being nothing done, it would be difficult here to hold that, if ejectment had been brought, and these plaintiffs had recovered, they would not have had protection. Again, if the annulling takes place before the rents are paid or anything is done, the question is whether it does not prevent the forfeiture from arising at all; for otherwise I do not see how this court could have stayed proceedings, however improper and irregular the bankruptcy may have been, for the forfeiture had taken place, the bankrupt had suffered the wrong of forfeiture, inasmuch as an adjudication had taken place. That would have been clearly absurd. But here the annulment was made with the consent of the creditors.

What I have, therefore, to consider, regard being had to all the authorities down to *Smallcombe v. Olivier* (3) is, whether or not, the defendant Charles Chitty having succeeded in annulling the bankruptcy before any part of the property was acquired, before any step being taken by the assignee to recover these rents which were directed to be paid personally to him, and to nobody else, I ought to regard him as having forfeited these rights because, before the testator died, this adjudication took place. Upon the whole, I think I am bound to hold that the act of forfeiture never accrued, because there is no person who has ever obtained the rents, but the defendant has always been in possession and in receipt of these rents, and nobody else has been in a condition to receive them. The decree will be, that the court, being of opinion that the forfeiture of the life-interest of Charles Chitty has not accrued, does not think it proper to give any directions to the trustees for proceeding, by way of ejectment or otherwise, to recover such rents on behalf of the residuary legatees. The costs of all parties to come out of the estate.

Decree accordingly.

LISTER v. PICKFORD

[ROLLS COURT (Sir John Romilly, M.R.), June 5, 6, 12, 1865]

[Reported 34 Beav. 576; 6 New Rep. 243; 11 Jur.N.S. 649;
13 W.R. 827; 55 E.R. 757]

Will—"Appurtenances"—*Land as an appurtenance of land*—*Devise of lands in parish of G. "with the appurtenances"*—*Exclusion of land outside parish of G. treated by testator as part of parish of G.*

A testator specifically devised his manor or lordship of G., and "all his lands and hereditaments in the said manor and parish of G., with the appurtenances." The testator, at the time of his death, had a piece of land in the parish of A., which had always been dealt with by him as if it had been part of the manor of G. He had no other land in the parish of A., and it was clearly proved that the piece of land, although treated as a part of the manor of G., was known to be in the parish of A., and not in that of G.

Held: land cannot be "appurtenant" to land, and the piece of land in the parish of A. did not pass under the specific devise, but passed to the residuary devisee.

A *Limitation of Action—Recovery of land—Possession by trustee—Rents paid by trustee to wrong person—Claim by beneficiary—Acquiescence.*

A testator died in 1842, having by his will specifically devised certain land to X. for life with remainder to X.'s children, and devised the residue of his real estate to trustees upon trust for Y. The trustees, on the death of the testator, through an alleged mistake on their part as to the rights of Y., allowed X. to receive the rents of a portion of the residuary estate. X. died in 1850, leaving an only child, an infant. The trustees, on the death of X., received the rents of the residuary estate previously received by him. In 1863 Y. first heard that the rents of the portion of the residuary estate so received by X. had been wrongfully received by him. In August, 1863, the only child of X. attained the age of twenty-one years. In February, 1864, Y. filed a bill against the trustees of the testator's will and the child of X. for a declaration as to the rights of the parties. On the question whether the plaintiff was barred by the Real Property Limitation Act, 1833, or by acquiescence,

Held: the trustees took possession on the death of X.; when trustees took possession of land or property they were in equity in possession of it for the rightful cestui que trust; accordingly, the plaintiff's suit was not barred by the statute or by acquiescence.

Notes. The Real Property Limitation Act, 1833, has been replaced by the Limitation Act, 1939: see s. 4 (limitation of actions to recover land); s. 19 (limitation of actions in respect of trust property).

E Distinguished: *East Stonehouse U.D.C. v. Willoughby*, [1902] 2 K.B. 365. Considered: *Owens v. Scott & Sons (Bakers), Ltd. and Wastall*, [1939] 3 All E.R. 663. Referred to: *Cuthbert v. Robinson* (1882), 51 L.J.Ch. 238; *Churcher v. Martin* (1889), 42 Ch.D. 312.

As to period of limitation for recovery of land, see generally 24 HALSBURY'S LAWS (3rd Edn.) 228 et seq.; as to actions in respect of trust property, see *ibid.* 277 et seq.; as to possession of trustee being deemed possession of cestui que trust, see *ibid.* 285; as to meaning of appurtenances, see 39 HALSBURY'S LAWS (3rd Edn.) 1018; and for cases see 32 DIGEST (Repl.) 541-543; 44 DIGEST 689-691. For the Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to in argument:

- G** *Buck d. Whalley v. Nurton* (1797), 1 Bos. & P. 53; 126 E.R. 774; 44 Digest 581, 4024.
- Evans v. Angell* (1858), 26 Beav. 202; 32 L.T.O.S. 382; 5 Jur.N.S. 134; 53 E.R. 874; 44 Digest 630, 4617.
- Buszard v. Capel* (1828), 8 B. & C. 141; 2 Man. & Ry.K.B. 197; 6 L.J.O.S.K.B. 267; 108 E.R. 996; affirmed sub nom. *Capel v. Buszard* (1829), 6 Bing. 150; 3 Y. & J. 344; 3 Moo. & P. 480; 130 E.R. 1237; 31 Digest (Repl.) 234, 3688.
- H** *Webber v. Stanley* (1864), 16 C.B.N.S. 698; 4 New Rep. 192; 33 L.J.C.P. 217; 10 L.T. 417; 10 Jur.N.S. 657; 12 W.R. 833; 143 E.R. 1301; 44 Digest 530, 3472.
- Downes v. Bullock* (1858), 25 Beav. 54; 53 E.R. 556; affirmed sub nom. *Bullock v. Downes* (1860), 9 H.L.Cas. 1; 3 L.T. 194; 11 E.R. 627, H.L.; 44 Digest 978, 8342.
- I** *Sturgis v. Morse* (1857), 24 Beav. 541; 53 E.R. 466; affirmed (1858), 3 De G. & J. 1; 44 E.R. 1169, L.J.J.; 32 Digest (Repl.) 596, 1819.
- Mills v. Drewitt* (1855), 20 Beav. 632; 25 L.T.O.S. 293; 1 Jur.N.S. 816; 3 W.R. 626; 52 E.R. 748; 23 Digest (Repl.) 430, 4999.
- Hibon v. Hibon* (1863), 1 New Rep. 532; 32 L.J.Ch. 374; 8 L.T. 195; 9 Jur.N.S. 511; 11 W.R. 455; 44 Digest 691, 5317.
- Boocher v. Samford* (1588), Cro. Eliz. 113; 78 E.R. 370; sub nom. *Bucher v. Samford*, Gouldsb. 99; 44 Digest 689, 5302.

Bright v. Legerton (No. 1) (1861), 2 De G.F. & J. 606; 30 L.J.Ch. 338; 3 L.T. A
713; 7 Jur.N.S. 559; 9 W.R. 239; 45 E.R. 755, C.A.; 20 Digest (Repl.) 561,
2644.

Burroughs v. McCreight (1844), 1 Jo. & Lat. 290; 32 Digest (Repl.) 535, *844.

Wrixon v. Vize (1842), 3 Dr. & War. 104; 32 Digest (Repl.) 540, *881.

Action in which the plaintiff, Matthew Henry Lister, the residuary devisee under the will of Matthew Bancroft Lister, sought a declaration, against the defendant, Emily Grace Bagnell (née Lister), a specific devisee under the will, and against the trustees, that a piece of land containing 33a. 2r. 26p. in the parish of Asterby, in the county of Lincoln, passed to him as residuary devisee under the will, and also an account of the rents.

Matthew Bancroft Lister, the testator, by will dated May 14, 1841, devised certain lands and hereditaments in the parish of Goulceby, in the county of Lincoln, together with other lands and hereditaments, to the use of his son George Arthur Lister for life, with remainder to the child or children of the said G. A. Lister in tail. The trustees of the will, Francis Pickford and George Jackson, had, during the minority of any tenant in tail, power to lease and to enter into and hold possession of the estate and to apply the rents for the maintenance of the minor. The said hereditaments were so devised by the following description :

"All that my manor or lordship of Goulceby, in the said county of Lincoln, with all and every the rights, royalties, quit-rents and appurtenances thereto belonging, with the advowson or perpetual right of patronage and presentation of, in and to the vicarage of the parish and parish church of Goulceby, with all rights, members and appurtenances whatsoever to the said advowson belonging; and all and every my messuages, lands, tenements, tithes and tithe commutation rents charges and hereditaments, situate, lying and being within the said manor and parish of Goulceby, with the appurtenances; and all my messuages, lands, tenements and hereditaments situate, lying and being in the several parishes of Scamblerby and Frithville, in the said county of Lincoln, with the appurtenances."

The testator also devised his residuary real estate to the trustees, Pickford and Jackson, and their heirs upon trust to pay the rents to the plaintiff Matthew Henry Lister until he should dispose thereof by anticipation, with remainder over. The testator died in 1842. At the time of his death he was seised of certain lands, containing about 33a. 2r. 26p., in the parish of Asterby, in the said county of Lincoln. Those lands were, together with the specifically devised lands at Goulceby aforesaid, then in the possession or occupation of a Mr. Robert East, a farmer, who held the same several lands and hereditaments under one lease thereof respectively, which had been granted to him by the testator, at one entire yearly rent of £400 per annum.

The bill in the suit stated, that on the death of the testator the trustees of his will, instead of entering into the receipt of the rents of Mr. East's farm at Asterby, and investing the same for the benefit of the plaintiff (who was then abroad), allowed George Arthur Lister to receive the whole of those rents, and to apply the same to his own use; and that he continued so to receive the entire rents of both the Goulceby and the Asterby lands till his death in October, 1850, leaving the defendant Emily Grace Lister (then an infant, but now of age and the wife of a Mr. Bagnell) his only child. Since the death of George Arthur Lister, the trustees of the testator's will had received the rent of the lands in Asterby and in Goulceby so leased to Mr. East as aforesaid, and had from time to time invested the same, but without

A making any distinction between the proportion of the rent properly attributable to the lands in each separate parish. In 1852 the plaintiff returned to England; but it was not until September, 1863, as he alleged by his bill, that he was informed that the lands at Asterby formed part of the residuary real estate of the testator. It was then only that he first became aware of a claim made by the defendant Mrs. Bagnell to the lands in the parish of Asterby, by virtue of the specific devise to her of the manor and farm of Goulceby, with its appurtenances, as above stated.

C There was now in the hands of the defendants the trustees, a sum of £700, representing the rents attributable to the Asterby portion of the Goulceby farm accrued since the death of George Arthur Lister. The bill in this suit was filed on Feb. 10, 1864, and it prayed a declaration that the said lands and hereditaments in the parish of Asterby formed part of the residuary real estates of the said testator; that the plaintiff was entitled to the rents and profits thereof which had accrued due since the death of the said testator; that the rents of the lands in the respective parishes of Asterby and Goulceby might be properly apportioned; for an account and payment thereof; and a direction that the defendants should pay the costs of the suit.

D The defendant Mrs. Bagnell, in support of her claim, stated, in her answer, and adduced corroborative evidence to prove, that the lands and hereditaments in the parish or township of Asterby did contain 33a. 2r. 26p. or thereabouts; and she submitted that they were included in the specific devise to her father of the Goulceby manor farm, or Goulceby farm, as "being held by the testator as part thereof or appurtenant thereto." She further stated by the answer, E that the aforesaid 33a. 2r. 26p. were, together with other lands and hereditaments situate in the township of Goulceby, and containing 327a. 1r. 29p., allotted to the testator's father by an award made under an Act of Parliament passed in 1776, for dividing and inclosing certain open commons, fields, ings, common pastures and other commonable lands within the township of Asterby and Goulceby, in the county of Lincoln; and which the preamble of the Act stated to lie so intermixed throughout both townships that the boundaries of either parish could not be distinguished or known; that the several lands of the said proprietors in the said fields, ings, common pastures and other commonable lands lay intermixed and dispersed in small parcels, and were in general so inconveniently situated as to render the cultivation thereof difficult and expensive to the respective proprietors, and in their then present situation were incapable of much improvement; and that by the said Act, in making such allotments, the commissioners thereunder were directed to have due regard to the situation and conveniences, as well as quantity and quality, of the lands belonging to each person interested, and the right of common and every other property of such person, and also the lands so to be allotted in lieu thereof; G that the said Asterby portion of the said farm was contiguous to and did lie immediately in front of the homestead of the said farm, and was allotted to the testator's father under the aforesaid Act, in regard to the situation and convenience of his other allotments forming the remainder of the said farm; H that the whole did lie together in a ring-fence, and for many years prior to the testator's death were leased together as one farm at an entire rent, and I treated in all respects as the same property, and usually called and described as the "Goulceby Manor Farm," or "Goulceby Farm"; that for a series of years long prior to the testator's death the Asterby portion of the farm was always identified therewith and spoken of as part thereof; that previous to the testator's death he had granted a lease for twelve years of the whole of the said farm, comprising the Asterby portion, at an entire rent of £400 per annum to Mr. Robert East; that upon the expiration of that lease George Arthur Lister granted a new lease of the said farm, including the said Asterby portion, to the said Robert East, for a term of fourteen years from May 13, 1847,

at the like entire yearly rent of £400; that in each of those leases the said farm was described as A

"all that messuage or farmhouse, with the outbuildings and several parcels of land thereto belonging, lying in the parishes of Goulceby and Asterby, in the county of Lincoln, containing the quantities, etc. (setting forth the acreage of the Goulceby land, and of that in the parish of Asterby), together with all and singular the buildings, yards, gardens and appurtenances whatsoever to the said farm and lands belonging." B

The answer also stated that the said farm was subject to a perpetual rent-charge of £7, payable to the mayor and burgesses of Great Grimsby, by a deed executed in the reign of King Edward VI, charging the same upon the manor of Goulceby, "with the appurtenances," and 1000 acres of land with the appurtenances in Goulceby, Asterby, and Scamblerby; and that the payment of such rentcharge had been charged by the defendants, the trustees of the will, in their accounts, and had since her majority been paid by Mrs. Bagnell. C

By the Real Property Limitation Act, 1833 :

"Section 2 . . . no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same." D

"Section 3 . . . in the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as herein-after is mentioned; (that is to say,) [inter alia] when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received . . ." E

"Section 24 . . . no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions herein-before contained he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity." F

Selwyn, Q.C., and *Speed* for the plaintiff.

Hobhouse, Q.C., and *J. Napier Higgins* for Mrs. Bagnell.

Southgate, Q.C., and *E. K. Karlake* for the trustees.

Williamson for other parties. G

Cur. adv. vult. H

June 12, 1865. **SIR JOHN ROMILLY, M.R.**—The first question in this case is whether a piece of land containing about 33a. 2r. 26p., in the parish or township of Asterby, in the county of Lincoln, passed under a specific devise of a farm called Goulceby farm, also in the county of Lincoln, but in the township of Goulceby, and not in that of Asterby. The testator in the suit was a Mr. Matthew Bancroft Lister. He made his will in the year 1841, and the specific devise is in these words. [His Honour read the devise as above I

A stated, and continued:] There is also a subsequent residuary devise in the will of all the testator's real estate to or for the benefit of the plaintiff; and his contention is, that the piece of land in the parish of Asterby really passed under the latter devise to him, and not under the former.

B The facts of the case, as I understand them, are not in dispute. The piece of land was originally allotted to the father of the testator in 1776, under an Act of Parliament in respect of other lands, as to which, however, it seems that there was some little doubt about their identity. The testator does not appear to have had any other lands in Asterby than this piece; and this piece had always been held and enjoyed by him with other lands in the township or parish of Goulceby. It had been let by him with those other lands, and the entire rent had been received on those lettings with respect to it and the other lands. Moreover, it was a well-known fact that it was actually situated in the township of Asterby and not in that of Goulceby. In that state of things I am of opinion that the piece of land in the parish or township of Asterby did not pass under the specific devise to George Arthur Lister, the father of the defendant Mrs. Bagnell.

D It was said on her behalf, that the word "appurtenances," in the specific devise, would comprehend this land, inasmuch as it had always been held, let and enjoyed as a part of the Goulceby farm. But it has long been settled law—settled by the earliest authorities—that "land cannot be appurtenant to land." An appurtenant to land may include any incorporeal, but not any corporeal, hereditament. If, indeed, the specific devise, instead of being one of "all the manor or lordship of Goulceby," with its rights and appurtenances, E had been a devise of "all the testator's farm at Goulceby," the case might have been very different. But the words of the devise are so strictly confined to all the testator's lands and hereditaments in Goulceby, that it is impossible to hold that this piece of land, which was not in fact in Goulceby, passed under the specific devise. It was admitted that the words in the devise, F "within the said manor and parish of Goulceby," did not affect the question; and when, therefore, it is once settled—as I apprehend it clearly is—that land cannot be appurtenant to land, it is plain to my mind that, looking at the words of this devise, the piece of land in Asterby parish, did not pass under it, but that it did pass under the residuary devise to or for the benefit of the plaintiff.

G The next questions are whether the plaintiff is barred by the Real Property Limitation Act, 1833, or by any acquiescence on his part?

H With respect to the first of those questions, the legal estate in the testator's residuary estate was, during the life of Matthew Henry Lister, in the trustees of the will. The legal estate in the Goulceby lands was, during the life of George Arthur Lister, in him. George Arthur Lister during his life entered into the possession of the Goulceby manor and lands; and was also allowed by the trustees to enter into that of this piece of land in Asterby. He did so on the death of the testator in 1842, and, therefore, more than twenty years before the filing of the bill in this suit. George Arthur Lister died in 1850, leaving one child only, an infant daughter, who attained her majority in August, 1863, and has since married a Mr. Bagnell. On the death of George Arthur Lister, I a trust arose for her benefit in the Goulceby farm property. In 1851 she and her mother instituted a suit in this court; and in it one of the defendants the trustees of the testator's will was appointed her guardian. In 1861 the trustees granted a new lease of the Goulceby farm to a Mr. Robert East, including therein the piece of land at Asterby. That lease is still subsisting. If there had been nothing more in the case than the facts which I have mentioned, the statute would obviously have applied to it; but by the will the trustees appointed by the testator were the same for all the beneficiaries. If, therefore, I have come to the right conclusion as to the piece of land in Asterby parish, the legal

estate in it was, on the death of the testator, in the defendants the Messrs. A
Pickford and Jackson. There was only eight years of adverse possession, viz., during the life of George Arthur Lister, from the death of the testator in 1842, till George Arthur's death in 1850. On his death the trustees did take possession of the lands at Goulceby and in Asterby, and remained in that possession till August, 1863, when Mrs. Bagnell attained her majority and B
released them. It was endeavoured in the course of the argument to make out that the trustees were not actually in possession of the lands till 1861, when they granted the new lease; but there is, in my opinion, nothing in that objection. The legal estate was clearly in them on the death of George Arthur Lister, so far as regards the land in Asterby.

The arguments, however, adduced before me principally turned upon this: C
that, even admitting the trustees to have had the legal estate throughout, and to have been in possession as they were, that possession by them enured for the benefit, not of the plaintiff, but of Mrs. Bagnell—I mean as to the Asterby lands. But I think it is clear that where a trustee is in possession of land or property he is in equity in possession of it for his rightful cestui que trust, and if the trustee makes a mistake with respect to the person who is his rightful D
cestui que trust, that cannot affect the position of that party. Even if they (the trustees) had thought themselves entitled to any beneficial interest in the land, and that they were not merely trustees of it, I do not think it would have affected the question. As it was, they were the only persons who could have maintained an action of ejectment with respect to the land at Asterby. I must hold that they were bound to know the law; that they ought to have known E
who was really beneficially entitled to the 33a. 2r. 26p.; and that when they knew that, they should have taken possession of it for their cestui que trust accordingly. I see no distinction in principle, so far as the result is concerned, between the case of trustees who wilfully abstain from taking possession of the trust property, and that of trustees who ignorantly disregard their duty to do so, and thereby neglect the rights and interests of their cestui que trust. F
In this case, however, the trustees did take possession of the land in question in 1850, and that possession must, in my opinion, be attributed to their rightful cestui que trust; that is, to the plaintiff. I must, therefore, make a declaration according to the prayer of the bill.

There should also be an additional statement in the decree, that the plaintiff is not barred by the Real Property Limitation Act, 1833, or, as I take it, by any acquiescence on his part. G

Declaration accordingly.

A

MIDLAND RAILWAY CO. v. TAYLOR

[HOUSE OF LORDS (Lord Westbury, L.C., Lord Cranworth and Lord Chelmsford),
March 11, 1862]

B

- [Reported 8 H.L.Cas. 751; 31 L.J.Ch. 336; 6 L.T. 73;
8 Jur.N.S. 419; 10 W.R. 382; 11 E.R. 624]

Company—Shares—Transfer—Forged transfer—Restoration of shares—Joint holders—Forgery of signature of one holder by other—Right of executors to dividends.

C

T. and B., in partnership, owned stock in a company as partnership property. B. forged T.'s name to a deed of transfer of the stock, purporting to be from T. and B. to L. The company acted on this deed, and entered L. on its register as the proprietor. To prevent T. discovering the fraud, B. accounted to the partnership throughout the remainder of T.'s life for the amount of the dividends declared on the stock, using money derived from a different source. Some time after T. died, the fraud was discovered. In an action by T.'s personal representative,

D

Held: (i) he was entitled to have transferred to him by the company the appropriate amount of stock; (ii) he was also entitled to be paid by the company the dividends on such stock which had accrued after, but not before, T.'s death; and (iii) the company was entitled to a lien on such stock for anything which might be found owing from T. to B. on the taking of the partnership accounts.

E

Notes. Before this case went to the House of Lords, it had been found on taking the accounts on further consideration that the estate of Bright was indebted to the estate of Taylor, so the question whether the company was entitled to a lien became academic.

F

Considered: *Barton v. North Staffordshire Rail. Co.*, [1886-90] All E.R. Rep. 288; *Barton v. London and North Western Rail. Co.* (1888), 38 Ch.D. 144; *Welch v. Bank of England*, [1955] 1 All E.R. 811. Referred to: *Swan v. North British Australian Co.* (1862), 10 W.R. 841; *Sutton v. Wilders* (1876), L.R. 12 Eq. 373.

As to forged transfers, see 6 HALSBURY'S LAWS (3rd Edn.) 261; and for cases see 9 DIGEST (Repl.) 404-405; 10 DIGEST (Repl.) 1233-1235. For the Companies Clauses Consolidation Act, 1845, ss. 14, 15, see 3 HALSBURY'S STATUTES (2nd Edn.) 285, 286.

G

Cases referred to in argument:

Hare v. London and North Western Rail. Co. (1860), John. 722; 30 L.J.Ch. 817, 821, n.; 2 L.T. 229; 7 Jur.N.S. 1145, 1147, n.; 8 W.R. 352; 70 E.R. 610; 1 Digest (Repl.) 92, 680.

H

Davis v. Bank of England (1824), 2 Bing. 393; 9 Moore, C.P. 747; 3 L.J.O.S.C.P. 4; 130 E.R. 357; on appeal sub nom. *Bank of England v. Davis* (1826), 5 B. & C. 186; 7 Dow. & Ry.K.B. 828; 4 L.J.O.S.K.B. 145; 108 E.R. 69; 3 Digest (Repl.) 131, 22.

I

Appeal by the Midland Rail. Co. from a decree of SIR JOHN ROMILLY, M.R., reported 28 Beav. 287, declaring a transfer of certain stock void and holding that the respondent, Robert John Taylor, the plaintiff in this action and the administrator of John Taylor deceased, was entitled to a transfer by the appellants of the appropriate amount of stock; and to be paid by the appellants the dividends which had accrued on such stock since the death of John Taylor deceased.

The late John Taylor, corn merchant, Hull, took Henry Smith Bright into partnership, which continued until 1856, when Taylor died. In September, 1857, Bright was adjudicated a bankrupt. In 1845, 386 shares were taken in the Midland Rail. Co., and duly registered in the joint names of Taylor and Bright.

The calls were duly paid out of, and the dividends paid into, the funds of the partnership. Part of these shares, amounting to £9440, were converted in 1852 into stock in the company, and stood in the joint names of Taylor and Bright. Bright was in the habit of receiving the dividends on the shares, and regularly accounted for the same to Taylor. In September, 1852, Bright forged the name of Taylor by way of signature to a transfer deed of this stock, and also forged the name of a witness to Taylor's ostensible signature. The company caused the name of the ostensible transferee to be substituted for Taylor and Bright. Bright survived Taylor, and was, after being made a bankrupt, tried and sentenced for forgery, and died in 1859. He had, however, concealed the forgery from Taylor during his life, and continued to account to Taylor for the amount of the dividends using money derived from a different source. After Taylor's death, he represented that the said stock was still standing in their joint names, and handed to Taylor's administrator a paper containing a list of dividends due on that year, in which list Bright treated the said stock as still standing in the joint names of Taylor and Bright.

Owing to the circumstance of the stock having been in the joint names of Taylor and Bright, and that Bright survived Taylor, no proceedings could be taken at law or otherwise than in equity against the company in respect of the stock and dividends. The assignees of Bright admitted that Bright never had more than a very small interest in the said stock, and that at Taylor's death the whole of it was the property of Taylor. The railway company never in any way communicated with Taylor respecting the transfer of the stock, and they acted on the forged transfer and substituted another name for those of Taylor and Bright.

The Midland Rail. Co.'s Acts of Parliament incorporated the Companies Clauses Consolidation Act, 1845, with respect to the transfer and transmission of shares, which contain the following provisions :

"14. Subject to the regulations herein or in the special Act contained, every shareholder may sell and transfer all or any of his shares in the undertaking, or all or any part of his interest in the capital stock of the company in case such shares shall, under the provisions hereinafter contained, be consolidated into capital stock, and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated, and such deed may be, according to the form in the schedule (B) to this Act annexed, or to the like effect. 15. The said deed of transfer, when duly executed, shall be delivered to the secretary, and be kept by him, and the secretary shall enter a memorial thereof in a book to be called the 'Register of Transfers,' and shall endorse such entry on the deed of transfer, and shall on demand deliver a new certificate to the purchaser, and for every such entry, together with such endorsement and certificate, the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed then a sum not exceeding two shillings and sixpence, and on the request of the purchaser of any share an endorsement of such transfer shall be made on the certificate of such share, instead of a new certificate being granted, and such endorsement being signed by the secretary shall be considered in every respect the same as a new certificate, and until such transfer has been so delivered to the secretary as aforesaid the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share."

On Aug. 19, 1858, the respondent Robert John Taylor filed his bill of complaint in the Court of Chancery against the appellants the Midland Railway Co. and Theophilus Carrick, John Raspin Ringrose, and Elijah Meggett, as assignees in bankruptcy of Henry Smith Bright, thereby alleging that Bright had forged the

A name of John Taylor, deceased, to the deed of transfer of Sept. 15, 1852, and also the name of the respondent as a witness to the execution thereof by John Taylor, deceased, and that owing to the circumstance of the shares having been in the joint names of John Taylor, deceased, and Henry Smith Bright, and to the fact of Henry Smith Bright having survived John Taylor, deceased, no proceedings at law could be taken against the company or otherwise, in respect of the shares, or otherwise than in the court; and that Henry Smith Bright never himself had anything beyond a very small and inconsiderable interest (if any) in the shares, and that with the exception of such very small and inconsiderable interest (if any) the whole thereof were the property of John Taylor, deceased. And also alleging that the company were bound at their peril not to act on anything but a valid and authentic transfer, and that the said alleged deed of transfer was wholly void. And it was thereby prayed that the Midland Rail. Co. might be decreed to pay to the plaintiff, as representing the estate of John Taylor, deceased, the dividends which would have been received on the shares and stock subsequently to the death of John Taylor, deceased, by his representative, but for the company having acted on the deed of transfer, and to indemnify the estate of John Taylor, deceased, and to appropriate or purchase and transfer a sufficient amount of the stock for that purpose, and to place the name of John Taylor or of the plaintiff on their registers, or that they and their agents might be restrained by the order and injunction of that honourable court from setting up in any action or other proceeding at law that might be brought against them in respect of the matters aforesaid, in the name of Henry Smith Bright or his assigns, or any person claiming through him or them, any such defence as might prevent relief being obtained therein by reason of Henry Smith Bright, being the person who committed the fraud and forgery, and from doing any act in derogation of the respondent's rights and interests, or that an issue might be directed for the purpose of ascertaining the truth of the material facts therein alleged; and that on the truth thereof being established, the relief thereby prayed might be granted to the respondent, and for general relief.

SIR JOHN ROMILLY, M.R., ultimately, on April 25, 1860, made a decree declaring the transfer wholly void; that the plaintiff was entitled to a transfer of the stock with all dividends due subsequently to John Taylor's death. An account was then ordered to be taken of the partnership dealings between Taylor and Bright, and the railway company were declared entitled to stand in the place of the said Bright to the extent of anything coming to him on taking the partnership accounts, and to have a lien on the stock for the amount. The railway company appealed.

Sir Hugh Cairns, Q.C., Knowles, Q.C., and Speed for the appellants.

Sir Roundell Palmer, Q.C., Selwyn, Q.C., and G. L. Russell for the respondent.

H LORD WESTBURY, L.C.—The matter rests on the plainest and clearest principles. Certain stock of the Midland Railway Co. was standing in the books of the company in the names of two persons, Taylor and Bright; Bright, by a transfer executed by himself, in Taylor's life, and having also forged the name of Taylor, transferred that stock to a third person. Immediately on that act I being done, there was a right of action at law in Taylor; in fact, there was also a right of suit in equity, and the right of action in law and of suit in equity were both founded upon a legal right; that legal right vested in Taylor remained with him, and is now vested in the present plaintiff, his personal representative; and there can be no earthly doubt that there is a title in that personal representative to call on the company to replace the stock. That right has been declared by the decree of the Master of the Rolls, and it is impossible to say that the right which existed at the time when the forged transfer was made, is taken away and lost by the accidental circumstance of Taylor subsequently dying in the

lifetime of Bright. I apprehend the whole argument is founded on a fallacy, A
and that the decree of the court below was clearly right. A point was subsequently
mentioned of an accidental error that was made in the order on further con-
sideration, that may be corrected; it was not, as has been very properly and
candidly stated by the counsel for the appellants, the ground on which the appeal
was presented. I apprehend, therefore, your Lordships will be of opinion that B
there is no ground for dealing with this appeal in any other manner than its
merits require; and I submit to your Lordships that the appeal should be
dismissed with costs.

LORD CRANWORTH.—I do not think it necessary to add more than a single
observation to what has already fallen from my noble and learned friend. It is C
said that the right in equity is dependent on there being a right in law. That
is a mistake; it is not dependent on the right in law. There would have been
no right in equity if there had not been a wrong which would have entitled the
party to bring an action at law; but as to the principle of *actio personalis*
moritur cum persona, where the right of action is gone it does not affect the
right in equity here, which clearly is to have a specific transfer of the stock D
which has been improperly transferred.

LORD CHELMSFORD.—I am entirely of the same opinion.

Appeal dismissed.

DILLWYN v. LLEWELYN

[COURT OF APPEAL IN CHANCERY (Lord Westbury, L.C.), June 4, July 12, 1862]

[Reported 4 De G.F. & J. 517; 31 L.J.Ch. 658; 6 L.T. 878;
8 Jur.N.S. 1068; 10 W.R. 742; 45 E.R. 1285]

*Gift—Incomplete gift—Land—Expenditure by donee on faith of incomplete gift—
Right of donee to the land.*

A testator, by will, devised his property to his wife for life with remainder to
the plaintiff, his son, for life, with remainder to the first and other sons of the
plaintiff. Subsequently, the plaintiff requiring a place for his residence, the
testator signed the following memorandum, which was also signed by his son:
“H., together with my other freehold estates, are [sic] left in my will to my
dearly beloved wife, but it is her wish, and I hereby join in presenting the same
to my son for the purpose of furnishing him with a dwelling-house.” The
plaintiff took possession and expended during the lifetime of his father, and
with his knowledge, large sums in the erection of a house and in the general
improvement of the property.

Held: although a voluntary agreement will not be completed or assisted by a
court of equity in cases of mere gift if anything be wanting to complete the title
of the donee in obtaining it, the subsequent acts of the donor may give that
right; in the circumstances the subsequent expenditure by the plaintiff with
the approbation of his father supplied a valuable consideration originally want-
ing; and the plaintiff was entitled to the fee simple of the property.

A Notes. Referred to: *Veitch v. Caldicott* (1945), 173 L.T. 30.

As to incomplete gifts, see 18 HALSBURY'S LAWS (3rd Edn.) 396-400; as to contracted licences, see 23 HALSBURY'S LAWS (3rd Edn.) 430-432; as to part performance, see 36 HALSBURY'S LAWS (3rd Edn.) 292-298; and for cases see 25 DIGEST (Repl.) 589.

B Case referred to:

- (1) *Foxcraft v. Lister* (1701), cited 2 Vern. p. 456; reversed sub nom. *Lester v. Foxcraft*, Colles, 108; 1 E.R. 205, H.L.; 30 Digest (Repl.) 406, 493.

Also referred to in argument:

East India Co. v. Vincent (1740), 2 Atk. 82; 26 E.R. 451, L.C.; 21 Digest (Repl.) 453, 1548.

Dann v. Spurrier (1802), 7 Ves. 231; 32 E.R. 94, L.C.; 30 Digest (Repl.) 406, 495.

Duke of Beaufort v. Patrick (1853), 17 Beav. 60; 1 Eq. Rep. 41; 22 L.J.Ch. 489; 21 L.T.O.S. 296; 17 Jur. 682; 1 W.R. 280; 7 Ry. & Can. Cas. 906; 51 E.R. 954; 21 Digest (Repl.) 480, 1686.

Somerset Coal Canal Co. v. Harcourt (1857), 24 Beav. 571; 27 L.J.Ch. 139; 30 L.T.O.S. 194; 4 Jur.N.S. 1; 6 W.R. 96; 53 E.R. 478; on appeal sub nom. *Somersetshire Coal Canal Co., Ltd. v. Harcourt* (1858), 2 De G. & J. 596; 27 L.J.Ch. 625; 31 L.T.O.S. 259; 4 Jur.N.S. 671; 6 W.R. 670; 44 E.R. 1120, L.C.; 28 Digest (Repl.) 765, 193.

Unity Joint Stock Mutual Banking Association v. King (1858), 25 Beav. 72; 27 L.J.Ch. 585; 31 L.T.O.S. 128; 4 Jur.N.S. 470; 6 W.R. 264; 53 E.R. 563; 32 Digest (Repl.) 300, 432.

Appeal by the plaintiff, Lewis Llewelyn Dillwyn, from a decree of SIR JOHN ROMILLY, M.R., holding that the plaintiff was entitled to an equitable interest only in a property known as Hendrefoilan for his life and the life of the defendant, Mary Dillwyn, his mother. The plaintiff claimed to be the equitable owner in fee simple of this property, and sought an order that the defendant John Dillwyn Llewelyn might be ordered to execute to him a conveyance of the estate.

The case depended upon the effect of the gift made by the late Lewis Weston Dillwyn, the plaintiff's father. The plaintiff's father, being seised in fee of freehold estates in the counties of Glamorgan and Carmarthen, by his will, dated June 21, 1847, devised all his real estates in Glamorgan and Carmarthen unto the Rev. John Montgomery Traherne and to his two sons, the defendant John Dillwyn Llewelyn and the plaintiff Lewis Llewelyn Dillwyn, upon trust for the sole use of his the testator's wife, the defendant Mary Dillwyn, during her life, with remainder in trust for his second son Lewis Llewelyn Dillwyn and his assigns for his life, with remainder in trust for the son or sons of the plaintiff as thereby provided, and gifts over in default of sons who attained twenty-one years.

In 1853 the plaintiff, having some difficulty in finding a suitable residence, there was a discussion between himself and the other members of his family whether he should build a suitable residence for himself. The plaintiff's father, Lewis Weston Dillwyn, resided at Sketty Hall, and had expressed a wish that the plaintiff should reside within a short distance of Sketty Hall. Lewis Weston Dillwyn was possessed of a farm called Hendrefoilan, about fifty acres in extent, of which he was owner in fee, and which was situated about a mile and a half from Sketty Hall. He proposed to give this farm to the plaintiff if he approved of the situation, in order that the plaintiff might build a house there, and reside near his parents. The plaintiff decided to build on Hendrefoilan, and in the beginning of the year 1853 the plaintiff went with his brother the defendant John Dillwyn Llewelyn, to Hendrefoilan, for the purpose of looking at and selecting a site on which the plaintiff should build, and it was soon afterwards arranged between the plaintiff and his father, with the privity and assent of his

mother, Mary Dillwyn, that Lewis Weston Dillwyn should give the estate of Hendrefoilan to the plaintiff for the purposes aforesaid. Lewis Weston Dillwyn, by way of preserving evidence of the gift made by him to the plaintiff, delivered to the plaintiff the following memorandum, at or about the time at which it bore date.

"Hendrefoilan, together with my other freehold estates, are [sic] left in my will to my dearly beloved wife; but it is her wish, and I hereby join her in presenting the same to our son Lewis Llewelyn Dillwyn, for the purpose of furnishing himself with a dwelling-house.

"J. D. Llewelyn,
"Feb. 10, 1853. Sketty Hall."

"L. W. Dillwyn.

Shortly after the date of the memorandum, the plaintiff entered upon and took possession of the estate, and shortly afterwards erected a new house and buildings thereon, and he continued in the uninterrupted possession of the property up to the trial. The plaintiff spent £14,000 of his own money in building the house and buildings, laying out and planting the grounds, which he did in reliance on the gift to him by his father, and in the lifetime and with the knowledge and privity of his father. No conveyance, however, of the estate of Hendrefoilan was ever executed by Lewis Weston Dillwyn to the plaintiff, who died in August, 1855, without having altered his will save by making certain codicils not material hereto. John Montgomery Traherne was dead. The plaintiff had had male issue one son only, the defendant Henry Delabeche Dillwyn. The plaintiff had applied to the defendant John Dillwyn Llewelyn to execute to him a conveyance of the estate of Hendrefoilan, but the defendant was advised that he could not do so with safety.

The bill prayed that it might be declared that the plaintiff became, in the lifetime of Lewis Weston Dillwyn, the equitable owner in fee-simple of the estate in question, and that the defendant John Dillwyn Llewelyn might be ordered to execute to him a conveyance of the estate. By the evidence it appeared that at the time when the plaintiff was put in possession of the property, the fee-simple of the land was not worth more than £1500. That the plaintiff had expended in the erection of the house and outbuildings, and in draining the land and other improvements, the sum of £20,000.

SIR JOHN ROMILLY, M.R., held that the plaintiff had an equitable interest only in the property during his own life and the life of the defendant Mary Dillwyn his mother, and made a decree accordingly. The plaintiff presented his petition of appeal, and prayed that he might be declared to be the owner in fee-simple of the estate.

Selwyn, Q.C., and *Hobhouse* for the plaintiff.

Lloyd, Q.C., and *Surrag* for the defendants.

LORD WESTBURY, L.C.—In this case the testator by his will devised his property to his wife during her life, the wife being the mother of the plaintiff, with remainder to the plaintiff for life, with remainder to the first and other sons of the plaintiff. Subsequently the father and mother became desirous that the plaintiff, their eldest son, should reside in their immediate neighbourhood, and accordingly they selected a small estate and determined to give it to the son in order that he might build a proper dwelling-house for his residence thereon. A memorandum was made of the transaction, which was in these words:

"Hendrefoilan, together with my other freehold estates, are left in my will to my dearly beloved wife, but it is her wish, and I hereby join her in presenting the same to our son Lewis Llewelyn Dillwyn, for the purpose of furnishing himself with a dwelling-house.—L. W. Dillwyn.
J. D. Llewelyn. Feb. 10, 1853. Sketty Hall."

A This memorandum was signed by the testator and also by his eldest son, the plaintiff. No alteration was made by the testator in his will. The son was put in possession of the estate, and immediately proceeded to build a dwelling-house thereon, and laid out, as it is stated, a sum of no less than £14,000. This expenditure took place in the lifetime of the father, and with the assent and approbation of the father. No alteration was made by the father in his will, and he died in August, 1855.

B The question now arises, what estate the son has in the property, so given him, and which was made the site of his dwelling-house. The mother is willing that the son should be regarded as the absolute owner, but inasmuch as the estates of the testator under the will are given to the first and other sons of the plaintiff, his eldest child, who is an infant, is interested in contesting the effect of the transaction; and it requires, therefore, to be narrowly examined by reason of the infancy of the child.

C About the rules of the court there can be no controversy. A voluntary agreement will not be completed or assisted by a court of equity; in cases of mere gift, if anything be wanting to complete the title of the donee, a court of equity will not assist him in obtaining it, for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if A. gives a house to B., but makes no formal conveyance, and the house is afterwards, on the marriage of B., included, with the knowledge of A., in the marriage-settlement of B., A. would be bound to complete the title of the parties claiming under that settlement. So if A. puts B. in possession of a piece of land, and tells him, "I give it you, that you may build a house on it; and B., on the strength of that promise, with the knowledge of A., expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract which arises from the contract, and to complete the imperfect donation which was made. The case is somewhat analogous to that of verbal agreement, not binding originally for want of the memorandum in writing signed by the party to be charged, but which becomes binding by virtue of the subsequent part performance. The early case of *Foxcraft v. Lister* (1) is an example nearly approaching to the terms of the present case.

G SIR JOHN ROMILLY, M.R., however, seems to have thought that a question might still remain as to the extent of the estate taken by the donee; and that, in this particular case, the extent of the donee's interest depended on the terms of the memorandum. I am not of that opinion. The equity of the donee and the estate to be claimed by virtue of it depend on the transaction, that is, on the acts done, and not on the language of the memorandum, except as that shows the purpose and intent of the gift. The estate was given as the site of a dwelling-house to be erected by the son. The ownership of the dwelling-house and the ownership of the estate must be considered as intended to be co-extensive and co-equal. No one builds a house for his own life only, and it is absurd to suppose that it was intended by either party that the house, at the death of the son, should become the property of the father. If, therefore, I am right in the conclusion of law that the subsequent expenditure by the son, with the approbation of the father, supplied a valuable consideration originally wanting, the memorandum signed by the father and son must be thenceforth regarded as an agreement for the soil, extending to the fee-simple of the land. In a contract for sale of an estate, no words of limitation are necessary to exclude the fee-simple; but further, upon the construction of the memorandum itself, taken apart from the subsequent acts, I should be of opinion that it was the plain intention of the testator to vest in the son the absolute ownership of the estate.

The only inquiry, therefore, is, whether the son's expenditure, on the faith of the memorandum, supplied a valuable consideration and created a binding obligation. On this I have no doubt, and it, therefore, follows that the intention to give the fee-simple must be performed, and that the decree ought to declare the son the absolute owner of the estate comprised in the memorandum. I propose, therefore, to reverse the decree of the Master of the Rolls, and to declare that, by virtue of the original gift made by the testator, and of the subsequent expenditure by the plaintiff, with the approbation of the testator, and of the right an obligation resulting therefrom, the plaintiff is entitled to have a conveyance from the trustees of the testator's will, and the other parties interested under the same, of all their estate and interest under the testator's will in the estate of Hendrefoilan, in the pleading mentioned; and, with this declaration, refer it to the judge in chambers to settle such conveyance accordingly.

HEXT v. GILL AND OTHERS

[COURT OF APPEAL IN CHANCERY (James and Mellish, L.JJ.), June 12, 13, 15, 16, 17, 22, 1872]

[Reported 7 Ch. App. 699; 41 L.J.Ch. 761; 27 L.T. 291;
20 W.R. 957]

Minerals—Defined—Every substance gotten from under land for profitable purpose—Exception from sale of land—"All mines and minerals within and under the premises"—China clay.

Where there is a reservation of "mines and minerals" in a conveyance or other instrument granting real estate the presence of the word "mines" before "minerals" does not restrict the more extended meaning of the word "minerals." "Minerals" includes every substance of every kind which can be got from under the surface of the land for a profitable purpose unless there is something in the context of the words or in the nature of the transaction which would induce the court to give the words a more limited meaning.

By an indenture dated Jan. 4, 1799, vendors conveyed land to purchasers excepting "all mines and minerals within and under the said several and respective premises."

Held: china clay was a mineral within the reservation.

Minerals—Right to work—Destruction of surface.

In the absence of an express power in an instrument conveying real estate with a reservation of all mines and minerals within and under the premises the vendor cannot work the minerals beneath the land so as to destroy the surface.

Land—Right to support—Presumption of right—Ownership of minerals separate from ownership of surface.

Where the ownership of the minerals is separate from the ownership of the surface *prima facie* the owner of the surface is entitled to have the surface supported by the minerals.

Notes. Considered: *Aspden v. Seddon* (1874), 10 Ch. App. 396, n.; *A.-G. for Isle of Man v. Mylchreest* (1879), 4 App. Cas. 294; *Hedley v. Bates* (1880), 49 L.J.Ch. 170. Applied: *Davis v. Treharne* (1881), 6 App. Cas. 460. Considered: *Pountney v. Clayton* (1883), 11 Q.B.D. 820. Applied: *Robinson v. Milne* (1884), 53 L.J.Ch. 1070. Explained: *Elwes v. Brigg Gas Co.*, [1886-90] All E.R. Rep. 559. Applied:

A *A.-G. v. Welsh Granite Co.* (1887), 35 W.R. 617; *Shafto v. Bolckow, Vaughan & Co.* (1887), 34 Ch.D. 725. Considered: *Glasgow Corp'n. v. Farie*, [1886-90] All E.R. Rep. 115. Followed: *Jersey v. Neath Poor Law Union Guardians* (1889), 22 Q.B.D. 555. Applied: *Phillips v. Thomas* (1890), 62 L.T. 793. Considered: *Earl of Westmoreland v. New Sharlston Collieries Co.* (1898), 79 L.T. 716. Explained: *Johnstone v. Crompton*, [1899] 2 Ch. 190. Distinguished: *Great Western Rail. Co. v. Blades*, [1901] 2 Ch. 624. Applied: *Greville v. Hemingway* (1902), 87 L.T. 443. Doubted: *Re Todd, Birleston and North Eastern Rail. Co.*, [1903] 1 K.B. 603. Considered: *Bishop Auckland Industrial Co-operative Flour and Provision Society v. Butterknowle Colliery* (1904), 73 L.J.Ch. 335. Applied: *Leckhampton Quarries Co. v. Ballinger and Cheltenham R.D.C.* (1904), 68 J.P. 464; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A.C. 468. Considered: *Welldon v. Butterley Co.*, [1920] 1 Ch. 130; *Waring v. Foden, Waring v. Booth Crushed Gravel Co., Ltd.*, [1931] All E.R. Rep. 291. Referred to: *Eardley v. Granville* (1876), 24 W.R. 528; *A.-G. v. Tomline* (1877), 5 Ch.D. 750; *Hall v. Byron* (1877), 4 Ch.D. 667; *Newington Local Board v. Cottingham Local Board* (1879), 12 Ch.D. 725; *Gill v. Dickinson* (1880), 5 Q.B.D. 159; *Loosemore v. Tiverton and North Devon Rail. Co.* (1882), 22 Ch.D. 25; *Midland Rail. Co. v. Haunchwood Brick and Tile Co.* (1882), 20 Ch.D. 552; *Bell v. Love* (1883), 10 Q.B.D. 547; *Tucker v. Singer* (1883), 8 App. Cas. 508; *Consett Waterworks Co. v. Ritson* (1889), [1922] 2 Ch. 187, n.; *Re Constable and Cranswick* (1899), 80 L.T. 164; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Society*, [1904-7] All E.R. Rep. 977; *Great Western Rail. Co. v. Carpalla United China Clay Co. and Clifden* (1908), 99 L.T. 869; *Butterley Co. v. New Hucknall Colliery Co.*, [1909] 1 Ch. 37; *Skey v. Parsons* (1909), 101 L.T. 103; *North British Rail. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116; *Dickens v. National Telephone Co., National Telephone Co. v. Hythe Corp'n.* (1911), 75 J.P. 557; *I.R. Comrs. v. Joicey* (No. 2), [1913] 2 K.B. 580; *Thornhill v. Weeks*, [1913] 1 Ch. 438; *Westhoughton U.D.C. v. Wigan Coal and Iron Co.*, [1919] 1 Ch. 159; *Warwickshire Coal Co. v. Coventry Corp'n.*, [1934] Ch. 488; *R. and W. Paul, Ltd. v. Wheat Commission*, [1936] 2 All E.R. 1243; *A.-G. for Isle of Man v. Moore*, [1938] 3 All E.R. 263; *Re Wilson Syndicate Conveyance, Wilson v. Shorrock*, [1938] 3 All E.R. 599.

As to minerals and the right to the support of the surface of land, see 26 HALSBURY'S LAWS (3rd Edn.) 320, 339; and for cases see 33 Digest (Repl.) 727, 840.

G Cases referred to:

- (1) *Bell v. Wilson* (1865), 2 Drew. & Sm. 395; 6 New Rep. 81; 34 L.J.Ch. 572; 12 L.T. 529; 11 Jur.N.S. 437; 13 W.R. 708; 62 E.R. 671; on appeal (1866), 1 Ch. App. 303; 35 L.J.Ch. 337; 14 L.T. 115; 12 Jur.N.S. 263; 14 W.R. 493; L.J.J.; 33 Digest (Repl.) 723, 2.
- (2) *Harris v. Ryding* (1839), 5 M. & W. 60; 8 L.J.Ex. 181; 151 E.R. 27; 33 Digest (Repl.) 848, 1024.
- (3) *Roberts v. Haines* (1856), 6 E. & B. 643; 25 L.J.Q.B. 353; 2 Jur.N.S. 999; affirmed sub nom. *Haines v. Roberts* (1857), 7 E. & B. 625; 119 E.R. 1377; sub nom. *Roberts v. Haines*, 27 L.J.Ex. 49; 29 L.T.O.S. 233; 3 Jur.N.S. 886; 5 W.R. 631, Ex. Ch.; 11 Digest (Repl.) 67, 916.
- (4) *Smart v. Morton* (1855), 5 E. & B. 30; 3 C.L.R. 1004; 24 L.J.Q.B. 260; 25 L.T.O.S. 97; 1 Jur.N.S. 825; 119 E.R. 393; 33 Digest (Repl.) 850, 1032.
- (5) *Rowbotham v. Wilson* (1860), 8 H.L.Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 6 Jur.N.S. 965; 11 E.R. 463, H.L.; 33 Digest (Repl.) 735, 131.
- (6) *Hilton v. Lord Granville* (1844), 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; 8 Jur. 311; 114 E.R. 1414; 33 Digest (Repl.) 844, 1001.
- (7) *Duke of Buccleuch v. Wakefield* (1870), L.R. 4 H.L. 377; sub nom. *Wakefield v. Duke of Buccleuch, Duke of Buccleuch v. Wakefield*, 39 L.J.Ch. 441; 23 L.T. 102; 34 J.P. 724, H.L.; 33 Digest (Repl.) 844, 1005.

Also referred to in argument :

Darvill v. Roper (1855), 3 Drew. 294; 3 Eq. Rep. 1004; 25 L.T.O.S. 302; 3 W.R. 467; 61 E.R. 915; sub nom. *Darvell v. Roper*, 24 L.J.Ch. 779; 33 Digest (Repl.) 723, 1.

Brown v. Chadwick (1857), 7 I.C.L.R. 101; 9 Ir. Jur. 494; 33 Digest (Repl.) 752, *201.

Listowel v. Gibbings (1858), 9 I.C.L.R. 223; 11 Ir. Jur. 64; 33 Digest (Repl.) 752, *202.

R. v. Brettell (1832), 3 B. & Ad. 424; 1 L.J.M.C. 46; 110 E.R. 152; 33 Digest (Repl.) 724, 6.

Humfries v. Brogden (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries v. Brogden*, 15 Jur. 124; 33 Digest (Repl.) 732, 94.

Hedley v. Fenwick (1864), 3 H. & C. 349; 11 L.T. 571; 159 E.R. 566, Ex. Ch.; 11 Digest (Repl.) 68, 919.

Midgley v. Richardson (1845), 14 M. & W. 595; 15 L.J.Ex. 257; 153 E.R. 613; 33 Digest (Repl.) 861, 1113.

Bullen v. Denning (1826), 5 B. & C. 842; 8 Dow. & Ry.K.B. 657; 4 L.J.O.S.K.B. 314; 108 E.R. 313; 17 Digest (Repl.) 301, 1075.

Duke of Hamilton v. Graham (1871), L.R. 2 Sc. & Div. 166; 33 Digest (Repl.) 736, 144.

Blackett v. Bradley (1862), 1 B. & S. 940; 31 L.J.Q.B. 65; 5 L.T. 832; 26 J.P. 358; 8 Jur.N.S. 588; 121 E.R. 963; 33 Digest (Repl.) 852, 1043.

Earl of Rosse v. Wainman (1845), 14 M. & W. 859; affirmed sub nom. *Wainman v. Earl of Rosse* (1848), 2 Exch. 800; 154 E.R. 714, Ex. Ch.; 11 Digest (Repl.) 62, 894.

Micklethwait v. Winter (1851), 6 Exch. 644; 20 L.J.Ex. 313; 17 L.T.O.S. 185; 155 E.R. 701; 11 Digest (Repl.) 62, 893.

Midland Rail. Co. v. Checkley (1867), L.R. 4 Eq. 19; 36 L.J.Ch. 380; 16 L.T. 260; 31 J.P. 500; 15 W.R. 671; 11 Digest (Repl.) 163, 364.

Lowdes v. Bettle (1864), 3 New Rep. 409; 33 L.J.Ch. 451; 10 L.T. 55; 10 Jur.N.S. 226; 12 W.R. 399; 2 Digest (Repl.) 139, 1075.

Hamilton v. Worsefold (1786), 10 Ves. 290, n.

Mogg v. Mogg (1786), Dick. 670; 21 E.R. 432; 2 Digest (Repl.) 139, 1076.

Mitchell v. Dors (1801), 6 Ves. 147; 31 E.R. 984, L.C.; 33 Digest (Repl.) 782, 532.

Courthope v. Mapplesden (1804), 10 Ves. 290; 32 E.R. 856; 2 Digest (Repl.) 139, 1074.

Earl Cowper v. Baker (1810), 17 Ves. 128; 34 E.R. 50, L.C.; 33 Digest (Repl.) 782, 533.

Davenport v. Davenport (1849), 7 Hare, 217; 18 L.J.Ch. 163; 13 Jur. 227; 68 E.R. 89; 2 Digest (Repl.) 139, 1080.

Smith v. Collyer (1803), 8 Ves. 89; 32 E.R. 286; 2 Digest (Repl.) 139, 1079.

Haigh v. Jaggard (1845), 2 Coll. 231; 63 E.R. 712; 28 Digest (Repl.) 869, 971.

Grey v. Duke of Northumberland (1806), 13 Ves. 236.

Kinder v. Jones (1810), 17 Ves. 110; 34 E.R. 43, L.C.; 43 Digest 402, 249.

Thomas v. Oakley (1811), 18 Ves. 184; 34 E.R. 287, L.C.; 33 Digest (Repl.) 782, 534.

Roads v. Trumpington Overseers (1870), L.R. 6 Q.B. 56; 40 L.J.M.C. 35; 23 L.T. 821; 35 J.P. 72; 33 Digest (Repl.) 837, 963.

Dugdale v. Robertson (1857), 3 K. & J. 695; 30 L.T.O.S. 52; 3 Jur.N.S. 687; 69 E.R. 1289; 33 Digest (Repl.) 843, 993.

Appeal from a decision of WICKENS, V.-C., in an action for an injunction to restrain the defendants from entering on the land of the plaintiffs.

The Dukes of Cornwall being seised in fee, as lords of the manor of Treverbyn Courtenay, in the county of Cornwall, of the lands therein described, did, by a

A deed dated Jan. 4, 1799, under the hand of the Surveyor-General for the Duchy of Cornwall, cause to be conveyed and vested in Charles Rasleigh the fee simple and inheritance of

B "all that customary or copyhold tenement called Greys, with the appurtenances, parcel of the before mentioned manor of Treverbyn Courtenay, consisting of a house, garden, farmyard, mowhay, and offices, containing by admeasurement 3 roods and 33 perches, with divers closes and parcels of ground, containing also by admeasurement 103 acres, 1 rood, and 39 perches, or thereabouts, and a parcel of land running with Garker Moor, containing 27 acres and 2 roods, which said tenement called Greys is now held for the life of John Hext, gentleman, under the yearly rent of 15s. 3d., by copy of court roll bearing date Sept. 20, 1771."

C The deed contained the following reservation :

D "Excepting nevertheless and always reserving unto his said Royal Highness the Prince of Wales, his heirs and successors, Dukes of Cornwall, all mines and minerals within and under the said several and respective premises, or any part thereof, together with full and free liberty of ingress, egress, and regress to and for his said Royal Highness, his heirs and successors, and his and their officers, agents, and workmen, and to and for the lessee or lessees of his said Royal Highness, his heirs and successors, and the agents and workmen of such lessee or lessees, into and out of the said several premises, and every part thereof, with or without horses, carts, and carriages, to dig and search for and to take, use, and work the said excepted mines and minerals."

The deed contained no provision giving compensation for any injury done to the surface in getting the mines and minerals.

F By an indenture dated Mar. 7, 1799, and made between Charles Rasleigh, of the one part, and Samuel Hext, of the other part, the premises comprised in the deed of Jan 4, 1799, were granted to Samuel Hext, his heirs and assigns, subject to a reservation of the mines and minerals, in the same words as the reservation contained in the deed of Jan. 4, 1799. The plaintiffs became entitled to this property through Samuel Hext. In 1856 the defendants, Thomas Gill and Joseph Ivimey, purchased from the Duchy of Cornwall the manor of Treverbyn Courtenay, and became entitled to all the duchy rights under the reservation of mines and minerals in the deed of Jan. 4, 1799.

G The bill alleged that the defendants Gill and Ivimey had in 1868 executed to the defendants William Derry and Sack-Noy Scott a lease by which they pretended to grant to Derry and Scott the right to work for china clay within the entirety of the Greys estate, as well the enclosures as the unenclosed part thereof, the unenclosed part being the parcel of land running with Garker Moor. The bill also alleged that the defendants had entered upon the unenclosed part of the Greys estate, and commenced working therein for china clay, and had by such workings done almost irreparable damage to it, having destroyed the surface, and that the lessees threatened to enter also upon the enclosures, and to commence working for china clay thereon. The bill prayed for an injunction restraining all the defendants from entering upon and remaining in possession of the Greys estate, as well the enclosures as the unenclosed part thereof, for the purpose of working for china clay. The defendants, Gill and Ivimey, claimed that by virtue of their ownership of Garka Moor, they were entitled not only to the china clay, but also to all the minerals and other materials there, and to work for and get any of them in such manner as they might think fit. They, moreover, claimed that by virtue of the reservation contained in the deed of Jan 4, 1799, they were entitled to the china clay within the limits of the Greys estate, and to work

for and get it by open pits and workings from the surface, such being the only practical mode of getting it. The vice-chancellor having dismissed the bill, the plaintiffs appealed.

Manisty, Q.C., Eddis, Q.C., and Boger, for the plaintiffs.

Sir George Jessel, Q.C., Karlake, Q.C., and Phear for the defendants.

Cur. adv. vult.

July 22, 1872. **MELLISH, L.J.**, read a judgment in which he stated the facts, and continued: The first question which has to be determined is whether china clay is within the reservation of "mines and minerals." China clay is thus described:

"Granite consists of quartz, felspar, and mica, and china clay consists of decomposed granite, in which felspar exists in considerable proportions. To make china clay fit for the market, the felspar, which alone is merchantable, has to be separated from the other component parts of the said decomposed granite. The working for china clay is commenced almost in the same manner as quarrying for building stone, namely, by the removal of the soil covering the clay, which lies in beds of more or less thickness. The working is then carried on by turning a stream of water over the head of the clay when so arrived at, and washing the same forward into channels and reservoirs, in which reservoirs the pure clay is held in solution and separated from the impurities by the same impurities which are heavier being precipitated to the bottom of the reservoir, while the pure clay is allowed to run forward over the top of the reservoir into a pit, where it settles down and is dried and made solid, either by exposure to the sun or by a drying kiln, after which it is fit for sale in the market."

There was a great deal of discussion before us as to the meaning of the word "mines." It appears to me that it is hardly necessary to go into that because there can be no doubt that, whatever may be the meaning of the word "mines," whether it is confined to underground workings, or may possibly extend to open workings, or whether it does not apply to the workings at all, but in this sort of reservation means the metal, the veins and seams themselves, which are in a secondary sense called "mines"—I rather think that that is probably the real meaning of it—whatever may be the meaning of the word "mines," there can be no doubt that "minerals" is by far the more general word. The authorities seem to show that where there is a reservation of "mines and minerals," the presence of the word "mines" before "minerals" does not restrict the more extended meaning of the word "minerals." A great many authorities, some at law and some in equity, have been brought before us to show what is the meaning of the word "minerals." But the result of the authorities, without going through them, appears to be that the word "minerals" includes every fossil substance, every substance, in fact, of every kind which can be got from underneath the surface of the land for a profitable purpose. A reservation of minerals probably would not give the right to go and get them merely for the purpose of annoying your neighbour, and not for the purpose of profit. That would be an absurd construction to put upon it. The reasonable meaning to put upon it seems to be that the word "minerals" includes everything which can be got under the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction which would induce the court to give it a more limited meaning.

The question in this case is: Ought it to have a more limited meaning here? The circumstances, as far as they are material to be stated, are these. The vendor was the lord of the manor. What he sold was the freehold of a copyhold

A tenement. That was the subject-matter that was sold. The lord of the manor of a copyhold tenement is, beyond all question, entitled to all the minerals under the tenement in the most general sense. Where he has parted with the surface of the land he cannot work the minerals beneath the land so as to destroy the surface unless express power to do so has been reserved to him. Whether there was
B any special custom in this manor there is no evidence to show; and, certainly, it may be said that, whatever special custom there may have been, it is impossible there could have been a special custom respecting china clay, because china clay was not known to be a valuable substance from time immemorial; it was only
C discovered to be a valuable substance in very modern times. There being no special words before "mines and minerals" by which the meaning of the general words might be limited, but there being a simple exception of mines and minerals, I am of opinion that the word "minerals" should only receive that which is its general signification. I think the real meaning of the grant, expressed as it is in very general terms, is that the surface and all profit that can be got from cultivating the surface, or building on it, or using the surface, is intended to be conveyed, but that the right to everything under the surface,
D any profit that can be got from digging anything from under the surface, is intended to be reserved. Therefore, I come to the conclusion that china clay is included in the term "minerals."

The only argument against this in the present case is what we shall have to consider in the next part of the case, namely, that china clay cannot be got without destroying the surface, and that it could not be intended to give the
E lord power to destroy the surface. *Bell v. Wilson* (1) appears to me to be a direct authority that the mere circumstance that a mineral cannot be got without destroying the surface, though it may be a very strong ground for holding that the owner of the mineral is not entitled to get it, is not a ground for straining the meaning of the word "mineral." In that respect the lords justices differed from *KINDERSLEY, V.-C.*, and we are bound by the decision of the lords justices,
F and, therefore, there appears no reason for straining the meaning of the word "mineral." Is there power to get this china clay in the only way in which it can be got, for all the witnesses apparently agree that the only way in which it can be got is by first removing all the surface, then, apparently, by digging pits for it and bringing streams of water over the clay so as to separate the part which is valuable from the heavy part, which is not valuable and sinks to the
G bottom. Is power given to do that by this conveyance? A very great number of cases were cited to us upon that point. In none of the cases, of course, was the language exactly similar to that in the case before us, and the cases must be referred to merely for the purpose of getting the principle from them. The cases show that where the ownership of the minerals is separate from the ownership of the surface, *prima facie* the owner of the surface is entitled to have the surface supported by the minerals. That is not confined to the case where the court has not before it the instrument by which the ownership of the surface was separated, but it also applies to the case where the court has the instrument before it for the purpose of construing the instrument to this extent, that *prima facie* the right to support exists, and it is for the owner of the minerals to show
H that power has been given to him by the conveyance, or the Act of Parliament, whichever it is, under which he claims, to destroy that which is described by the judges as the inherent right of a person who owns the surface while the minerals are owned by somebody else.

I Therefore, the question turns upon the construction of the words of reservation. It seems merely to come to this: Do they mean that the ownership of the surface, which is the subject of the conveyance, is altogether to be subject to the ownership of the minerals, so that whatever thing is necessary to enable the owner of the minerals to get them is conferred upon him, notwithstanding that it might of necessity utterly destroy the surface or that portion of the surface

over the minerals, or do the words, according to their true construction, only give a right in the nature of an easement to go upon the surface, and then to dig through the surface for the purpose of getting at the minerals underneath? In my opinion, the words in the present case being, to say the very least of it, very ambiguous words, expressed very shortly, their proper construction only gives a right to create what I may call temporary damage. It was not intended that they should, and they do not, according to their fair construction, in my opinion, enable the owner of the minerals to cause the absolute destruction of the surface, or a serious and continuous permanent injury to the owner of the surface.

It will be found that there are several authorities in the courts of law, most of which relate, no doubt, to the owner of minerals getting the minerals by pure mining, holding that the owner of the minerals is entitled to let down the surface. There are certainly many cases in which the language has been very strong, in which the power of getting the minerals has been given in far stronger language than it is in the present case, and, nevertheless, the courts have held that the owner of the minerals is not entitled to get the whole of the minerals if that involves the destruction of the surface—that in getting the minerals he must have regard to the right of the owner of the surface to be supported by the minerals.

In *Harris v. Ryding* (2) the power was this :

“With full liberty of ingress, egress, and regress, to come into and upon the said hereby appointed and granted and released premises, and to dig . . . the said mines . . . and every part thereof, and to sell and dispose of, take and carry away, whatever might be there found at their or his respective wills and pleasures.”

That is certainly very much stronger language than anything that is here found, because there is a power to take whatever might be there found at his will and pleasure,

“and also to sink shafts . . . for the raising-up works, carrying away or disposing of the same or any part thereof, making a fair compensation to T. P.”

In *Roberts v. Haines* (3) the words were :

“And be it further enacted that it shall be lawful for the said Jervoise Clerke Jervoise and the lord of the said manor for the time being, and his agents, servants, and workmen, from time to time and at all times hereafter, to come into and upon the said commons and waste lands hereby intended to be enclosed or any part or parts thereof, either before or after the same shall be enclosed (except as hereinafter is mentioned) to search for, dig, get, and raise any coal and ironstone lying and being in or under the commons and waste lands, and to erect any work or works for that purpose, and to dig and take earth for making and to make bricks for any such work or works, and to carry away and dispose of such coal and ironstone to and for his and their own use.”

Therefore, there were to a certain extent express powers given to deal with the surface.

In *Smart v. Morton* (4), the words were :

“With free leave and liberty to sink, work, and win the same in any part of the said premises, and to drive drift or drifts, make watergate or water-gates, or use any other way or ways for the better and more commodious working and winning the same in the said hereby granted, or intended to be granted premises, or any part thereof.”

A Almost all these cases have general words, while there are no general words in the present reservation.

B *Bell v. Wilson* (1) is a more important authority because it related not merely to the letting down of the surface by working underground, but also to the working from above. The words are such that it appears to me they are almost binding upon us as a matter of authority. I believe it will be found that every single word that is in the present power is in the power in *Bell v. Wilson* (1). The words of the latter power are :

C “With full liberty to search for, dig, bore, sink, win, work, load and carry away the same, and to dig, bore, sink, win, work, and make pit and pits, trench and trenches, groove and grooves, and to drive and make drifts, drains, levels, staples, watergates and watercourses of any kind in, over, under, through, or along all or any part of the said closes or parcels of ground, with sufficient ground room and heap room, and to erect fire engines and other buildings, and to exercise, do and perform every liberty, matter and thing necessary for digging, sinking, winning, and working the said collieries, mines, and minerals, and free way leave and passage to and from the said collieries, mines, and minerals in, through, and over the same closes or parcels of ground, or any of them, or any part thereof respectively, with agents, workmen, horses, waggons, carts, and carriages, with liberty to make all such waggon ways, and other ways as shall be necessary and convenient for that purpose, and according to the usage or custom of the country, paying a reasonable satisfaction for all damages or spoil of ground to be occasioned thereby.”

The lords justices held on those words that, although stone was reserved as a mineral, yet there was no right to get it by quarrying. It appears to me that it is very difficult to distinguish that case from the present.

F There have, however, been two cases in the House of Lords in which it may be said that the House of Lords has to a certain extent limited those authorities and has held that the owner of the minerals may either let down the surface or may absolutely destroy the surface for the purpose of getting the minerals. The first of those cases is *Rowbotham v. Wilson* (5). In that case there was a covenant by which the surface owner disclaimed all right to the mines and the mineowner agreed to work them without molesting the surface owner and without being subject to any action for damage to the surface. That covenant, which was construed to be a grant, provided in terms that the surface might be let down; and, no doubt, the House of Lords decided contrary to what was said in *Hilton v. Lord Granville* (6), that such a grant, where it was clearly expressed, was not void.

H But in *Duke of Buccleuch v. Wakefield* (7) the House of Lords held that by proper words and on a construction of the whole conveyance power might be given absolutely to destroy the surface. That is the only case which so far resembles the present that it was a case as to a peculiar kind of iron which could not be got without destroying the surface. But if that case is looked into, it will be found to differ from the present in three most material respects. I In the first place, the iron ore had been let in very large quantities by the lord of the manor before the Act of Parliament for enclosing the waste was passed, and, that being a most valuable mineral, it was impossible to suppose that it was not in the contemplation of the parties at the time they obtained their Act; and it was proved that the lord of the manor had constantly let similar iron mines in the manor, paying compensation for the damage which was done. In the next place, without stopping to read the whole of the reservation in that case, it will be found that it contains far more extensive words than the reservation in the present case. It contained powers, as is pointed out in the

judgments, which clearly enabled, in certain events, the surface to be destroyed. There was an unlimited power to deposit the refuse of the minerals on the surface, and there was unlimited power to erect buildings upon the surface, and there were at the end most general words enabling every power to be exercised which was necessary to get the minerals. Lastly, there was a clause which enabled full compensation to be given for any damage that might be done. Taking the whole of the clause in the Act of Parliament into consideration, the House of Lords, overruling the judgment of MALINS, V.-C., came to the conclusion that the real meaning of the Act was that the lord of the manor was to be entitled, if he found it necessary for the purpose of getting what was known to all parties to be a most valuable mineral, to buy the surface back, paying the full value for it. I cannot think that anybody can read those judgments without coming to the conclusion that, if the power to give compensation had not been there, the House of Lords, notwithstanding the strength of the other words, in all probability would not have come to the conclusion to which they did come.

As the result of the authorities, I am of opinion that in this case, the words of the reservation are far too ambiguous to give the owner of the minerals, who is selling the surface and reserving the minerals to himself, the absolute power of destroying the surface. There is no reason to suppose that the parties had china clay particularly in contemplation at the time when this deed was executed. I come to the conclusion that the words are not sufficient to give the power which the parties here claim. When an owner of both mines and minerals sells the surface, reserves the minerals, and gives himself power to get minerals, he ought to frame his power in such language, if he intends to destroy the surface, that the court is able to say that that is clearly the intention of the parties. The vice-chancellor, in his judgment, fully acknowledges the difficulty created by holding that the reservation gives the right to take china clay, for if the defendants have the right to take china clay that is really in a great measure a reservation of the surface. But he said that he could not see where he was to fix the limit. I feel myself that it is very difficult to say where the limit is to be placed. It is very difficult to lay down in words exactly what the owners of minerals may do for the purpose of getting the minerals, but in the present case I do not think it would be just to the owner of the surface to hold that his surface may be destroyed because there is a difficulty in saying exactly what the owner of the minerals may do and what he may not do. In the present case, I think the result is that the china clay has been reserved, but that this was not known to the parties at the time when the instrument was executed. Here, that was a mineral in the ground, unknown to the parties, apparently, at the time they executed the instrument, which cannot be got without destroying the surface. It appears to me that the fair result of that state of things is that the lord of the manor is practically in the same position as he would have been in if this had remained a copyhold tenement—viz., that the right is in him, but, inasmuch as he has not reserved the power to destroy the surface, and inasmuch as this clay cannot be got without destroying the surface, he cannot get the clay unless he can make some arrangement with the owner of the surface. I am of opinion upon the whole that the plaintiffs are entitled to have an injunction to restrain the defendants from getting china clay in such a way as to destroy or seriously injure the surface.

JAMES, L.J.—I entirely concur both with the conclusions and reasoning of the lord justice. The long and uniform series of authorities appears to me to have established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time saving the landowner's practical enjoyment of his houses, gardens, fields, and woods, without which the grant to him would have been illusory. But for these authorities I should have thought that what was meant by "mines and minerals" in

A such a grant was a question of fact, a question what those words meant in the vernacular of the mining world, of the commercial world, and of landowners at the beginning of the last century, among which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral. There will be no costs on either side.

B

C

MERSEY DOCKS AND HARBOUR BOARD TRUSTEES v. GIBBS
MERSEY DOCKS AND HARBOUR BOARD TRUSTEES
v. PENHALLOW

D

[House of Lords (Lord Cranworth, L.C., Lord Wensleydale and Lord Westbury), July 4, 5, 6, 1864, June 29, 30, 1865, February 22, June 5, 1866]

[Reported L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225;
14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872;
2 Mar. L.C. 353; 11 E.R. 1500]

E

Statute—Private act—Power to public authority to execute and maintain works—Liability for negligence—Liability imposed on private person by general law, unless contrary intention shown.

Public Authority—Negligence—Authority not authorised to make profit—Application of surplus funds to reduction of charges—Liability.

F

The proper rule of construction of statutes empowering public bodies to execute and maintain public works is that, in the absence of words in the statute to show a contrary intention, the legislature intended that the authority created by the statute should have the same duties, and that its funds should be subject to the same liabilities, as the general law would impose on a private person doing the same things. This rule applies in the case of an authority which is not empowered to make a profit, e.g., a dock board authorised to charge dues for the use of the dock, but required to apply the money so received, first, to the cost of maintaining the docks, then to paying the interest on the debt incurred by the board in respect of the construction of the docks, and, when the debt is paid off, to reducing the dues so far as could be done, keeping in view the obligation of the board to improve and maintain the docks.

G

H

Such a board **held** to be liable to the owner of a ship and the owner of cargo on board her for damage done to the ship and the cargo through the ship striking a bank of mud situated at the entrance of a dock owing to the negligence of the servants of the board.

I

Notes. The personal liability of servants of the Crown and of public authorities is dealt with at HALSBURY'S LAWS (3rd Edn.), vol. 7, pp. 252-254, and *ibid.*, vol. 30, pp. 700, 701.

Applied: *Worral Waterworks Co. v. Lloyd* (1866), L.R. 1 C.P. 719; *A.-G. v. Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146. Considered: *Foreman v. Canterbury Corpn.* (1871), L.R. 6 Q.B. 214; *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 129, n. Applied: *Winch v. Thames Conservators* (1874), L.R. 9 C.P. 378; *A.-G. and Dommes v. Basingstoke Corpn.* (1876), 24 W.R. 871; *Goslin v. Agriculture Hall Co.* (1876), 1 C.P.D. 482. Considered: *Forbes v. Lee Conservancy Board* (1879), 4 Ex.D. 116. Applied: *Fleming v. Manchester Corpn.* (1881), 44

L.T. 517; *Dormont v. Furness Rail. Co.* (1883), 11 Q.B.D. 496; *R. v. Williams* (1884), 9 App. Cas. 418. Considered: *Lowther v. Curwen* (1887), 58 L.T. 168; *Tucker v. Axbridge Highway Board* (1888), 53 J.P. 87; *The Moorcock*, [1886-90] All E.R. Rep. 530; *Gibraltar Sanitary Comrs. v. Orfila* (1890), 15 App. Cas. 400; *R. v. Selby Drainage Comrs.*, [1892] 1 Q.B. 348. Applied: *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Crossfield v. Manchester Ship Canal Co.* (1903), 19 T.L.R. 398; *Hackney Corp'n. v. Lee Conservancy Board*, [1904] 2 K.B. 541; *The Bearn*, [1906] P. 48; *Bede Steamship Co. v. River Wear Comrs.*, [1907] 1 K.B. 310; *Queen of the River Steamship Co. v. Eastern, Gibb and River Thames Conservators* (1907), 96 L.T. 901. Distinguished: *Tozeland v. West Ham Union*, [1907] 1 K.B. 920. Considered: *Pyman Steamship Co. v. Hull and Barnsley Rail. Co.*, [1914] 2 K.B. 788. Applied: *Ryan v. Tipperary North Riding County Council* (1914), 8 B.W.C.C. 415; *Liebig's Extract of Meat Co. v. Mersey Docks and Harbour Board and Nelson*, [1918] 2 K.B. 381. Considered: *Boynnton v. Ancholme Drainage and Navigation Comrs.*, [1921] 2 K.B. 213; *The Devon* (1923), 130 L.T. 448; *Dee Conservancy Board v. McConnell*, [1928] All E.R. Rep. 554; *Blundy, Clark & Co., Ltd. v. London and North-Eastern Rail. Co.*, [1931] All E.R. Rep. 160; *The Neptun*, [1938] P. 21; *Collins v. Hertfordshire County Council*, [1947] 1 All E.R. 633. Referred to: *White v. Hindley Local Board* (1875), L.R. 10 Q.B. 219; *Harris v. Great Western Rail. Co.* (1876), 1 Q.B.D. 515; *Holborn Union and St. Leonard, Shoreditch, Vestry* (1876), 2 Q.B.D. 145; *Hill v. Metropolitan Asylum District Managers* (1879), 4 Q.B.D. 433; *Jersey v. Uxbridge Sanitary Authority*, [1891] 3 Ch. 183; *Hillyer v. St. Bartholomew's Hospital*, [1909] 2 K.B. 820; *McClelland v. Manchester Corp'n.*, [1911-13] All E.R. Rep. 562; *Papworth v. Battersea Corp'n.*, [1914] 2 K.B. 89; *The Ella*, [1915] P. 111; *Hayward v. Drury Lane Theatre, Ltd.*, [1916-17] All E.R. Rep. 405; *Baker v. James Bros. & Sons, Ltd.*, [1921] All E.R. Rep. 590; *Sutcliffe v. Clients Investment Co.*, [1924] 2 K.B. 746; *British Petroleum Co. v. A.-G. for Ceylon*, [1926] A.C. 147; *Silverman v. Imperial London Hotels, Ltd.*, [1927] All E.R. Rep. 712; *Hall v. Brooklands Auto-Racing Club*, [1932] All E.R. Rep. 208; *Skilton v. Epsom and Ewell U.D.C.*, [1936] 2 All E.R. 50; *East Suffolk Rivers Catchment Board v. Kent*, [1940] 4 All E.R. 527; *Gold v. Essex County Council*, [1942] 2 All E.R. 237; *The Jersey*, [1942] P. 119; *London Graving Dock Co. v. Horton*, [1951] 2 All E.R. 1; *Longden-Griffith v. Smith*, [1950] 2 All E.R. 662.

As to the liability of a public authority for negligence in exercising its powers, see 30 HALSBURY'S LAWS (3rd Edn.) 695-701; and for cases see 38 DIGEST (Repl.) 13 et seq.

Cases referred to:

- (1) *Metcalfe v. Hetherington* (1855), 11 Exch. 257; on appeal (1860), 5 H. & N. 719; 2 L.T. 806; 24 J.P. 788; 8 W.R. 475; 157 E.R. 1867, Ex. Ch.; 38 Digest (Repl.) 33, 168.
- (2) *Parnaby v. Lancaster Canal Co., Lancaster Canal Co. v. Parnaby* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex. Ch.; 38 Digest (Repl.) 7, 16.
- (3) *Southampton and Itchin Floating Bridge and Roads Co. v. Southampton Local Board of Health* (1858), 8 E. & B. 801; 28 L.J.Q.B. 41; 4 Jur.N.S. 1298; 120 E.R. 298; sub nom. *Itchin Bridge Co. v. Southampton Local Board of Health*, 30 L.T.O.S. 256; 6 W.R. 223; 38 Digest (Repl.) 9, 29.
- (4) *Coe v. Wise* (1864), 5 B. & S. 440; 33 L.J.Q.B. 281; 10 L.T. 666; 28 J.P. 677; 12 W.R. 1036; reversed (1866), L.R. 1 Q.B. 711; 7 B. & S. 831; 37 L.J.Q.B. 262; 14 L.T. 891; 30 J.P. 484; 14 W.R. 865, Ex. Ch.; 38 Digest (Repl.) 50, 252.
- (5) *R. v. Liverpool (Inhabitants)* (1827), 7 B. & C. 61; 9 Dow. & Ry.K.B. 780; 4 Dow & Ry.M.C. 524; 5 L.J.O.S.M. 145; 108 E.R. 647; 38 Digest (Repl.) 482, 48.

- A** (6) *Mersey Docks and Harbour Board Trustees v. Cameron, Jones v. Mersey Docks and Harbour Board Trustees*, ante p. 78; 11 H.L. Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur.N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest (Repl.) 545, 395.
- B** (7) *Lane v. Cotton* (1701), 1 Ld. Raym. 646; Carth. 487; 1 Com. 100; Holt, K.B. 582; 5 Mod. Rep. 455; 11 Mod. Rep. 12; 12 Mod. Rep. 472; 1 Salk. 17; 91 E.R. 1332; 38 Digest (Repl.) 70, 468.
- (8) *Whitfield v. Lord Le Despencer* (1778), 2 Cowp. 754; 98 E.R. 1344; 38 Digest (Repl.) 70, 470.
- (9) *Nicholson v. Mounsey and Symes* (1812), 15 East, 384; 104 E.R. 890; 38 Digest (Repl.) 71, 477.
- C** (10) *R. v. Pease* (1832), 4 B. & Ad. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366; 38 Digest (Repl.) 39, 205.
- (11) *British Cast Plate Manufacturers (Governor & Co.) v. Meredith* (1792), 4 Term Rep. 794; 100 E.R. 1306; 38 Digest (Repl.) 19, 78.
- (12) *Sulton v. Clarke* (1815), 6 Taunt. 29; 1 Marsh. 429; 128 E.R. 943; 38 Digest (Repl.) 13, 49.
- D** (13) *Whitehouse v. Fellowes* (1861), 10 C.B.N.S. 765; 30 L.J.C.P. 305; 4 L.T. 177; 26 J.P. 40; 9 W.R. 557; 142 E.R. 654; 38 Digest (Repl.) 33, 169.
- (14) *Brine v. Great Western Rail. Co.* (1862), 2 B. & S. 402; 31 L.J.Q.B. 101; 6 L.T. 50; 26 J.P. 516; 8 Jur.N.S. 410; 10 W.R. 341; 121 E.R. 1123; 38 Digest (Repl.) 30, 154.
- (15) *Leader v. Moxon* (1773), 3 Wm. Bl. 924; 3 Wils. 461; 96 E.R. 546; 38 Digest (Repl.) 12, 42.
- E** (16) *Jones v. Bird* (1822), 5 B. & Ald. 837; 1 Dow. & Ry.K.B. 497; 106 E.R. 1397; 34 Digest (Repl.) 196, 1376.
- (17) *Hall v. Smith* (1824), 2 Bing. 156; 9 Moore, C.P. 226; 2 L.J.O.S.C.P. 113; 130 E.R. 265; 38 Digest (Repl.) 73, 488.
- (18) *Duncan v. Findlater* (1839), 6 Cl. & Fin. 894; Macl. & Rob. 911; 7 E.R. 934, H.L.; 34 Digest (Repl.) 155, 1075.
- F** (19) *Holliday v. St. Leonard, Shoreditch Vestry* (1861), 11 C.B.N.S. 192; 30 L.J.C.P. 361; 4 L.T. 406; 26 J.P. 135; 8 Jur.N.S. 79; 9 W.R. 694; 142 E.R. 769; 34 Digest (Repl.) 194, 1365.
- (20) *Pickard v. Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 34 Digest (Repl.) 203, 1425.
- G** (21) *Quarman v. Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest (Repl.) 157, 1095.
- (22) *Scott v. Manchester Corpn.* (1856), 1 H. & N. 59; 27 L.T.O.S. 82; 20 J.P. 295; 4 W.R. 544; affirmed (1857), 2 H. & N. 204; 26 L.J.Ex. 132, 406; 29 L.T.O.S. 233; 22 J.P. 70; 3 Jur.N.S. 590; 5 W.R. 598; 157 E.R. 85, Ex. Ch.; 38 Digest (Repl.) 45, 228.
- H** (23) *Ward v. Lee* (1857), 7 E. & B. 426; 26 L.J.Q.B. 142; 28 L.T.O.S. 355; 3 Jur.N.S. 557; 5 W.R. 403; 21 J.P.Jo. 179; 119 E.R. 1305; 38 Digest (Repl.) 32, 165.
- (24) *Clothier v. Webster* (1862), 12 C.B.N.S. 790; 31 L.J.C.P. 316; 6 L.T. 461; 9 Jur.N.S. 231; 10 W.R. 624; 142 E.R. 1363; 38 Digest (Repl.) 33, 170.
- I** (25) *Ruck v. Williams* (1858), 3 H. & N. 308; 27 L.J.Ex. 357; 31 L.T.O.S. 167; 22 J.P. 420; 6 W.R. 622; 157 E.R. 488; 38 Digest (Repl.) 30, 153.
- (26) *Brownlow v. Metropolitan Board of Works and Aird* (1862), 13 C.B.N.S. 768; 31 L.J.C.P. 140; 6 L.T. 187; 10 W.R. 384; affirmed (1864), 16 C.B.N.S. 546; 4 New Rep. 173; 33 L.J.C.P. 233; 12 W.R. 871; 143 E.R. 1241, Ex. Ch.; 34 Digest (Repl.) 207, 1451.

Appeal by the defendants from a decision of the Court of Exchequer Chamber reversing a decision of the Court of Exchequer in favour of the appellants on a demurrer to the declaration.

The action was commenced on Oct. 15, 1855. It was originally brought against the trustees of the Liverpool Docks, but upon the passing of the Mersey Docks and Harbour Act, 1857, by which the Liverpool Docks were vested in the Mersey Docks and Harbour Board, a suggestion was, pursuant to the said Act, entered upon the record, and the action was continued against the said board, the appellants. A

The first action was brought by the respondent Gibbs as owner of the cargo on board the ship *Sierra Nevada*. The first count alleged that the ship, in endeavouring to enter a dock of the appellants called the Wellington Half-tide dock, struck against a bank of mud remaining by the negligence of the appellants in the entrance of the dock. The second count alleged that the appellants, knowing that the dock was, by reason of an accumulation of mud therein in an unfit state to be navigated, did not take reasonable care to put the same into a fit state for that purpose, whereupon the *Sierra Nevada* in endeavouring to enter into the dock struck against the mud, and the cargo thereby became damaged. To that the Board pleaded Not Guilty and demurred to the whole declaration. The respondent took issue on the first three pleas and joined in demurrer. The demurrer was argued before the Court of Exchequer in 1856, and that court gave judgment in favour of the appellants on the ground that the case was governed by the decision in *Metcalf v. Hetherington* (1): see 1 H. & N. 439. B C D

The respondent appealed against that decision and the Court of Exchequer Chamber reversed it, and gave judgment in favour of the respondent: see 3 H. & N. 164. The issues in fact came on for trial before MARTIN, B., and a special jury, at Liverpool assizes in 1858, when a verdict was given for the respondent. E

The owner of the ship, the respondent, Penhallow, also brought an action against the appellants in respect of the damage sustained by the vessel on the same occasion. That action came on for trial before POLLOCK, C.B., and a special jury in 1859, when the learned Lord Chief Baron directed the jury that if, in their opinion, the cause of the misfortune was a bank of mud in the dock, and the appellants by their servants had the means of knowing the state of the dock and were negligently ignorant of it, then in the opinion of him (the Lord Chief Baron) the appellants were liable. A bill of exceptions was tendered to this ruling, and the jury thereupon found a verdict for the respondent, and judgment was signed thereon in the Court of Exchequer. On appeal the Court of Exchequer Chamber (7 H. & N. 329) overruled the bill of exceptions, and confirmed the judgment given by the Court of Exchequer. In both cases the Board appealed to the House of Lords. F G

The following learned judges attended the House upon the argument—CHANNELL, B., BLACKBURN, KEATING and SHEE, JJ., and PIGOTT, B.

Sir Fitzroy Kelly, Q.C., Mellish, Q.C., and Quain for the appellants. H

Sir Robert Collier, Q.C., Sir Hugh Cairns, Q.C., Cleasby, Q.C., Honyman and V. Lushington for the respondents.

At the conclusion of the arguments the House put the following questions to the learned judges: *Mersey Docks and Harbour Board v. Gibbs*—Does the declaration in this case state a good cause of action? *Mersey Docks and Harbour Board v. Penhallow*—Is the judgment of the Court of Exchequer Chamber right? The learned judges took time to consider, and afterwards returned their unanimous opinion, delivered as follows by I

BLACKBURN, J., who stated the facts and continued: The Court of Exchequer Chamber in each of these cases, based their judgment on that of the Court of Exchequer Chamber in *Parnaby v. Lancaster Canal Co.* (2). In that

A case the defendants were a company incorporated by Act of Parliament for the purpose of making and maintaining a canal, which was to be open for the use of the public on the payment of rates which the canal company were empowered to receive for their own proper use and behoof (i.e. to be divided among the shareholders). The Court of Exchequer Chamber in that case state the law thus (11 Ad. & El. at p. 242):

B "The facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon payment of tolls to the company; and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property."

C In the present case the Board do not receive the dock rates for their own use and behoof, i.e., to be divided among themselves or their shareholders, but they are bound by the statutes under which they are incorporated to apply them to the purposes of the Acts which govern them, which may in substance be stated to be to maintain the docks and pay the very large debt contracted in making them. The Court of Exchequer Chamber in both cases decided that this difference did not affect the question; that so long as the dock was kept open for the public, the duty to take reasonable care that the dock and its entrance were in such a state that those who navigate it may do so without danger was equally cast on the proprietors having the receipt of the tolls and the possession and management of the dock, whether the tolls are received for a beneficial or a fiduciary purpose. If this proposition is correct, the direction of POLLOCK, C.B., excepted to was right, for a body corporate never can either take care or neglect to take care except through their servants; and, assuming that it was the duty of the corporation to take reasonable care that the dock was in a fit state, it seems clear that if the corporation, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit.

G After hearing the very able arguments at your Lordships' Bar, we are of opinion that the judgment of the Court of Exchequer Chamber was correct. It is pointed out by LORD CAMPBELL in *Southampton and Itchin Floating Bridge and Roads Co. v. Southampton Local Board of Health* (3), that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created. It is desirable, therefore, in the first place to state what was the effect of the legislation, so far as it applied to these docks, at the time of the accident on April 12, 1865. The docks in H Liverpool have been made at different times under a great many different Acts of Parliament, the earliest being the 8 Anne, c. 8. At the time when the accident happened which gave rise to these actions, the latest of the Acts was the 14 & 15 Vict. c. lxiv. All these numerous statutes are public Acts, of which the courts must take judicial notice; and as many of the statutes were at that time still in force, though their provisions had been in many respects varied by I those subsequently passed, it is extremely difficult to ascertain with precision what was, at the time of the accident, the exact state of the legislation peculiar to those docks. But having had the assistance afforded by the able and industrious counsel who argued at your Lordships' Bar, we think we may venture to say that the effect of the material parts of the statutes is the following.

The members of the Town Council of Liverpool and their successors were formed into a corporation by the style of the "Trustees of the Liverpool Docks." By statutes 51 Geo. 3, c. cxliii, s. 2, 6 Geo. 4, c. lxxxvii, s. 3, and 14 & 15 Vict.

c. lxiv, ss. 2, 3, and 4, the powers of this corporation were to be exercised by committee. Subject to these provisions we may say that the effect of the legislation was that the dock corporation were empowered to make and maintain docks and warehouses, which were to be open to the use of the public, paying dock rates for the use of the docks and warehouse rates for the use of the warehouses. The same accommodation and the same services were to be supplied to those using the docks and the warehouses respectively that would have been supplied by any ordinary dock and warehouse company to their customers. Powers are given to the trustees of the Liverpool docks from time to time to close the docks for the purpose of cleansing and repair. General powers are given to them to appoint officers and servants; but the duties of those officers and servants are not in any place defined in the statutes, except by statute 51 Geo. 3, c. cxliii, ss. 80, 81, 82, 84, 85, and 86. By those sections the water bailiff or harbour-master, or any of the dock-masters, have power to remove wrecks and obstructions, and to regulate the time and manner in which vessels shall enter and leave the docks; and penalties are imposed on those who disobey the orders of those officers.

Such powers are almost essential for the due use of any dock; and, accordingly, it has been for many years the practice to insert similar clauses in all harbour and dock Acts, whether for private companies or public bodies. In the Harbour Docks and Pier Clauses Act, 1847, the clauses commonly in use are collected under the head "and with respect to the appointment of harbour-masters and pier-masters and their duties." It will be found on examining them that s. 56 in the general Act is equivalent to s. 80 in the 51 Geo. 3, c. cxliii, and that the other powers given to the officers of the Liverpool Dock Corporation are also given to the officers of all dock companies, whether for public or for private purposes, incorporated by any statute which incorporated the Harbours, Docks, and Piers Clauses Act, 1847. By a general appropriation clause, 51 Geo. 3, c. cxlvi, s. 29, all the revenues of the trustees of the Liverpool docks are to be applied in the first instance to making and maintaining the docks, paying the interest on the large debt secured on the dock rates, and to paying

"all the charges and expenses already incurred, or hereafter to be incurred, in the carrying into execution or under or in consequence of any of the former Acts or this present Act; and the residue in paying off the principal moneys of the debt."

When it is all paid off, the trustees are required to lower and reduce the rates,

"as far as can be done, leaving sufficient for defraying all charges of management and other concerns of the docks, etc., and improving, repairing, and maintaining the same, and for the carrying into execution the provisions of this Act and the former Acts."

In our opinion, the great question in both these cases is: What is the duty which the general law does cast upon a corporation, being the proprietors of docks maintained under such enactments? It is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid. It is well observed by MELLOR, J., in *Coe v. Wise* (4), of corporations, like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. We think that in the absence of anything in the statutes (which

A create such corporations) showing a contrary intention in the legislature, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works. If, indeed, the legislature has by express enactment or necessary intendment enacted that they should not be subject to such a liability, B there is an end of the question; and if the legislature had in the Acts, now under consideration, enacted that none of the revenue of the trustees of the Liverpool docks should be applied to the purpose of discharging liabilities incurred in consequence of the trustees acting as proprietors of docks and warehouses, it would go far to show that the legislature intended that they should not be so liable.

C But the appropriation clause in the Acts, now under consideration, has no such effect. It was, indeed, supposed by the Court of King's Bench, in *R. v. Liverpool (Inhabitants)* (5), that its effect was to prohibit the payment of poor rate; but your Lordships' House decided in *Jones v. Mersey Docks and Harbour Board Trustees* (6), that this was a mistake, and that the trustees D of the Liverpool docks were out of that fund to defray all expenses incident by law to the maintenance of the docks, and, as such, poor rate. We think on the same principle they are at liberty to apply the fund to the discharge of the liabilities which in execution of the Act, by keeping open the docks and warehouses, they must from time to time incur to their customers. It was pointed out in the course of argument that the effect of applying the revenue E of the Trustees of the Liverpool docks to the payment of such a liability as the present would be to postpone the time at which the rates would be reduced, and that, consequently, the ultimate loss would fall on those who were the payers of the rates at the time when the rates, but for this liability, would have been reduced, so that, in the possible, but not very probable, event of the respondents being then persons using the docks, the loss would partly fall upon F the respondents themselves. We are unable to see how that affects the question whether the action would lie or not. A shareholder in an incorporated company, such as a railway company or an ordinary dock company, who has a cause of action against the corporation, does in effect, by obtaining redress, diminish the future dividends of the shareholders, including his own. In this respect his position is analogous to that of the ratepayer, yet it never can be contended that G a shareholder in an incorporated dock company could not maintain an action for an injury to his ship from the neglect of the company. It was pointed out by counsel for the respondents, in the course of his argument at your Lordships' Bar, that the legislature, in the 6 Geo. 4, c. clxxxvii, ss. 130 to 136, showed a clear intention that the funds of the dock trust might, in some cases at least, be applied by the committee to indemnifying parties who had suffered by the H negligence of the servants of the trustees of the Liverpool docks, and also that damages recovered against the trustees of the Liverpool docks might be levied out of the rates, by the circuitous and somewhat clumsy process of distraining on the goods of the treasurer, who was to recoup himself out of the rates.

I These enactments, so far as they go, seem to us to show that the legislature at least did not intend to take away any liability of the trustees, which would otherwise have been cast on them by the general law, though we should not willingly infer from them that it was intended to impose any liability beyond that which would be imposed by the general law.

[His Lordship dealt with a point which does not call for report, and continued:] We have gone through these enactments, and we think your Lordships will hardly be inclined to dispose of this important case on any of the special provisions peculiar to these Acts. As we have already intimated, in our opinion, the proper rule of construction of such statutes is that, in the

absence of something to show a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be subject to the same liabilities, as the general law would impose on a private person doing the same things. This rule of construction was not admitted by the appellants. They did not rest their case exclusively, or even mainly, on any special provisions peculiar to their own private legislation, but upon broader grounds, which, if we do not mistake them, were in effect two. They said that, by the general law of this country, bodies such as the present are trustees for public purposes, and that, being such, they are not in their corporate capacity liable to make compensation for damages sustained by individuals from the neglect of their servants and agents to perform the duties imposed on the corporation, or, at all events, that the duty of such a corporation was limited to that of exercising due care in the choice of their officers, and that, if they had properly selected their officers, any evil which ensued must be the fault of the officer, and redress for it must be sought against him alone.

A great many cases were cited at your Lordships' Bar as supporting this position, many of which are really not applicable to such a case as the present. *Lane v. Cotton* (7); *Whitfield v. Lord Le Despencer* (8) (the case of the Postmaster-General); and *Nicholson v. Mounsey and Symes* (9) (the case of the captain of a man-of-war), are authorities that where a person is a public officer in the sense that he is a servant of the government, and as such has the management of some branch of the government business, he is not responsible for any negligence or default of those in the same employment as himself. But these cases were decided upon the ground that the government was the principal, and the defendant merely the servant. If an action were brought against the manager of the goods traffic of a railway company for some injury sustained by the owner of goods on their line, it would fail unless it could be shown that the particular acts which occasioned the damage were done by his orders or directions, for the action must be brought either against the principal or against the immediate actors in the wrong: see *STORY ON AGENCY*, s. 313. All that is decided by this class of cases is that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal, the public, cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals the inhabitants of the parish. The defendants in the present action are not servants of the public in that sense. For this we need do no more than refer to the decision of your Lordships' House in *Jones v. Mersey Docks and Harbour Board Trustees* (6), where they were held to be rateable as occupiers of the docks on the very ground that they did not occupy as servants of the public or government.

Another class of cases also cited depends upon the following principle. If the legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorising the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalising what would otherwise be a wrong. This, however, is the case whether the thing is authorised for a public purpose or for private profit. No action will lie against a railway company for erecting a line of railway authorised by their Acts, so long as they pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their Acts, though the one road is made for the profit of the shareholders in the company and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorised by the legislature: see *R. v. Pease* (10). This, we think, is the

A point decided in *British Cast Plate Manufacturers (Governor & Co.) v. Meredith* (11); *Sutton v. Clarke* (12), and several other cases, as is well explained by WILLIAMS, J., in *Whitehouse v. Fellows* (13).

B But though the legislature has authorised the execution of the works, it does not thereby exempt those authorised to make them from the obligation to use reasonable care that in making them no unnecessary damage be done. In *Brine v. Great Western Rail. Co.* (14) CROMPTON, J., says (2 B. & S. at p. 411):

C "The distinction is now clearly established between damage from works authorised by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works having been negligently done, as to which the owner's remedy by way of action remains."

D This distinction is as applicable to works executed for one purpose as for another. This principle seems to have been acted upon in *Leader v. Moxon* (15), and it is to some extent recognised in *Sutton v. Clarke* (12), by GIBBS, C.J., who puts the judgment on the ground that the defendant, in the execution of a duty imposed on him by the legislature, had exercised his best skill, diligence, and caution in the execution of it. He says (6 Taunt. at p. 44):

"We are of opinion that he is not liable for an injury which he did not only not foresee, but could not foresee. He has done all that is incumbent on him, having used his best skill and diligence."

E This certainly implies that in the opinion of those who concurred in that judgment the defendant would have been liable if he had neglected to use his best skill and diligence. In *Jones v. Bird* (16) BAYLEY, J., laid down a stricter rule. He said that the defendants, who in that case were the persons actually executing a sewer authorised by statute, were not protected merely because acting bona fide and to the best of their skill and judgment. He said (5 B. & Ald. at p. 845):

F "That is not enough, they are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case."

G There is a considerable number of cases to which we shall afterwards refer, in which, on this principle, actions have been held to lie against bodies executing works under the authority of statutes for the improper mode in which their powers have been executed, though the defendants did not derive any profit from the execution of the works. There are, however, authorities that bear the other way upon this part of the case; and it is necessary to examine these authorities in order to contrast them with the others. It will be for your Lordships then to decide on which side the preponderance of authority lies.

H Those in favour of the appellants are *Hall v. Smith* (17); *Duncan v. Findlater* (18); *Holliday v. St. Leonard's, Shoreditch Vestry* (19); and *Metcalfe v. Hethrington* (1). It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work. This distinction is well stated in *Pickard v. Smith* (20) by WILLIAMS, J., who says (10 C.B.N.S. at p. 480):

"Unquestionably no one can be made liable for any act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment; consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants

commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. . . . If the performance of the duty be omitted, the fact of his having entrusted it to a person who also neglected it furnishes no excuse either in good sense or law."

Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman v. Burnett* (21), where PARKE, B., says (6 M. & W. at p. 509):

"Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist."

In such a case as the present, the liability does not depend on that relation. Liability for doing an improper act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and in the last two cases it is quite immaterial whether the actual actors are servants or not.

In *Hall v. Smith* (17), the action was brought against the commissioners for paving Birmingham (sued by their clerk), Norton, a surveyor, and Kimberley, a contractor, employed by them to make a sewer, for leaving a quantity of rubbish unguarded and unlighted, whereby the plaintiff was thrown down and injured. The commissioners were authorised by an Act of Parliament to order the making of the sewer. BEST, C.J., said (2 Bing. at p. 158):

"No negligence was imputed to the commissioners themselves; they had ordered the tunnel to be made, and left the making of it to the defendants Norton and Kimberley, the former of whom was the surveyor and the latter the undertaker of the work. The accident happened to the plaintiff from these persons not putting up rails, and not having lights during the night."

The close of his judgment is that

"no action can be maintained against a man acting gratuitously for the public for the consequence of any act which he is authorised to do, and which, so far as he is concerned, is done with due care and attention; and that such a person is not answerable for the negligent execution of an order properly given."

This, no doubt, is true; but it would be equally true if the defendants, instead of being a body acting gratuitously for the public, had been a body like a railway company authorised to make the tunnel for their own profit. No action could have lain against them unless they stood in the relation of master to the parties actually guilty of negligence. This was not noticed by BEST, C.J., as is pointed out in *Scott v. Manchester Corpn.* (22). There, ALDERSON, B., says (1 H. & N. at p. 60):

A "Hall v. Smith (17) goes too far: the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work, they will be liable for the acts of such servants."

B But, he adds, "*Hall v. Smith* (17) was rightly decided upon the facts." Although what BEST, C.J., said in *Hall v. Smith* (17) was irrelevant, and, therefore, of less weight, still, his opinion is an authority in favour of the appellants. It is, however, based upon a ground quite inapplicable to the present, or indeed to any modern case. He points out clearly and forcibly that it is harsh and impolitic to cast on individuals, gratuitously, a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the legislature to exempt the private means of commissioners from liability, either, as in the present series of Acts, by incorporating them, or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The basis of BEST, C.J.'s, reasoning fails, and debile fundamentum fallit opus.

D *Duncan v. Findlater* (18), was a Scottish appeal brought before the House of Lords on a bill of exceptions. The action was against the trustees of a turnpike road, to recover damages for an injury sustained by the plaintiff from falling over a heap of stones negligently left on the road. It was stated in the bill of exceptions that the trustees had given directions, through their surveyor, that a drain should be filled up, and that the workmen engaged in filling up the drain left negligently the stones in the road. Assuming that the law of Scotland and of England are the same, it is clear that no one could be answerable for this sort of negligence unless he stood to those who actually were guilty of the negligence in the relation of master and servant. The judge who presided at the trial took a different view of the law of Scotland, and directed the jury

F "that road trustees on a public road are liable for any injury which may happen to passengers, in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees."

G To this direction there was an exception. If the body authorising the operation had been a railway company or a private individual instead of being trustees of a turnpike road, this direction would, according to English law, have been wrong, and this is pointed out by LORD BROUGHAM, who says (6 Cl. & Fin. at pp. 809, 810):

H "The rule of liability and its reason I take to be this: I am liable for what is done by me and under my orders by the man I employ, for I may turn him off from that employ when I please. And the reason I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it."

I Language which is very similar to that already cited from *Quarman v. Burnett* (21). But though all that really was decided in that case was that the trustees were not liable for the negligence of persons in their employment who were not shown to be their servants, it is not to be disputed that LORD COTTENHAM's language goes a great deal further, and shows that, in his opinion, persons incorporated for the purpose of executing works could never in their official or corporate capacity be liable to damages at all, the remedy for any wrong or neglect being only against the individual corporators for their individual wrong or neglect. His reasoning on this point is (6 Cl. & Fin. at pp. 907, 908):

"If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it. And this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct."

LORD COTTENHAM is there speaking of a body of trustees acting under the Scottish Turnpike Act, but his reasoning is general. The dilemma, if a good one, is applicable to all cases. This is, no doubt, a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scottish case, but not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority.

It is pointed out by LORD CAMPBELL, in *Southampton and Itchin Floating Bridge and Roads Co. v. Southampton Local Board of Health* (3), that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created, and if the true interpretation of the statutes is that a duty is cast upon the incorporated body, not only to make the works authorised, but also to take proper care, and use reasonable skill, that the works are such as the statute authorises, or, as in the present case, to take reasonable care that they are in a fit state for the use of the public who use them, there is, with great deference to LORD COTTENHAM, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil the duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute. Accordingly the Court of Queen's Bench, in *Ward v. Lee* (23), and the Court of Common Pleas in *Clothier v. Webster* (24), have expressed an opinion that an action lay against a local board of health in its corporate capacity, for an injury sustained from making improper works.

In *Southampton and Itchin Floating Bridge and Roads Co. v. Southampton Local Board of Health* (3), the point was expressly decided. This decision was followed and approved of by the Court of Exchequer in *Ruck v. Williams* (25), where it was held that an action would lie against the improvement commissioners of Cheltenham (sued by their clerk) for the improper mode in which they caused a sewer to be made. BRAMWELL, B., forcibly observed (3 H. & N. at p. 320):

"I can well understand if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that if one of several commissioners does something not within the scope of his authority, the commissioners as a body are not liable; but where commissioners, who are a quasi corporate body, are not affected [i.e. personally] by the result of an action, inasmuch as they are authorised by Act of Parliament to raise a fund for payment of the damages, on what principle is it that if an individual member of the public suffers from an act bona fide but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

In *Whitehouse v. Fellows* (13) the Court of Common Pleas decided that an action lay against the trustees of a turnpike road sued in their quasi corporate capacity by their clerk, for negligence in the manner in which they had caused

A drains to be made. This decision it is hardly necessary to point out, though quite consistent with all that was decided by the House of Lords in *Duncan v. Findlater* (18), is directly opposed to the opinion of LORD COTTENHAM. Lastly, in *Brownlow v. Metropolitan Board of Works and Aird* (26), it was decided that an action lay against the Metropolitan Board for the injury sustained by a ship-owner owing to the improper construction of a sewer in the bed of the Thames.

B This decision was affirmed by the Court of Exchequer Chamber. It must rest with your Lordships to say whether those decisions to which we have referred are to be overruled. We think they are not consistent with LORD COTTENHAM's opinion.

C Before leaving this part of the subject we ought to call your Lordships' attention more particularly to *Holliday v. St. Leonard's, Shoreditch Vestry* (19). The point actually decided there was that there is an exception from the general law, making a master liable for the negligence of his servant, where the servant is employed by a public body. The Court of Common Pleas did not intend to decide anything inconsistent with the decisions of the Court of Exchequer Chamber now at your Lordships' Bar, or with their own decision in *Whitehouse v. Fellowes* (13). The point which they did decide does not arise in the present case, so that it is unnecessary directly to decide anything upon it. But we think that we ought to call your Lordships' attention to the case, as much of what was said in the course of the judgment by ERLE, C.J., is based upon the opinion of LORD COTTENHAM in *Duncan v. Findlater* (18), and is, therefore, an authority making against the view we have submitted to your Lordships.

E There remains only one further point to consider. The Acts under which the Liverpool docks have been made contain clauses enabling the trustees of the docks to appoint water-bailiffs and harbour-masters, and confers on those officers powers of regulating the manner in which vessels shall enter the docks, etc. It was argued that the effect of these clauses was to confine the duty of the trustees to that of selecting proper officers, and they could not be responsible further.

F *Metcalfe v. Hetherington* (1) was cited as an authority for this position, and we think it is a decision much in point. The Court of Exchequer there, in construing the Maryport Harbour Act, attributed this effect to enactments not very dissimilar to those now in question, and we agree, if this was so, the consequence would follow that the plaintiffs' remedy would be, not against those who appointed the officer, but only against the officer himself. But we cannot

G agree in so construing the present Acts. As has been already pointed out, clauses almost identical with those now in question are inserted in every Harbour and Dock Act, whether the docks be, as in the present case, the property of public commissioners or of a trading company. We cannot think that it was the intention of the legislature to deprive a shipowner who pays dues to a wealthy trading company, such as the St. Catherine's Dock Co., for instance, of all recourse

H against them, and to substitute the personal liability of a harbour-master, no doubt a respectable person, but whose whole means, generally speaking, would not be equal to more than a very small percentage of the damages, when there are any. If these enactments are in the present case so construed as to relieve the Mersey Board from liability, the corresponding enactments in the Harbours, Piers, and Docks Clauses Act, 1847, must also be so construed as to relieve all

I trading dock companies from liability, and that we think a *reductio ad absurdum*. This was not brought to the notice of the Court of Exchequer when deciding *Metcalfe v. Hetherington* (1). With greatest respect for those who joined in that decision, we think it was erroneous. For these reasons we answer both your Lordships' questions in each of these cases in the affirmative, that is, in favour of the respondents.

Their Lordships took time for consideration.

June 5, 1866. The following opinions were read.

LORD CRANWORTH, L.C.—These are two appeals depending very much on the same principles as those which led to the decision of your Lordships' House in *Mersey Docks and Harbour Board Trustees v. Cameron* (6). The question there was whether the trustees of the docks and harbour, who are a body having no beneficial interest in the tolls and other produce of the docks, were rateable to the relief of the poor. The argument was that, as a public body not receiving tolls for their own benefit, they were not liable; but your Lordships, after a long argument, decided that they were.

The question in the present two cases is different. Both cases arise out of the one transaction. A ship called the *Sierra Nevada*, in entering, or endeavouring to enter, one of the docks, sustained damage by reason of a bank of mud left negligently at its entrance. The ship and the cargo were damaged. Two actions were brought against the Board, one by Gibbs, as owner of the cargo, the other by Penhallow, as owner of the ship. In both cases the Exchequer Chamber held that the Board were liable. In both cases they have appealed, and the ground of appeal is that they are not a public company, deriving benefit, like a railway, from the traffic, but a public body of trustees constituted by the legislature for the purpose of maintaining the docks, and for that purpose having authority to collect tolls to be applied in the maintenance and repair of the docks, then in paying off a large debt, and ultimately in reducing the tolls for the benefit of the public. In the case of Gibbs it must be taken as admitted by the appellants that, knowing that the dock was, by reason of an accumulation of mud therein, in an unfit state to be navigated, they did not take reasonable care to put the same into a fit state for that purpose, whereupon the *Sierra Nevada*, in endeavouring to enter into the dock, struck against the mud, and the cargo thereby became damaged. In the other case it must be taken as an established fact that the appellants had, by their servants, the means of knowing the dangerous state of the dock, but were negligently ignorant of it. It is plain that if the appellants are liable in the former case, they must be liable also in the latter. If the knowledge of the existence of the mud-bank made them responsible for the consequences of not causing it to be removed, they must equally be responsible if it was only through their culpable negligence that its existence was not known to them. The principles, therefore, which are to regulate the judgment of the House in the one case, must also decide it in the other.

The question, therefore, is: What are the principles which regulate the liabilities of such a body as that of the Mersey Docks and Harbour Board? Where such a body is constituted by statute having the right to levy tolls for their own profit in consideration of their making and maintaining a dock or a canal, there is no doubt of their liability to make good to the persons using it any damage occasioned by their neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and their decision was affirmed on appeal in *Parnaby v. Lancaster Canal Co.* (2). The ground on which the Court of Exchequer Chamber rested their decision in that case is stated by TINDAL, C.J., to have been that the company made the canal for their profit and opened it to the public upon the payment of tolls. The common law in such a case imposes a duty upon the proprietors to take reasonable care so long as they keep the canal open for the public use of all who may choose to navigate it, so that they may do so without danger to their lives or property. The only difference between that case and those now standing for decision by your Lordships is that here the appellants, in whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public. I do not, however, think that this makes any difference in principle in respect to their liability. It would be a strange distinction to persons coming with their ships to different ports of this country that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not, such a distinction arising, not from any visible

A difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed. It is impossible to argue, after the decision of this House in *Mersey Docks and Harbour Board Trustees v. Cameron* (6), that the appellants are not in the occupation of the docks. They are as much the occupiers of them as if they received the tolls and dues for their own use and benefit. The principle of that decision, coupled with that of *Parnaby v. Lancaster Canal Co.* (2), must govern this case. The appellants are the occupiers of the docks, entitled to levy tolls from those who use them and so are liable to the same responsibilities as would attach on them if they were the absolute owners, occupying and using them for their own profit.

C It cannot be denied that there have been dicta, and, perhaps, decisions, not capable of being reconciled with the result at which I have arrived. But the whole series of authorities have been so fully brought under review in the very able and elaborate opinion of the learned judges delivered by BLACKBURN J., in answer to the questions put to them by your Lordships, that I do not feel myself called on to do more than to express my concurrence in that opinion. I content myself, therefore, with moving your Lordships to give judgment in both cases for the respondents.

D **LORD WENSLEYDALE.**—The Court of Exchequer Chamber in both these cases founded their judgment on that of the Exchequer Chamber in *Parnaby v. Lancaster Canal Co.* (2), in which case there was a company incorporated by Act of Parliament for the purpose of maintaining a canal to be open for the use of the public on payment of rates which the canal company might receive for their own benefit (that is, the profit to be divided among the shareholders), and the court held that the common law imposed a duty on the proprietors, not, perhaps, to repair the canal or absolutely to free it from obstructions, but to take reasonable care, so long as they kept it open for the use of all that might navigate it, so that they might navigate it without damage to their lives or property. Of the propriety of this decision there could be no doubt where the profits were received for the benefit of the company.

E In the present case the dock board do not receive the rates for their own use, but to be applied to great public purposes for the benefit of all the subjects of the realm—that is, to maintain the docks for the use of any who choose to frequent them and to pay the debt incurred in their construction. The Court of Exchequer Chamber decided that there was no difference between that case and the present. If this question were res integra not settled by the authority of decisions, I am strongly inclined to think that this decision of the courts could not be supported. It would appear to me that this case falls within the principle of those cases which have decided that when a person is acting as a public officer on behalf of government, and has the management of some branch of the government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business. This was the principle of decision in *Lane v. Cotton* (7), and *Whitfield v. Lord Le Despencer* (8), and other cases. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that Department even if appointed by them. Thus, the Postmaster-General, who has the management of one Department of the public service, the duly receiving, and conveying and delivering of letters from and to different places, which is eminently beneficial to the whole community and causes profit to the government, is not responsible for any of the servants of the Post Office, though he might appoint or dismiss them, and whether the Postmaster-General be an individual, as he is now, or two, as in *Whitfield v. Lord Le Despencer* (8), or if more, however numerous, or the Crown were to make a corporate body for the regulation and government of the Post Office, neither individuals nor a corporate body would be responsible for the neglect of their servants.

In this case, if there had been a Postmaster-General for all the ports of England to take care that the receipt and discharge of goods, and the repairs of ships should be easy and convenient, and the receipt of Custom duties convenient, or suppose his duties to be limited to a certain number of ports; or suppose a corporation were appointed instead of an individual; would it cause that corporation to be responsible for the defects of its officers by whom alone they act in the management of the docks, and in the due discharge of its duties towards the public, on whose behalf it was acting? If we had now only to review a great number of cases connected with this subject decided in different courts, many contradictory and many very unsatisfactory, I should be disposed to abide by the decision of *Metcalf v. Hetherington* (1), where the trustees and managers of the harbour were held not to be responsible for the defaults of the persons actually employed in conducting the business of the harbour. If this case depended only on the decision of the courts below I should feel great difficulty indeed in supporting the decision of the Court of Exchequer Chamber. But I cannot help thinking that the decisions of your Lordships' House, which are, no doubt, binding upon your Lordships and all inferior tribunals, have gone so far that they have concluded the question, and ought to be considered as deciding that the appellants are responsible. In *Mersey Docks and Harbour Board Trustees v. Cameron, Jones v. Mersey Docks and Harbour Board Trustees* (6), your Lordships, upon a full review and consideration, after a difference of opinion between the consulted judges, decided that the appellants, the Mersey Dock and Harbour Board, were liable to be rated as occupiers though they occupied those docks for the purposes of those who frequented the port and derived no benefit from the occupation, and that they did not occupy for public purposes in such a sense as to exempt them from liability to poor rate.

It seems to follow, therefore, that they were not considered as being on the same footing as occupiers of public buildings for the Post Office or other government purposes, but were liable as mere private individuals, and, if so, it is difficult to say that they were acting on behalf of the public benefit, and, therefore, were irresponsible for the neglect and defaults of their servants, by whom alone they could act. Whether they were acting for the benefit of the public or not seems to be decided by that case. As we are bound by your Lordships' decision, the opinion of the learned judges delivered by BLACKBURN, J., must be considered as correct, and, therefore, ought to be affirmed.

LORD WESTBURY.—I entirely concur in the conclusion derived from the authorities, and from the principles of law laid down in the very able opinion delivered to your Lordships by BLACKBURN, J. I concur also in the observation of my noble and learned friend on the Woolsack, and that judgment ought to be given for the respondents. But I think it desirable to say a few words with reference to the difficulty felt by the learned judges in consequence of certain observations that fell from LORD COTTENHAM, L.C., which are reported in *Duncan v. Findlater* (18).

I can well divine what was at that time passing in the mind of my LORD COTTENHAM. He seems to have thought that, if a corporation be trustees of property for the direct benefit of certain individuals and there is no other corporate property, and if in their capacity as trustees an act is done by order of the corporation which amounts to a tort or trespass and gives a right of action and a right to damages to any private individual, a court of equity would not permit an execution to issue on any judgment that might be recovered against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries and that the corporation as trustees have no interest therein. But, my Lords, I apprehend that was a misapprehension on the part of the noble and learned Lord, and that it would lead to very mischievous consequences. It is by no means true that a court of equity is able to protect the property of

A beneficiaries against the act of trustees. If trustees alienate property for valuable consideration to a person who pays that consideration without notice of the trust, the interest of the beneficiaries suffers from that act, and it would be a very unreasonable and a very mischievous thing if, in the case of a corporation dealing with the public or with individuals, such corporation should, by any act of theirs
B in respect of property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorising those acts, and should be driven to seek a remedy against the individual corporators whose decision or order in the name of the corporation may have led to the mischief complained of. It is much more reasonable in such a case that the trust or corporate property
C should be amenable to the individuals injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint and his title to relief against the individual corporators who have wrongfully used the name of the corporation.

The learned judges observed—and with very great correctness—that it is not everything that falls from a noble and learned Lord in advising the House, which is to be considered as the opinion of the House. Those observations of LORD
D COTTENHAM, which directly tend to this conclusion, that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done, would, if they were recognised as the law, undoubtedly lead to very great evil and injury. I confine my observations
E to the case of a remedy sought for a wrongful act, because we are very well aware that the rule has been well established that if, in the case of a contract entered into with a corporation created by Act of Parliament, the contract is made by the corporation ultra vires of the corporation, the party may not be entitled to recover under that contract. That may be a very convenient rule, and it is not at all affected by the considerations we are now dealing with. But with
F regard to the observations attributed to LORD COTTENHAM, I conceive that they ought not to be taken or regarded as establishing any rule that at all interferes with the decision at which your Lordships have arrived in the case now before you.

With regard to what has been suggested by my noble and learned friend, LORD
G WENSLEYDALE, that it would be a more correct principle to hold public Departments not to be answerable for inferior servants, that may be quite correct where an officer, fulfilling a public duty, is directly appointed by the Crown, and is acting as the servant of the Crown, but it has no application to the case of trustees incorporated for the purpose of public works, and standing in relation to the public in the way these trustees do in the present case. I concur, therefore, in the motion of my noble and learned friend.

Appeal dismissed.

HOLROYD AND OTHERS v. MARSHALL AND OTHERS

[HOUSE OF LORDS (Lord Westbury, L.C., Lord Wensleydale and Lord Chelmsford), June 14, 17, 18, 1861, July 25, August 4, 1862]

[Reported 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172;
9 Jur.N.S. 213; 11 W.R. 171; 11 F.R. 999]

Mortgage—Security—After-acquired property—Consideration for mortgage received—Beneficial interest transferred to mortgagor when property acquired.

If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract and afterwards becomes possessed of property answering the description in the contract, a court of equity will compel him to perform the contract which in equity would transfer the beneficial interest in the property to the mortgagor or purchaser immediately on its being acquired.

Sale of Land—Beneficial interest—Passing to purchaser before formal conveyance—Contract for valuable consideration capable of being ordered to be specifically performed—Vendor trustee for purchaser—Personal property—Beneficial interest passing to buyer before completion of contract.

Per LORD WESTBURY, L.C. : In equity it is not necessary for the alienation of real property that there should be any formal deed of conveyance. A contract for valuable consideration by which it is agreed to make a present transfer of property passes at once the beneficial interest provided the contract be one of which a court of equity will decree specific performance. The vendor then becomes a trustee for the purchaser. This is true also of contracts relating to personal property.

Notes. Distinguished: *Re Barker Ex parte Gorely* (1864), 5 New Rep. 22. Considered: *Dean v. Byrnes* (1864), 3 Moo. P.C.C.N.S. 92; *Belding v. Read* (1865), 3 H. & C. 955. Distinguished: *Thompson v. Cohen* (1872), L.R. 7 Q.B. 527. Considered: *Fothergill v. Rowland* (1873), 43 L.J.Ch. 252. Followed: *Anon.*, [1875] W.N. 203. Considered: *Greenbirt v. Smea* (1876), 35 L.T. 168. Followed: *Leatham v. Amor* (1878), 47 L.J.Q.B. 581. Considered: *Re Bamford, Ex parte Games* (1879), 12 Ch.D. 314; *Lazarus v. Andrade* (1880), 5 C.P.D. 318; *Clements v. Matthews* (1883), 11 Q.B.D. 808; *Joseph v. Lyons* (1884), 15 Q.B.D. 280; *Reeves v. Barlow* (1884), 12 Q.B.D. 436; *Ross v. Army and Navy Hotel Co.* (1886), 34 Ch.D. 43. Distinguished: *Harding v. Harding* (1886), 17 Q.B.D. 442. Considered: *Re Clarke, Coombe v. Carter* (1887), 36 Ch.D. 348. Explained: *Tailby v. Official Receiver*, [1886-90] All E.R. Rep. 486. Considered: *Morris v. Delobel-Flipo*, [1891-4] All E.R. Rep. 605. Distinguished: *Administrator General of Jamaica v. Lascelles, de Mercado & Co.*, [1894] A.C. 135. Considered: *Re Lind, Industrials Finance Syndicate, Ltd. v. Lind*, [1914-15] All E.R. Rep. 527; *National Provincial and Union Bank of England v. Charnley*, [1924] 1 K.B. 431; *Re Wait (Trading as Wait and James), The Trustee v. Humphries and Bobbett*, [1926] All E.R. Rep. 433. Referred to: *Reeve v. Whitmore, Martin v. Whitmore* (1863), 4 De G.J. & Sm. 1; *Langton v. Waring* (1865), 18 C.B.N.S. 315; *Brown v. Bateman* (1867), L.R. 2 C.P. 272; *Trotter v. Watson* (1868), 19 L.T. 785; *Tebb v. Hodge* (1869), 38 L.J.C.P. 217; *Re Cook, Ex parte Izard* (1874), 30 L.T. 7; *Baghott v. Norman* (1880), 41 L.T. 787; *Collyer v. Isaacs* (1881), 19 Ch.D. 342; *Re D'Epineuil, Tadman v. D'Epineuil* (1882), 20 Ch.D. 758; *Re Jones, Ex parte Nichols*, [1881-5] All E.R. Rep. 170; *Walker v. Bradford Old Bank* (1884), 12 Q.B.D. 511; *Hilton v. Tucker*, [1886-90] All E.R. Rep. 440; *Re Turcan* (1888), 58 L.J.Ch. 101; *Re Pyle Works* (1890), 44 Ch.D. 534; *Church v. Sage* (1892), 67 L.T. 800; *Re Dallas*, [1904] 2 Ch. 385; *Ward, Lock & Co. v. Long*, [1906] 2 Ch. 550; *Performing Right Society v.*

A *London Theatre of Varieties*, [1924] A.C. 1; *Re Gillott's Settlement, Chattock v. Reid*, [1933] All E.R. Rep. 334; *Re Warren, Wheeler v. Mills*, [1938] 2 All E.R. 331; *Assaf v. Fuwa*, [1955] A.C. 215.

Cases referred to :

- (1) *Mogg v. Baker* (1838), 3 M. & W. 195; 7 L.J.Ex. 94.
- B** (2) *Robinson v. Macdonnell* (1816), 5 M. & S. 228; 105 E.R. 1034; 37 Digest (Repl.) 183, 132.
- (3) *Lunn v. Thornton* (1845), 1 C.B. 379; 14 L.J.C.P. 161; 4 L.T.O.S. 417; 9 Jur. 350; 135 E.R. 587; 7 Digest (Repl.) 124, 718.
- (4) *Congreve v. Evetts* (1854), 10 Exch. 298; 23 L.J.Ex. 273; 24 L.T.O.S. 62; 18 Jur. 655; 2 C.L.R. 1253; 156 E.R. 457; 7 Digest (Repl.) 125, 727.
- C** (5) *Hope v. Hayley* (1856), 5 E. & B. 830; 25 L.J.Q.B. 155; 26 L.T.O.S. 199; 2 Jur.N.S. 486; 4 W.R. 238; 119 E.R. 690; 7 Digest (Repl.) 125, 728.
- (6) *Re The Warre, Re Robinson, Clarkson and Parker, Re Sharps* (1817), 8 Price, 269, n.; 146 E.R. 1200, L.C.; 41 Digest 175, 150.
- (7) *Langton v. Horton* (1842), 5 Beav. 9; 11 L.J.Ch. 233; 6 Jur. 357, 594; 49 E.R. 479; 41 Digest 175, 151.
- D** (8) *Whitworth v. Ganguin* (1841), Cr. & Ph. 325; 10 L.J.Ch. 317; 5 Jur. 523; 41 E.R. 515, L.C.; subsequent proceedings (1844), 3 Hare, 416; 13 L.J.Ch. 288; 8 Jur. 374; affirmed (1846), 1 Ph. 728; 15 L.J.Ch. 433; 9 L.T.O.S. 213; 10 Jur. 531; 41 E.R. 809, L.C.; 39 Digest 32, 394.
- (9) *Abbott v. Stratton* (1846), 9 I.Eq. Rep. 233; 3 Jo. & Lat. 603; 39 Digest 57, 685*vi*.
- E** (10) *Metcalf v. Archbishop of York* (1836), 1 My. & Cr. 547; 6 L.J.Ch. 65; 40 E.R. 48, L.C.; 35 Digest (Repl.) 307, 266.

Also referred to in argument :

- Douglas v. Russell* (1831), 4 Sim. 524; 58 E.R. 196; affirmed (1833), 1 My. & K. 488, L.C.; 41 Digest 638, 4691.
- F** *Hobson v. Trevor* (1723), 10 Mod. Rep. 507; 2 P. Wms. 191; 88 E.R. 829; sub nom. *Hopson v. Trevor*, 1 Stra. 533, L.C.; 7 Digest (Repl.) 257, 954.
- Newlands v. Paynter* (1840), 4 My. & Cr. 408; 4 Jur. 282; 41 E.R. 158, L.C.; 21 Digest (Repl.) 590, 797.
- Wilmut v. Pike* (1845), 5 Hare, 14; 14 L.J.Ch. 469; 9 Jur. 839; 67 E.R. 808; 35 Digest (Repl.) 514, 2013.

G **Appeal** by the plaintiffs in the action from a declaration made by Lord CAMPBELL, L.C., that the appellants were not entitled to machinery then or recently in a certain mill.

The respondent James Taylor was the tenant of Hayes Mill, Ovenden, Yorkshire, where he carried on the business of a damask manufacturer. In 1859 he became embarrassed in his affairs, and the appellants Abraham Parkinson Holroyd and William Holroyd purchased all the machinery upon his mill at an auction sale. This machinery was not removed, and it was agreed between them and him that he should buy it back for £5,000. Taylor being at that time unable to pay this sum, it was further agreed that the same should remain owing upon the security of the following indenture. This indenture was dated Sept. 20, 1858, and was made and executed between and by the appellants Abraham Parkinson Holroyd and William Holroyd, of the first part, Taylor, of the second part, and the appellant Isaac Brunt, of the third part. After reciting the agreements before stated, it was witnessed, that the appellants, Abraham Parkinson Holroyd and William Holroyd did thereby grant and assign unto Brunt all that and those the machinery, implements and things specified in the schedule thereunder written; to have and take the said premises unto Brunt, on trust for Taylor until such demand as thereafter mentioned was made, and thereafter upon trust, if Taylor should pay unto Abraham Parkinson Holroyd and W. Holroyd the sum of £5,000,

together with interest as therein mentioned on demand in writing, but, if A
default should be made in payment of the £5,000 or the interest thereon,
or any part thereof respectively, that Brunt, his executors, administrators, or
assigns, should sell the same. It was then declared that Brunt should hold the
moneys to arise from any sale in the first place thereof to pay all the
expenses incurred on such sale or otherwise in relation to the premises, and
in the next place to apply such moneys in or towards satisfaction of the B
moneys for the time being owing on the security of the indenture, and then
to pay the surplus (if any) of the moneys to arise from such sale unto Taylor,
his executors, administrators, or assigns.

A clause of the deed provided

"all machinery, implements and things, which during the continuance of C
this security shall be fixed or placed in or about the said mill . . . in addition
to or substitution for the said premises or any part thereof, shall
during such continuance as aforesaid be subject to the trusts, powers, provisoes
and declarations thereinbefore declared and expressed concerning the
premises," D

and that Taylor, his executors, administrators, or assigns, would at all times
during such continuance as aforesaid, at the request of Abraham Parkinson
Holroyd and William Holroyd, do all necessary acts for assuring such added
or substituted machinery, implements and things, so that the same might
become vested accordingly. The deed, which was registered as a bill of sale, E
did not contain any express licence to any person to seize the after-acquired
property.

Taylor continued to carry on his business at Hayes Mill. The appellants
having complained of the sale by him of certain portions of the machinery,
he, on Mar. 1, 1860, furnished them with an account of the old machinery sold
and of the new machinery which he had substituted in its place, and upon F
his representation that the security had been thereby improved, the appellants
forebore to press for payment. On April 2, 1860, the appellants Abraham Parkin-
son Holroyd and William Holroyd served Taylor with a demand in writing for
the payment of the £5,000 and interest. Default was made in payment thereof,
no part of it being paid. On April 14, 1860, the respondent Marshall, who
was then the high sheriff of the county of York, seized and left an officer G
in possession of all the machinery and effects in the mill, under a writ of fi. fa.
sued out on a judgment recovered in an action at law by the respondent Preller
against Taylor. On May 11 the sheriff placed in the hands of his officer in
the mill a second warrant on a writ of fi. fa. sued out on a judgment recovered
in another action at law by Preller against Taylor. The machinery and effects
in and about the mill, buildings and appurtenances on April 14 consisted partly H
of machinery and effects which were therein at the date of the indenture of
Sept. 20, 1858, and partly of added and substituted machinery and effects which
had been purchased by James Taylor after the date of the security. The
appellants advertised the whole of the machinery and effects for sale by auction on
May 21, 22 and 23, 1860. On May 21, 1860, the sheriff and the execution-creditor I
served the auctioneer with notice that the machinery and effects so advertised for
sale were in the possession of the sheriff. The sale was notwithstanding pro-
ceeded with, and the whole of the added and substituted machinery and effects
were sold. On May 23, 1860, the sheriff took forcible possession of the sub-
stituted machinery and effects. Part he re-sold before removal, and (with a trifling
exception) to the same persons who had been the purchasers thereof at the appel-
lants' sale. The residue he carried away. The sale by the appellants of the
machinery and effects in existence at the date of the security was not interfered
with. It did not, however, realise sufficient to satisfy what was due to them.

On May 25, 1860, the appellants served the sheriff with a formal notice that they should hold him responsible for his proceedings aforesaid, and on May 30 they filed their bill of complaint in the High Court of Chancery, praying to be relieved in respect of such proceedings. By a decree of STUART, V.-C., dated July 26, 1860, it was declared that the appellants were entitled to all the machinery in Hayes Mill in the appellants' bill mentioned, at the date of the respondent Preller's executions, including all the machinery added and the substituted machinery. Preller appealed, and LORD CAMPBELL, L.C., reversed the order of STUART, V.-C., whereupon the present appeal was brought.

Malins, Q.C., and *Tool* for the appellants.

Amphlett, Q.C., and *Hobhouse* for the respondents.

Their Lordships took time for consideration.

Aug. 4, 1862. The following opinions were read.

LORD WESTBURY, L.C., stated the facts, and continued: The question is whether, as to the machinery added and substituted since the date of the mortgage, the title of the mortgagees or that of the judgment-creditor ought to prevail. It is admitted that the judgment-creditor has no title to the machinery originally comprised in the bill of sale, but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment-creditor.

The question may be easily decided by the application of a few elementary principles long settled in courts of equity. In equity it is not necessary, for the alienation of property, that there should be any formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract be one of which a court of equity will decree a specific performance. In the language of LORD HARDWICKE, the vendor becomes a trustee for the vendee, subject of course to the contract being one to be specifically performed. And this is true not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed. A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular, but a contract to sell the 500 chests of the particular kind of tea "which are now in my warehouse at Gloucester" is a contract relating to specific property which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person. The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir-at-law, who may require the personal representative to pay the purchase-money. But all this depends on the contract being such as a court of equity would decree to be specifically performed. There can be no doubt, therefore, that if the mortgage-deed in the present case had contained nothing but the contract which is involved in the covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery

and effects to have been in existence and upon the mill at the time of the execution of the deed. A

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed, and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is a conveyance void at law, simply because there is nothing to convey. So in equity, a contract which engages to transfer property which is not in existence, cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agree to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards become possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described; the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained. B C D

Applying these familiar principles to the present case, it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question. There is another criterion to prove that the mortgagees acquired an estate or interest in the added machinery as soon as it was brought on the mill. If, afterwards, the mortgagor had attempted to remove any part of the machinery, except for the purpose of substitution, the mortgagees would have been entitled to an injunction to restrain such removal, and that because of their estate in the specific property. E F

The result is, that the title of the appellants is to be preferred to that of the judgment-creditor. Some use was made at the Bar and in the court below of the language attributed to PARKE, B., in *Mogg v. Baker* (1). That learned judge appears to have given, not his own opinion, but what he understood would have been the decision of a court of equity upon the case. He is represented as speaking upon the authority of one of the judges of the Court of Chancery. Any communication so made was of course extra-judicial; and there is much danger in making communications of such a nature the ground of judicial decision. But I entirely concur in what appears to have been the principle intended to be stated, for PARKE, B., speaking of the agreement in the case, says: "It would cover no specific furniture, and would confer no right in equity." I have already explained that a contract relating to goods, but not to any specific goods, would not be the subject of specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest. If, therefore, the contract in *Mogg v. Baker* (1) related to no specific furniture, it is true that it would not, at the time of its execution, confer any right in equity; but it is equally true that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition. Whether a correct construction was put upon the agreement in *Mogg v. Baker* (1) is a different question, and which it is needless to consider, as I am only desirous of showing that the proposition stated by the learned judge is quite consistent with the principles G H I

on which this case ought to be decided. I therefore advise your Lordships to reverse the order of LORD CAMPBELL, L.C., and direct the petition of re-hearing presented to him to be dismissed with costs.

LORD WENSLEYDALE said that he acquiesced in the order proposed.

LORD CHELMSFORD.—The question in the case is whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mortgagor James Taylor was tenant, are entitled to the property which was seized by the sheriff under two writs of execution issued against the mortgagor in priority to those executions, or either of them. Are they entitled to a preference over the first execution by the mere effect of their deed, or was it necessary that some act should have been done after the new machinery was fixed or placed in the mill in order to complete the title of the appellants. It was admitted that the right of the judgment-creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said—and truly said—that those equities must be complete, and not inchoate or imperfect; or, in other words, that they must be actual equitable estates, and not mere executory rights.

What, then, was the nature of the title which the mortgagees obtained under their mortgage deed? If the question had to be decided at law, there would be no difficulty. At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void: *Robinson v. Macdonnell* (2). But where future property is assigned, and after it comes into existence possession is either delivered by the assignor, or is allowed by him to be taken by the assignee, in either case there would be the *novus actus interveniens* of the maxim, *Licet dispositio de interesse futuro sit inutilis tamen fieri potest declaratio præcedens quæ sortiatur effectum interveniente novo actu*, of LORD BACON, upon which LORD CAMPBELL rested his decree, and the property would pass. It seemed to be supposed upon the first argument that an assignment of this kind would not be void in law if the deed contained a licence or power to seize the after-acquired property. But this circumstance would make no difference in the case. The mere assignment is itself a sufficient declaratio præcedens, in the words of the maxim. And although TINDAL, C.J., in *Lunn v. Thornton* (3), said (1 C.B. at p. 385):

“It is not a question whether a deed might not have been so framed as to have given the defendant a power of seizing the future personal goods,”

he must have meant that under such a power the assignee might have taken possession, and so have done the act which was necessary to perfect his title at law. This will clearly appear from *Congreve v. Evetts* (4), in which there was an assignment of growing crops and effects as a security for money lent, with a power for the assignee to seize and take possession of the crops and effects bargained and sold, and of all such crops and effects as might be substituted for them. PARKE, B., said (10 Exch. at p. 308):

“If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods, but when executed not fully or entirely, but only to the extent of taking possession of the growing crops, it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops.”

In *Hope v. Hayley* (5), where there was an agreement to transfer goods to be afterwards acquired and substituted, with a power to take possession of all original and substituted goods, LORD CAMPBELL, C.J., said (5 E. & B. at p. 845):

"The intention of the contracting parties was, that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a licence to the grantee to enter upon the property, and that licence, when acted upon, took effect independently of the transfer."

I have thought it right to dwell a little upon these cases because, in determining the present question, it is useful to ascertain the precise limits of the doctrine as to the assignment of future property at law. The decree appealed from proceeds upon the ground, not indeed that an assignment of future property without possession taken of it would be void in equity (as the cases to which I have referred show that it would be at law), but that the equitable right is incomplete and imperfect unless there is subsequent possession, or some act equivalent to it to perfect the title. In considering the case it will be unnecessary to examine the authorities cited in argument to show that, if there be an agreement to transfer or to charge future-acquired property, the property passes or becomes liable to the charge in equity, where the question has arisen between the parties to the agreement themselves. In order to determine whether the equity which is created under agreements of this kind is a personal equity to be enforced by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, we must look to cases where the rights of third persons intervene.

The respondents, in support of the decree, relied strongly on what was laid down by PARKE, B., in *Mogg v. Baker* (1) (3 M. & W. at p. 198), as the rule in equity which he stated he had derived from a very high authority,

"that if the agreement was to mortgage certain specific furniture of which the corpus was ascertained, that would constitute an equitable title in the defendant so as to prevent its passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but if it was only an agreement to mortgage furniture to be subsequently acquired, [or] to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it would cover no specific furniture, and would confer no right in equity."

The meaning of these latter words must be that there would be no complete equitable transfer of the property, because there can be no doubt that the agreement stated would create a right in equity upon which the party entitled might file a bill for specific performance. This point is so clear that it is almost unnecessary to refer to the observations of LORD ELDON in *Re The Warre* (6), in support of it. It must also be observed that the proposition in *Mogg v. Baker* (1) hardly reaches the present question, because it is not stated as a case of an actual transfer of future property, but as an agreement to mortgage or to give a bill of sale at a future day. The only equity which could belong to a party under such agreement would be to have a mortgage or a bill of sale of the future property executed to him. It does not meet a case like the present, where it is expressly provided that all additional or substituted machinery shall be subject to the same trusts as are declared of the existing machinery. Under a covenant of this description, to hold that trust attaches upon the new machinery as soon as it is placed in the mill is to give an effect to the deed in perfect conformity with the intention of the parties; and as, by the terms of the deed Taylor was to remain in possession, the act of placing the machinery in the mill would appear to be an act binding his conscience to the agreed trust on behalf of the appellants, and nothing more would appear to be requisite, unless by the established doctrine of a court of equity some further act was indispensable to complete their equitable title.

A The judgment of LORD CAMPBELL resting, as he states, upon LORD BACON's maxim, determines that some subsequent act is necessary to enable "the equitable interest to prevail against a legal interest subsequently bona fide acquired." It is agreed that this maxim relates only to the acquisition of a legal title to future property. It must be extended to equitable rights and interests (if at all) merely by analogy. But in this proposing to enlarge the sphere of the rule it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law, non-existing property to be acquired at a future time is not assignable—in equity, it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it.

No case has been mentioned in which it has been held that upon an agreement of this kind the beneficial interest does not pass, in equity, to a mortgagee or purchaser immediately upon the acquisition of the property, except that of *Langton v. Horton* (7), which was relied upon by the respondents as a conclusive authority in their favour. I need not say that I examine every judgment of that able and careful judge, WIGRAM, V.-C., with the deference due to such a highly respected authority. *Langton v. Horton* (7) was the case of a deed of assignment by way of mortgage of a ship, her tackle and appurtenances, and all oil, head matter, and other cargo which might be caught and brought home. The vice-chancellor decided, in the first place, that as against the assignor there was a valid assignment in equity of the future cargo. But, the question arising between the mortgagees and a judgment-creditor who had afterwards sued out a writ of *fi. fa.*, his Honour, assuming that the equitable title which was good against the assignor would not under the circumstances of the case be available against the judgment-creditor, proceeded to consider whether enough had been done to perfect the title of the mortgagees, and ultimately decided in their favour upon the acts done by them to obtain possession of the cargo. It was said that the judgment of the vice-chancellor was, upon this occasion, fettered by his deference to the opinion apparently entertained and expressed by LORD COTTENHAM in *Whitworth v. Gangain* (8). It will be necessary, therefore, to direct attention for a short time to that case, and especially as it has an immediate bearing upon the question to be decided upon the present occasion.

The case, as originally presented before LORD COTTENHAM, was an appeal from an order of SHADWELL, V.-C., appointing a receiver. The bill of the equitable mortgagees was founded entirely upon alleged fraud and collusion between the mortgagor and the tenants by elegit. The defendants had denied fraud and collusion, and also notice of the mortgagee's title at the time of obtaining possession under the elegits. The plaintiffs, in argument, attempted to set up a case not made by their bill, viz. that independently of the question of fraud, they had by law a preferable title to the defendants. The Lord Chancellor discharged the order for a receiver solely on the ground that the plaintiffs had failed in making out the case on which they asked for the interference of the court. Upon discharging the order, LORD COTTENHAM is reported to have said that in the argument a totally different turn was given, or attempted to be given, to the plaintiffs' case, viz. that independently of the question of fraud, they had by law a preferable title to the defendants. He added (*Cr. & Ph.* at p. 336):

"If the bill had been framed with that view, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity before I could have interposed

by interlocutory order, because I find these defendants in possession of a legal title, although not to all intents and purposes an estate, yet a right and interest in the land which under the authority of an Act of Parliament they had a right to hold, the elegit being the creature of the Act of Parliament, and, therefore, they have a Parliamentary title to hold the land as against all persons, unless an equitable case can be made out to induce this court to interfere."

Although WIGRAM, V.-C., in *Langton v. Horton* (7), in adverting to this language, said that he thought LORD COTTENHAM intended only what his words literally expressed—that he would not interfere against the judgment-creditor by an interlocutory order unless he was well satisfied of the validity of the equity to which he was called upon to give summary effect—yet it is impossible to doubt (to use the expressions of his Honour when *Whitworth v. Gangain* (8) was before him upon the hearing) "that the strong leaning of LORD COTTENHAM's mind" was in favour of the legal right of the judgment-creditor over the equitable title of the mortgagees. This opinion, though merely expressed incidentally, would be entitled to the greatest weight upon the present question if the law had not been since settled in opposition to it; for, in consequence of the ground upon which LORD COTTENHAM discharged the order for a receiver, the plaintiffs amended their bill, and inserted a prayer for alternative relief, independent of fraud and collusion, and the cause having been brought on for hearing before WIGRAM, V.-C., his Honour decided that the mortgagees were entitled in equity to enforce their charge in priority to the judgment-creditors of the mortgagor, although they had no notice of the equitable mortgage, and had obtained actual possession of the lands by writ of elegit and attornment of the tenants. This decision was afterwards affirmed by LORD LYNTHURST, who, in the course of his judgment, mentioned *Abbott v. Stratton* (9), where LORD ST. LEONARDS, then Lord Chancellor of Ireland, had determined that an equitable mortgagee was entitled to priority over a subsequent creditor by judgment who was in possession by a receiver and had no notice of the mortgage. Referring to *Whitworth v. Gangain* (8), he expressed his agreement with the conclusion to which WIGRAM, V.-C., had come in that case, and stated that

"he had repeatedly acted on the rule, that an agreement binding property for valuable consideration, though equitable only, will take precedence of a subsequent judgment, whatever may be the consideration for it, and whether it be obtained in invitum or only by confession."

Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee over a judgment-creditor, though without notice, may now be considered to be firmly established; and, according to the opinion of LORD ST. LEONARDS, "any agreement binding property for valuable consideration" will confer a similar right. It does not appear, from this review of *Whitworth v. Gangain* (8), that it could have had any influence over the question in *Langton v. Horton* (7), as to the imperfection of the mortgagee's title, unless something had been done to perfect it. The point does not appear to have been at all noticed by LORD COTTENHAM, his observations having been confined to the competition between the equitable title of the mortgagee and the legal title of the judgment-creditors. *Langton v. Horton* (7) must, therefore, be accepted as an authority, that there may be cases in which an equitable mortgagee's title may be incomplete against a subsequent judgment-creditor. In that case the delivery of possession of the cargo on board the vessel was, as the vice-chancellor said, "impossible, as the vessel was at sea." The parties could do nothing more in this country with reference to it than execute an instrument purporting to assign such interest as Birnie (the mortgagor) had, send a notice of the assignment to the master of the ship, and await

A the arrival of the ship and cargo. This was the course taken, and on the arrival of the ship at the port of London, the plaintiffs immediately demanded possession. The cargo was, in point of fact, in possession of the captain, as the agent for the owner, the mortgagor. It would have been rather a strange effect to give to the assignment of the future cargo, to hold that when it came into existence a trust attached upon it for the benefit of the mortgagee, that B thereupon the captain became his agent, and that the mortgagee thereby acquired a perfect equitable right to the property, which was good against all subsequent legal claimants.

Langton v. Horton (7) may have been rightly decided as to the necessity for the completion of the mortgagee's title under the circumstances which there existed, and yet it will be no authority for saying that in every case of an equitable mortgage of future property something beyond the execution of the deed and the coming into existence of the property will be necessary. It C certainly appears to be putting too great a stress upon this case to urge it is an authority that an equitable title would have been defective if certain circumstances had not existed, when the existence of those circumstances was established in proof and made the ground of the decision. But if it should still D be thought that the deed, together with the act of bringing the machinery on the premises were not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose. The trustee could not take possession of the new machinery, for that would have been contrary to the provisions of the deed under which Taylor was to remain in possession until E default in payment of the mortgage-money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised, and if the inter-venient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill by which it became, to his knowledge, immediately F subject to the operation of the deed? I asked counsel for the respondents what *novus actus* he contended to be necessary, and he replied "a new deed." But this would be inconsistent with the terms of the original deed which embraces the substituted machinery and certainly was operative upon the future property as between the parties themselves; and it seems to be neither a convenient nor a G reasonable view of the rights acquired under the deed to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons. If something was still requisite to be done, and that by the mortgagor, I cannot help thinking that the account delivered by Taylor to the mortgagees of the old machinery sold, and of the new machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that H Taylor held the new machinery upon the trusts of the deed. I think that the account delivered by Taylor amounted to a declaration that Taylor held the new machinery upon the trusts of the deed, the only act which could be done by him in conformity with it, and it is difficult to understand for what other reason such an account should have been rendered. As between themselves, I it is quite clear that a new deed of the added and substituted machinery was unnecessary. No possession could be delivered of it, because it would have been inconsistent with the agreement of the parties; and anything, therefore, beyond this recognition of the mortgagee's right appears to be excluded by the nature of the transaction.

I will add a very few words on the subject of notice of the claim of the mortgagees to the judgment-creditor. I think that the equitable title would prevail even if the judgment-creditor had no notice of it, according to the authorities which have been already observed upon. It is true that LORD COTTENHAM, in *Metcalfe v. Archbishop of York* (10), said that if the plaintiff in that

case was entitled to the charge upon the vicarage under the covenant and charge in the deed of 1811, then, as the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to the judgment. This appears to imply that his opinion was that, if the judgment-creditor had not had notice, he would have been entitled to priority. Much stress, however, ought not to be laid upon an incidental observation of this kind where notice had actually been given, and where, therefore, the case was deprived of any such argument in favour of the judgment-creditor. If LORD COTTENHAM really meant to say that notice by the judgment-creditor of the prior equitable title was necessary in order to render it available against him, his opinion is opposed to the decisions which have established that a judgment-creditor, with or without notice, must take the property subject to every liability under which the debtor held it. The present case, however, meets any possible difficulty upon the subject of notice, because it appears that the deed was registered as a bill of sale under the provisions of the Bills of Sale Act, 1854. It was argued that this Act was intended to apply to bills of sale of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the legislature; but there is no ground for excluding them from the provisions of the Act; and upon the question of notice the register would furnish the same information of the dealing with future, as with existing, property, which is all that is required to answer the objection. I think that LORD CAMPBELL, L.C., was right in holding that, if actual possession of the machinery in question before the sheriff's officer entered was necessary, there was no proof of such possession having been taken on behalf of the mortgagee, but, upon a careful consideration of the whole case, I am compelled to differ with him upon the ground on which he ultimately reversed the decree made by STUART, V.-C. I think, therefore, that his decree should be reversed.

BACKHOUSE v. BONOMI AND WIFE

[COURT OF EXCHEQUER CHAMBER (Willes and Byles, JJ., Martin, Watson and Bramwell, BB.), May 13, 14, June 18, 1859]

[Reported E.B. & E. 646; 28 L.J.Q.B. 378; 33 L.T.O.S. 331;
5 Jur.N.S. 1345; 7 W.R. 667; 120 E.R. 652]

[HOUSE OF LORDS (Lord Westbury, L.C., Lord Brougham, Lord Cranworth, Lord Wensleydale and Lord Chelmsford), June 27, 1861]

[Reported 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754;
7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825]

Limitation of Action—Land—Damage caused by subsidence—Act resulting in subsidence occurring more than six years before action brought—Damage suffered within six years.

The plaintiffs were the owners of the reversion of the surface of land upon which buildings had been erected. The mines and minerals under the land and buildings belonged to other persons under whom the defendant claimed. More than six years before the commencement of the present action the defendant worked coal mines 280 yards distant from the plaintiffs' land, and in so doing, without negligence, left insufficient support for that land. As a result within the

A six years the surface of the plaintiffs' land subsided and they brought this action for damages for the damage to their property.

Held: the plaintiffs' right of action accrued when the subsidence occurred and not at the time of the defendants' wrongful working of the mine, and, therefore, the action was not barred by the Limitation Act, 1623, s. 3.

B Notes. The period of limitation for actions in tort (other than actions for negligence, nuisance or breach of duty where the damages claimed consist of or include damages in respect of personal injuries) is six years: see now the Limitation Act, 1939, s. 2, as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, and the Limitation Act, 1963.

C Distinguished: *Whitehouse v. Fellowes* (1861), 10 C.B.N.S. 765. Applied: *Smith v. Thackerah* (1866), L.R. 1 C.P. 564. Considered: *Spoor v. Green* (1874), L.R. 9 Ex. 99; *Ecclesiastical Comrs. for England v. North Eastern Rail. Co.* (1877), 4 Ch.D. 845; *Birmingham Corpn. v. Allen* (1877), 6 Ch.D. 284; *Lamb v. Walker* (1878), 3 Q.B.D. 389; *Dalton v. Angus*, [1881-5] All E.R. Rep. 1; *Darley Main Colliery Co. v. Mitchell*, [1886-90] All E.R. Rep. 449; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q.B. 165; *Hall v. Norfolk*, [1900] 2 Ch. 493; *Hague v. Doncaster R.D.C.* (1908), 73 J.P. 69. Applied: *West Leigh Colliery Co. v. Tunnicliffe & Hampson*, [1904-7] All E.R. Rep. 189; *Davies v. Powell Duffryn Steam Coal Co.* (1920), 36 T.L.R. 358; *Re Beckermert Mining Co., Ltd.'s Application*, [1938] 1 All E.R. 389. Distinguished: *London and North Eastern Rail. Co. v. B. A. Collieries, Ltd.*, [1945] 1 All E.R. 51. Referred to: *Croft v. London and North Western Rail. Co.* (1864), 3 B. & S. 346; *Fletcher v. Rylands* (1868), ante p. 1; *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), 25 L.T. 239; *Eadon v. Jeffcock* (1872), L.R. 7 Exch. 379; *Bower v. Peate* (1876), 1 Q.B.D. 321; *Colley v. London and North Western Rail. Co.* (1880), 49 L.J.Q.B. 575; *Bell v. Love* (1883), 10 Q.B.D. 547; *Bean v. Wade* (1885), Cab. & El. 519; *Crumbie v. Wallsend Local Board* (1891), 60 L.J.Q.B. 392; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q.B. 301; *Edinburgh and District Water Trustees v. Clippens Oil Co.* (1902), 87 L.T. 275; *Harrington v. Derby Corpn.*, [1905] 1 Ch. 205; *Nash v. Rochford R.D.C.*, [1916-17] All E.R. Rep. 299; *Elliott v. Burn*, [1934] All E.R. Rep. 665; *Cartledge v. E.-Jopling & Sons, Ltd.*, [1963] 1 All E.R. 341.

F As to when time begins to run, see 24 HALSBURY'S LAWS (3rd Edn.) 193 et seq.; as to right of support, see 26 HALSBURY'S LAWS (3rd Edn.) 339 et seq.; as to subsidence damage, see *ibid.* 371 et seq.; and for cases see 32 DIGEST (Repl.) 400-401. For the Limitation Act, 1939, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 1160.

G Cases referred to:

- H** (1) *Nicklin v. Williams* (1854), 10 Exch. 259; 23 L.J.Ex. 335; 24 L.T.O.S. 61; 2 C.L.R. 1304; 156 E.R. 440; 17 Digest (Repl.) 86, 74.
- (2) *Rowbotham v. Wilson* (1857), 8 E. & B. 123; 27 L.J.Q.B. 61; 29 L.T.O.S. 357; 3 Jur.N.S. 1297; 5 W.R. 820; 120 E.R. 45, Ex. Ch.; affirmed (1860), 8 H.L.Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 6 Jur.N.S. 965; 11 E.R. 463, H.L.; 19 Digest (Repl.) 8, 8.
- I** (3) *Caledonian Rail. Co. v. Sprot* (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 19 Digest (Repl.) 49, 272.
- (4) *Mellor v. Spateman* (1669), 1 Saund. 343; 85 E.R. 495; sub nom. *Miller v. Spateman*, 2 Keb. 570; sub nom. *Meller v. Staples*, 1 Mod. Rep. 6; 13 Digest (Repl.) 289, 1074.

Also referred to in argument:

Roberts v. Read (1812), 16 East, 215; 104 E.R. 1070; 38 Digest (Repl.) 138, 971.

Gillon v. Boddington (1824), 1 C. & P. 541; Ry. & M. 161, N.P.; 19 Digest (Repl.) 202, 1421.

- Howell v. Young* (1826), 5 B. & C. 259; 2 C. & P. 238; 8 Dow. & Ry. K.B. 14; 4 L.J.O.S.K.B. 160; 108 E.R. 97; 32 Digest (Repl.) 402, 269.
- Partridge v. Scott* (1838), 3 M. & W. 220; 1 Horn & H. 31; 7 L.J.Ex. 101; 150 E.R. 1124; 19 Digest (Repl.) 74, 420.
- Smart v. Morton* (1855), 5 E. & B. 30; 3 C.L.R. 1004; 24 L.J.Q.B. 260; 25 L.T.O.S. 97; 1 Jur.N.S. 825; 119 E.R. 393; 19 Digest (Repl.) 181, 1211.
- Humphries v. Brogden* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries v. Brogden*, 15 Jur. 124; 19 Digest (Repl.) 180, 1207.
- Roberts v. Haines* (1856), 6 E. & B. 643; 25 L.J.Q.B. 353; 2 Jur.N.S. 999; affirmed sub nom. *Haines v. Roberts* (1857), 7 E. & B. 625; 119 E.R. 1377; sub nom. *Roberts v. Haines*, 27 L.J.Ex. 49; 29 L.T.O.S. 233; 3 Jur.N.S. 886; 5 W.R. 631, Ex. Ch.; 11 Digest (Repl.) 67, 916.
- Ashby v. White* (1703), 2 Ld. Raym. 938; Holt, K.B. 524; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 92 E.R. 126; on appeal (1704), 1 Bro. Parl. Cas. 62, H.L.; 17 Digest (Repl.) 79, 22.
- Fetter v. Beale* (1701), Holt, K.B. 12; 1 Ld. Raym. 339; 1 Salk. 11; 90 E.R. 905; 1 Digest (Repl.) 18, 139.
- Marzetti v. Williams* (1830), 1 B. & Ad. 415; 1 Tyr. 77, n.; 9 L.J.O.S.K.B. 42; 109 E.R. 842; 17 Digest (Repl.) 79, 23.
- Bower v. Hill* (1835), 1 Bing. N.C. 549; 1 Hodg. 45; 1 Scott, 526; 4 L.J.C.P. 153; 131 E.R. 1229; 19 Digest (Repl.) 92, 529.
- Embrey v. Owen* (1851), 6 Exch. 353; 20 L.J.Ex. 212; 17 L.T.O.S. 79; 15 Jur. 633; 155 E.R. 579; 1 Digest (Repl.) 30, 236.
- Rodgers v. Nowill* (1847), 5 C.B. 109; 17 L.J.C.P. 52; 10 L.T.O.S. 88; 11 Jur. 1039; 136 E.R. 816; 43 Digest 264, 1017.
- Blofeld (Blofield) v. Payne* (1833), 4 B. & Ad. 410; 1 Nev. & M.K.B. 353; 2 L.J.K.B. 68; 110 E.R. 509; 1 Digest (Repl.) 31, 241.
- Metropolitan Association v. Petch* (1858), 5 C.B.N.S. 504; 27 L.J.C.P. 330; 23 J.P. 119; 4 Jur.N.S. 1000; 141 E.R. 204; 19 Digest (Repl.) 203, 1428.
- Hodsoll v. Stallebrass* (1840), 11 Ad. & El. 301; 9 C. & P. 63; 8 Dowl. 482; 3 Per. & Dav. 200; 9 L.J.Q.B. 132; 113 E.R. 429; 17 Digest (Repl.) 84, 58.
- Violett v. Sympton* (1857), 8 E. & B. 344; 27 L.J.Q.B. 138; 30 L.T.O.S. 114; 3 Jur.N.S. 1217; 6 W.R. 12; 120 E.R. 128; 32 Digest (Repl.) 401, 262.
- Lord Oakley v. Kensington Canal Co.* (1833), 5 B. & Ad. 138; 2 L.J.K.B. 208; 110 E.R. 743; 38 Digest (Repl.) 438, 924.
- Clegg v. Dearden* (1848), 12 Q.B. 576; 17 L.J.Q.B. 233; 11 L.T.O.S. 309; 12 Jur. 848; 116 E.R. 986; 33 Digest (Repl.) 868, 1161.
- Wordsworth v. Harley* (1830), 1 B. & Ad. 391; 9 L.J.O.S.M.C. 50; 109 E.R. 833; 38 Digest (Repl.) 138, 973.
- Brown v. Howard* (1820), 2 Brod. & Bing. 73; 4 Moore, C.P. 508; 129 E.R. 885; 32 Digest (Repl.) 394, 213.
- Imperial Gas Light and Coke Co. v. London Gas Light Co.* (1854), 10 Exch. 39; 2 C.L.R. 1230; 23 L.J.Ex. 303; 18 Jur. 497; 2 W.R. 527; 156 E.R. 346; 32 Digest (Repl.) 605, 1892.

Appeal by the defendant by way of writ of error from a decision of the Court of Exchequer Chamber (WILLES and BYLES, JJ., and MARTIN, WATSON and BRAMWELL, B.B.), reversing a decision of the Court of Queen's Bench (LORD CAMPBELL, C.J., ERLE and COLERIDGE, JJ., WIGHTMAN, J., dissenting), holding that the plaintiffs' action for damages for loss of support was barred under the Statute of Limitations.

The plaintiffs in the case complained of damage done to houses and buildings in the occupation of a person who held them as their tenant, by the improper working of coal mines near to such houses and buildings without leaving any proper support to their workings. The plaintiffs, in their declaration, after

A stating that the reversion of the premises belonged to them, alleged that they were entitled to have the messuages and buildings supported by the mines, earth and soil underground, contiguous and near to and under them. The defendant pleaded not guilty, and two traverses upon which no question was made; and, fourthly, that the plaintiffs were not entitled to have their messuages and buildings supported by the mines, etc., as alleged; and fifthly, the Statute of Limitations.

B It appeared by the award of the arbitrator, to whom the case was referred to find the facts, that the plaintiffs were the owners of the surface upon which the buildings had been erected more than forty years before the injuries complained of, but that the mines and minerals under the plaintiffs' land and buildings belonged to other persons under whom the defendant claimed. The defendant C and others with whom he was associated worked at the coal under the plaintiffs' land and also under the adjoining lands. In 1848 they purchased and worked the coal under the land of Daniel Simpson, and in 1849 removed the pillars which had been left in that land, and in 1850 the roof and superincumbent soil fell in and formed what is called a thrust. Simpson's land, where the D roof fell in, was 280 yards from the plaintiffs' premises. The previous workings of the defendant had caused no damage whatever to the plaintiffs' premises, but the effect of the thrust occasioned by the defendant's removal of the pillars in Simpson's land in 1849 was gradually to dislocate and throw down the pillars in the neighbouring workings, until in 1854 the plaintiffs' land and houses were injuriously affected by the subsidence of the surface.

E Under these circumstances the question was from what period the statute should run—whether from the accruings of the damage in 1854 or from the more remote cause in 1849; the arbitrator having found that the "thrust" then caused by the defendant's taking away the pillars under Simpson's land was the sole cause of the damage to the plaintiffs' premises. The Court of Queen's Bench differed in opinion, WIGHTMAN, J., being in favour of the plaintiffs, and F LORD CAMPBELL, C.J., ERLE and COLERIDGE, JJ., for the defendant.

From this decision the plaintiffs appealed to the Court of Exchequer Chamber.

Manisty, Q.C., for the plaintiffs.

Bovill, Q.C. (with him *Phipson*) for the defendant.

Cur. adv. vult.

G

H June 18, 1859. **WILLES, J.**, read the following judgment of the court.—This is a proceeding in error upon a judgment of the Court of Queen's Bench, and was brought to question the decision in that case and a judgment of the Court of Exchequer in *Nicklin v. Williams* (1). In the Court of Queen's Bench I WIGHTMAN, J., differed from the majority of the court; some of whom expressed their opinion with very great doubt. The question argued before us may be stated in a very few words. The plaintiffs were owners of the reversion of an ancient house. The defendant, more than six years before the commencement of the action, worked some coal mines 280 yards distant from it. No actual damage occurred until within the six years. The question is: Is the Statute of Limitations an answer to the action? Or, in other words: Did the cause of action accrue within the six years? The majority of the Court of Queen's Bench thought it did not.

The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being prima facie a right of property analogous to the flow of a natural river, or of air: *Rowbotham v. Wilson* (2)—though there may be cases in which it would be sustained as matter of grant: see *Caledonian Rail. Co. v. Sprot* (3)—while the latter must be founded upon prescription or grant, express or implied;

but the character of the rights, when acquired, is in each case the same. The question in this case depends upon what is the character of the right; viz., whether the support must be afforded by the neighbouring soil itself, or such a portion of it as would be beyond all question sufficient for present and future support, or whether it is competent for the owner to abstract the minerals without liability to an action unless and until actual damage is thereby caused to his neighbour.

The most ordinary case of withdrawal of support is in town property, where persons buy small pieces of land, frequently by the yard or foot, and occupy the whole of it with buildings. They generally excavate for cellars, and in all cases make foundations; and, in lieu of support given to their neighbour's land by the natural soil, substitute a wall. We are not aware that it has ever been considered that the mere excavation of the land for this purpose gives a right of action to the adjoining owner and is itself an unlawful act, although it is certain that if damage ensued a right of action would accrue. So also we are not aware that, until *Nicklin v. Williams* (1), it had ever been supposed that the getting coal or minerals, to whatever extent, in a man's own land was an unlawful act, although, if he thereby caused damage to his neighbour, he was undoubtedly responsible for it. The right of action was supposed to arise from the damage, not from the act of the adjoining owner in his own land. The law favours the exercise of dominion by everyone upon his own land, and his using it for the most beneficial purpose to himself.

As we have already said, the defendant's proposition is that the adjoining owner is entitled to have the adjacent land remain in its natural condition; he does not and cannot contend that an artificial substitute would prevent a cause of action. For, if he did, if he admitted that a man might excavate the natural soil to an extent dangerous to the adjoining owner, provided he applied a remedy in time to prevent damage, as by putting props or a wall, this consequence would follow: that he must have time within which to do it; and that time would be any time until damage resulted; which, in effect, would be to say that there was no cause of action till actual damage. If the defendant is right, these consequences follow: whenever a mine or quarry is worked, the worker may be subjected to actions by all surrounding owners; nay, they would in self-defence be compelled to bring them, if there was any reasonable ground to suppose that the working would in time produce damage to their property. It would be in vain that the worker should say: "You will not be injured; the workings are not injurious; if they turn out likely to be so, I will take means to prevent it; at all events wait till you are injured." Vexatious and oppressive actions might be brought, on the one hand; and, on the other, an unjust immunity obtained for secret workings of the most mischievous character, but the result of which did not appear within six years. The inquiry in such cases would be little better than speculative. The character of the soil, the inclination of the strata, the depth and extent of the works, the distance and nature of the land supposed to be in danger, and other considerations, would make the inquiry of such a character that the only prudent verdict would be "Not proven." In many cases, damages would be given where none could be sustained; while they would, in other cases, be given where they ought to be withheld.

There is no doubt that for an injury to a right an action lies; but the question is, What is the plaintiffs' right? Is it that their land should remain in its natural state, unaffected by any act done in the neighbouring land, or is it that nothing should be done in the neighbouring land from which a jury would find that damage might possibly accrue? There is no doubt that in certain cases an action may be maintained, although there is no actual damage. The rule laid down by SERJEANT WILLIAMS, in the note to *Mellor v. Spateman* (4) (1 Saund. at p. 346b), is that,

A "whenever an act injures another's right, and would be evidence in future in favour of the wrongdoer, an action may be maintained for an invasion of the right, without proof of any specific injury."

This is a reasonable and sensible rule; but it has no application to the present case; for the act of the defendant in getting the coal would be no evidence in his favour as to any future act: getting the coal was an act done by him in his own soil by virtue of his dominion over it. If the question were unaffected by decision, we cannot but think that the contention on the part of the plaintiffs is correct. That on behalf of the defendant is, that the action must be brought within six years after the excavation is made, and that it is immaterial whether any actual damage has occurred or not. The jury, according to this view, would have, therefore, to decide upon the speculative question whether any damage was likely to arise; and it might well be that in many cases they would, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur, when the most serious injury afterwards might in fact occur, and in others find and give large sums of money for apprehended damage, which in point of fact never might arise. This is certainly not a state of the law to be desired. On the other hand, the plaintiffs rely upon the ordinary rule that *damnum* and *injuria* must concur to confer a right of action, and that, although only one action could be maintained for damage in respect of such a claim, nevertheless it would be essential that some damage should have happened before a defendant was made liable for an act done in his own land. Actions upon contract and actions of trespass for direct injuries to the land of another are clearly distinguishable.

No authority is cited in *Nicklin v. Williams* (1) for the judgment there given; and, although the judgment in that case is distinct upon the point, it nevertheless was extrajudicial, for before the former action was commenced it is obvious that actual damage had been sustained; in which case another principle applies, viz., that no second or fresh action can under such circumstances be brought for subsequently accruing damage: all the damage consequent upon the unlawful act is in contemplation of law satisfied by the one judgment or accord. We are not insensible to the consideration that the holding damage to be essential to the cause of action may extend the time during which persons working minerals and making excavations may be made responsible; but we think that the right which a man has is to enjoy his own land in the state and condition in which nature has placed it, and also to use it in such manner as he thinks fit, subject always to this: that, if his mode of using it does damage to his neighbour, he must make compensation. Applying these two principles to the present case, we think that no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiffs; and that the cause of action did accrue when the actual damage first occurred.

We should be unwilling to rest our judgment upon mere grounds of policy; but we cannot but observe that a rule of law, or rather the construction of a Statute of Limitation, which would deprive a man of redress after the expiration of six years, when the act causing the damage was unknown to him, and when in very many instances he would be in inevitable ignorance of it, would be harsh, and contrary to ordinary principles of law. The judgment must, therefore, be reversed, and judgment given for the plaintiffs.

From this decision the defendant appealed to the House of Lords.

Sir Fitzroy Kelly, Q.C., Bovill, Q.C., and Phipson for the appellant.
Manisty, Q.C., and Davison for the respondents.

LORD WESTBURY, L.C.—This case has been rendered of great importance by reason of a difference of opinion which existed between the majority of the learned judges in the Court of Queen's Bench and the judges sitting in the

Court of Exchequer Chamber. Your Lordships have, therefore, deemed it right to hear the case at length, and I will now submit to your Lordships the following question as fit to be proposed for the opinion of the learned judges who are in attendance today, namely: "A. B. is the owner of a house, C. D. is the owner of a mine under the house, and under the surrounding land. C. D. works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can A. B. bring an action at any time within six years after the mischief happened; or must he bring it within six years after the workings rendered the support insufficient?"

LORD BROUGHAM.—I entirely agree that this question be put to the learned judges.

The learned judges (POLLOCK, C.B., WIGHTMAN, WILLIAMS, BYLES and BLACKBURN, JJ.), retired, and after a short time returned into the House.

POLLOCK, C.B.—I am desired by my learned brothers to deliver our unanimous opinion in reply to your Lordships' question. We are all of opinion that A. B. may bring an action at any time within six years after the mischief done, and we are of that opinion for the reasons given in the judgment of the Court of Exchequer Chamber.

LORD WESTBURY, L.C.—We are much indebted to the learned judges for giving an immediate answer to the question; and I think your Lordships will agree with me, that no important doubt can be entertained upon the answer that ought to be given to the question. I think it is abundantly clear, both upon principle and upon authority, that when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action then arises, and that the action may then be maintained. It is unnecessary to refer to the authorities that have been cited in the argument. I will only take the opportunity of observing that, with regard to *Nicklin v. Williams* (1), the decision of that case is, I think, beyond all question. Some of the dicta which occur in that case, and which have been relied upon by the counsel for appellant are certainly not necessary for the decision that was there pronounced; but without going into the consideration of those dicta, I think that, for the reasons that were given in the Court of Exchequer Chamber, the judgment there pronounced ought to be affirmed, and that this writ of error ought to be dismissed.

LORD BROUGHAM.—I entirely agree with my noble and learned friend that the judgment ought to be for the respondent.

LORD CRANWORTH.—I am of the same opinion. I think the error in the view which has been taken in certain quarters upon this subject is this. It was supposed that the party whose land was interfered with had a right to what is called the pillars or the support. In truth, his right was to the ordinary enjoyment of his land, and till that ordinary enjoyment was interfered with he had nothing to complain of. That seems to be the principle upon which the case ought to be disposed of, and it appears to me very analogous to this sort of case:—Suppose a slander to be uttered which is not actionable in itself, but under which special damage may arise, and does arise to somebody afterwards; from what date is the person complaining of that special damage to be limited according to the Statute of Limitations? Clearly not from the uttering of the slanderous words themselves, because *ex hypothesi*, they were innocent in themselves, and it was only when the subsequent damage occurred that the action

A would arise. It appears to me that furnishes a sort of analogy to this case; I will only, therefore, say that, both on the ground stated by my noble and learned friend on the Woolsack, and on those expressed by the Court of Exchequer Chamber, I entirely agree in the opinion that the judgment below should be affirmed.

B **LORD WENSLEYDALE.**—I entirely concur in the opinion that has been delivered by the learned judges. I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighbouring property not to interrupt that enjoyment.

C **LORD CHELMSFORD.**—I entirely agree with my noble and learned friends, and I can add nothing to what they have said.

Appeal dismissed.

D

STONE v. STONE AND BROWNRIGG

E [COURT OF DIVORCE AND MATRIMONIAL CAUSES (Wilde, J.O.), March 1, 8, 1864]

[Reported 3 Sw. & Tr. 372; 33 L.J.P.M. & A. 95; 10 L.T. 140;
12 W.R. 1088; 164 E.R. 1319]

Divorce—Settlement of wife's property—Property to which wife entitled in possession or "reversion"—Contingent interest.

F A wife was entitled to a sum of money under her father's marriage settlement, expectant on his death and in default of appointment by him.

Held: as the wife's interest might never be realised it was not an interest in "reversion" within the Matrimonial Causes Act, 1857, s. 45 [now s. 24 of Matrimonial Causes Act, 1950], and, therefore, the court had no power to order a settlement of the property or any part thereof.

G *Variation of Settlement—"Settlement"—Separation deed—Property transferred to trustees for benefit of children—Avoidance of trusts if marriage dissolved—Dissolution of marriage—Power of court to vary deed.*

H By a separation deed made between a husband and wife, they covenanted to transfer property to trustees on trusts ultimately for the benefit of the children of the marriage, the deed containing a stipulation that the trusts should be void if a dissolution of the marriage was obtained. Subsequently, the marriage was dissolved on the ground of the wife's adultery.

I **Held:** the settlement might be a "post-nuptial settlement" within the Matrimonial Causes Act, 1859, s. 5 [now s. 25 of Act of 1950], but the court could not deal with the property under that section as the settlement had come to an end on the dissolution of the marriage and there was no settlement with which the court could deal.

Notes. The Matrimonial Causes Act, 1857, s. 45, and the Matrimonial Causes Act, 1859, s. 5, have been repealed. For these sections see now the Matrimonial Causes Act, 1950, ss. 24, 25, respectively.

Considered: *Bosworthwick v. Bosworthwick*, [1926] All E.R. Rep. 198. Referred to: *Worsley v. Worsley and Wignall* (1869), 38 L.J.P. & M. 43; *Fenston v. Fenston*, [1945] 2 All E.R. 700; *Halpern v. Halpern*, [1951] 1 All E.R. 315.

As to settlement of the property of a wife in fault, see 12 HALSBURY'S LAWS (3rd Edn.) 441; as to costs of variation of settlements, see *ibid.* 459-460; and for cases see 27 DIGEST (Repl.) 638-639. For the Matrimonial Causes Act, 1950, ss. 24, 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 411, 412.

Application after a decree of dissolution of marriage on the ground of an adultery of the wife, for an order as to the application of certain settled property and also of certain other property to which, it was alleged, the wife was entitled in reversion.

The application dealt, first, with a post-nuptial settlement by which some property of the petitioner had been settled on himself for life, then upon the respondent for life, and then for the benefit of the children of the marriage. Secondly, the respondent was entitled, under her father's marriage settlement, on her father's death and in default of appointment by him, to £1,000. Thirdly, before the petition for dissolution of marriage a separation-deed was entered into between the petitioner and respondent, which, among other matters, recited that certain sums of money (other than those affected by the post-nuptial settlement) had come into the hands of the petitioner in right of his wife, and were then represented by £1,000 Caledonian Railway stock standing in their joint names. This stock they covenanted to transfer to the trustees named in the separation-deed on trusts ultimately for the benefit of the children of the marriage. The separation-deed contained a stipulation that, in case a dissolution of the marriage were obtained, the trusts under the deed should be null and void. In due time after the decree of dissolution, the respondent and co-respondent intermarried, and the trustees of the separation-deed, to whom the £1,000 stock had been transferred, sold it, and paid the proceeds to the respondent.

By the Matrimonial Causes Act, 1857, s. 45 :

"In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."

By the Matrimonial Causes Act, 1859, s. 5 :

"The court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit."

The Queen's Advocate (Dr. Swabey with him) for the petitioner.
Karslake, Q.C., for the respondent.

Cur adv. vult.

Mar. 8, 1864. **WILDE, J.O.**—This was an application after a decree of dissolution to deal with certain sums of money. As regards the first sum, which consisted of the petitioner's own money brought into settlement, there will be no difficulty in directing that the settlement should be read as if the respondent were naturally dead.

But to the other part of the application very different principles apply. The Matrimonial Causes Act, 1857, s. 45, enables the court, where a decree of dissolution is made by reason of the wife's adultery, to deal with her property in possession or reversion; these are well known legal terms. On looking at the

A marriage-settlement, under which, it is said, the respondent has a reversionary interest, it appears that she may never have any share of the moneys settled; she cannot, therefore, be said to have any property in reversion; and I have no power to deal with her interest, which may be defeated at any time by the exercise of the power of appointment.

B As to the £1,000 Caledonian Stock, is that, as described in the petition, within s. 5 of the Matrimonial Causes Act, 1859? I am not prepared to say that the separation-deed was not a post-nuptial settlement within the meaning of that section; undoubtedly property was settled, and I think the section should be liberally construed. But the settlement was made on certain conditions, namely, that its trusts should be at an end in case of a decree of dissolution, which, C howsoever, seems to have been then contemplated by the parties, and which has since occurred. There is, therefore, now no settlement with which I can deal. If the trustees have wrongfully sold the stock, and handed the proceeds to the respondent, the remedy against them must be sought elsewhere.

The co-respondent must pay the costs as regards the first part of the application which has been granted; but if the costs as regards that part of the application D which has been filed can be separated from the other, these ought not to be cast on the co-respondent.

E

THE CAPELLA (CARGO EX)

F [COURT OF ADMIRALTY (Dr. Lushington), May 4, 1867]

[Reported L.R. 1 A. & E. 356; 16 L.T. 800; 2 Mar. L.C. 552]

Shipping—Salvage—Action—Defence—Collision—Claimants' ship found to blame equally with other ship.

A collision occurred between two vessels, and both were held to blame. The crew of one of the vessels instituted a cause of salvage against the owners of the G cargo of the other.

Held: the claimants were not entitled to receive salvage for property which had been put in jeopardy by their own wrongdoing.

Notes. Considered: *The Ettrick* (1881), 6 P.D. 127. Applied: *The Duc d'Aumale*, [1900-3] All E.R. Rep. 510. Considered: *The Susan v. Luckenbach*, [1951] 1 All E.R. 753. Referred to: *The Cherubim* (1868), 19 L.T. 52; *Beaverford Owners v. Kafiristan Owners*, [1938] A.C. 136.

As to disqualifications from claiming salvage, see 35 HALSBURY'S LAWS (3rd Edn.) 739-740; and for cases see 41 DIGEST 849-850.

Case referred to in argument:

I *The Milan* (1861), Lush. 388; 31 L.J.P.M. & A. 105; 5 L.T. 590; 1 Mar. L.C. 185; 167 E.R. 167; 41 Digest 692, 5221.

Action by which the plaintiffs, the crew of the *Southern Empire*, claimed salvage against the cargo of the *Capella*.

A collision took place in March, 1865, between the English ship *Southern Empire*, then on a voyage from Callao to Liverpool, and the Dutch vessel *Capella*, which was bound from Amsterdam to Batavia with a cargo of silver specie. After the collision the crew of the *Southern Empire* succeeded in saving the specie and bringing it into Liverpool. For this service they instituted the present suit

against the cargo. A collision cause, by the owners of the *Capella*, which had been wrecked by the collision, was brought against the owners of the *Southern Empire* when the court, assisted by Trinity Masters, held that both vessels were to blame. A

Dr. Deane, Q.C., and *Butt* for the plaintiffs.

Brett, Q.C., and *Lushington* for the defendants. B

Cur. adv. vult.

May 7, 1867. **DR. LUSHINGTON.**—The question for me to determine is whether, when a collision has taken place between two vessels and both vessels are held to blame, one of them can sue for salvage, for having saved the cargo of the other from the perils consequent on the collision. I do not seek for authorities, but I look to the principle which ought to govern the case. In my mind the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by an English court. The application of this rule to the present case is obvious. The asserted salvors were the original wrongdoers: it was by their fault that the property was placed in jeopardy. The rule would bar any claim by them for service rendered to the other ship which was a co-delinquent in the collision; but the present claim, it is to be observed, is a demand for salvage against the cargo, the owners of which were perfectly innocent. There has been no decision as to this particular question, at least to my knowledge, during my practice in this court, but I am not surprised at it, because I think that the claim is so opposed to common justice as to render it unlikely that any person would make the experiment. I pronounce against the claim, with costs. C
D
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Re GENERAL ROLLING STOCK CO. JOINT STOCK DISCOUNT CO.'s CLAIM F

[COURT OF APPEAL IN CHANCERY (James and Mellish, L.JJ.), June 21, 1872]

[Reported 7 Ch. App. 646; 41 L.J.Ch. 732; 27 L.T. 88;
20 W.R. 762] G

Company—Winding-up—Claim—Limitation of action—Claim on bills accepted by company—Action brought more than six years after bills due. H

Time does not run against the creditors of a limited company after an order has been made to wind-up the company, but, until all the assets have been distributed, any creditor whose debt was valid at the date of the winding-up order may prove his debt, without, however, being entitled to disturb any dividends already paid. I

Notes. The Companies Act, 1862, s. 98, has been repealed. See now the Companies Act, 1948, ss. 302, 316. A six-year period of limitation for actions founded on simple contract is laid down by the Limitation Act, 1939, s. 2 (1) (a), replacing provisions in the Limitation Act, 1623 (the Statute of Limitations).

Considered: *Re Fleetwood and District Electric Light and Power Syndicate*, [1915] 1 Ch. 486. Applied: *Re Art Reproduction Co.*, [1951] 2 All E.R. 984. Referred to: *Re Delhi Electric Supply and Traction Co.*, [1953] 2 All E.R. 1452.

- A** As to proof of statute-barred debts in a winding up, see 6 HALSBURY'S LAWS (3rd Edn.) 652-653, 657; and for cases see 10 DIGEST (Repl.) 982. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 690, 697. For the Limitation Act, 1939, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 1160.

Case referred to :

- B** (1) *Re Royal Bank of Australia, Ex parte Forest* (1860), 2 Giff. 42; 29 L.J.Ch. 295; 1 L.T. 477; 6 Jur.N.S. 245; 8 W.R. 269; 66 E.R. 18; 10 Digest (Repl.) 982, 6758.

Also referred to in argument :

Sterndale v. Hankinson (1827), 1 Sim. 393; 57 E.R. 625; 12 Digest (Repl.) 550, 4173.

- C** **Appeal** by the Joint Stock Discount Co. from a decision of LORD ROMILLY, M.R., dismissing its claim against the General Rolling Stock Co. as acceptors of a number of bills on the ground that it was statute-barred.

The General Rolling Stock Co., Ltd., was ordered to be wound-up on a creditor's petition on Feb. 11, 1865, and the usual advertisements for creditors were issued on April 12 following. The chief clerk's certificate of debts and claims was made on Dec. 14, 1870, and a dividend of 7d. in the pound was declared on Jan 2, 1871. The Joint Stock Discount Co. had a claim for £18,969 11s. 11d. against the General Rolling Stock Co. as acceptors of eight bills of exchange, which had been discounted by the Joint Stock Discount Co. and became due on Feb. 7, 1865. Notice of this claim was not sent in to the liquidator of the General Rolling Stock Co. till March, 1871, more than six years after the bills became due; and it was not till Nov. 20, 1871, that a summons was taken out to enforce the claim. The Master of the Rolls held that the claim was barred by the Statute of Limitations, and dismissed the summons with costs. From this decision the Joint Stock Discount Co. appealed.

- F** *Fry, Q.C.*, and *Jackson* for the Joint Stock Discount Co.
Southgate, Q.C., and *Bush* for the liquidator of the General Rolling Stock Co.

- JAMES, L.J.**—I think that this case is entirely unprejudiced by the decision in *Ex parte Forest* (1), before STUART, V.-C. The provisions of the statute now in force as to the winding-up of companies are clear. Section 98 of the Companies Act, 1862, provides :

- H** "As soon as may be after making an order for winding-up the company, the court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities."

- I** A duty, a power and a trust, are thereby imposed upon the court to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company at the time when the winding-up order is made, which gives the right. It appears to me that it would be unjust, indeed, if any other construction were put upon the section. No action is to be brought except by the special leave of the court, which special leave was not intended to be applied in order to get rid of the Statute of Limitations. It was intended to be applied in those cases where the court thought that that was the only proper mode by which to determine the precise question that arose between the claimant and the company. The assets are to be applied in discharge of the liabilities. I am of opinion that this debt was a liability existing at the time of the winding-up order, and that the order was for the benefit of the Joint Stock Discount Co., which was one of the creditors to whom the company was liable. Counsel for that company has pointed out that no possible mischief or

inconvenience can arise (except perhaps as to the question of the lapse of time) because there is a day fixed for creditors to come in and prove; and as the section says that any creditor who does not come in within the particular time named shall lose the benefit of any dividend which has been paid in the meantime, no mischief can be done to any creditor by reason of delay or laches on the part of another creditor, but the creditor who has delayed must come in and take his chance of what assets he can find for the payment of his debt without disturbing any former dividend.

MELLISH, L.J.—I am of the same opinion. I think the case is governed by the true construction of s. 98 of the Act of 1862. It is unnecessary to consider what was the proper construction of the former Acts. It appears to me that in the Act of 1862 it was the intention of the legislature that the assets should be divided among all the liabilities existing at the time of the winding-up order. There does not seem to be anything extraordinary in that. It appears to me that the legislature intended to follow the analogy that exists in all other cases where the assets of a debtor are to be divided among his creditors, whether in bankruptcy, or in insolvency, or under a trust for creditors, or under a decree of the Court of Chancery in an administration suit; and the true construction of the Act is that the assets are to be divided among all persons who had a legal claim at the time when the winding-up order was made, and that any such person is entitled to have his share of the assets when he comes in to prove during the winding-up, not disturbing any former dividends.

Appeal allowed.

INCHBALD v. WESTERN NEILGHERRY COFFEE, TEA AND CINCHONA PLANTATION CO., LTD.

[COURT OF COMMON PLEAS (Erle, C.J., Willes, Byles and Keating, JJ.), November 10, 1864]

[Reported 17 C.B.N.S. 733; 5 New Rep. 52; 34 L.J.C.P. 15; 11 L.T. 345; 10 Jur.N.S. 1129; 13 W.R. 95; 144 E.R. 293]

Agent—Commission—Agent prevented from earning commission by voluntary act of principal—Liability of principal.

Contract—Quantum meruit—Performance rendered impossible by action of one party.

The defendants formed a company for the purchase of estates in India on which they intended to grow coffee and tea. The agreement to purchase the estates was made with the father of the owner who was in India at the time. The defendants agreed with the plaintiff, a stockbroker, that he should be paid £100 down (which payment was made) and a further £400 if all the shares in the company were allotted. Ten thousand shares were issued, and of these all but a few hundreds had been allotted by the plaintiff when the defendants were informed that the owner of the estates had repudiated the agreement made by his father. The defendants, without entering upon any litigation and without informing the plaintiff of the repudiation, wound-up the company.

Held: by their voluntary act the defendants had prevented the plaintiff from allotting the remaining shares in the company and he was entitled to recover £400, less an allowance for the risk he ran of all the shares not being allotted.

- A Notes.** Considered: *George Trollope & Sons v. Martyn Bros.* (1934), 50 T.L.R. 544; *Trollope & Sons v. Caplan*, [1936] 2 All E.R. 842; *Kahn v. Aircraft Industries Corp'n., Ltd.*, [1937] 3 All E.R. 476. Referred to: *Ogdens v. Nelson*, *Ogdens v. Telford*, [1903] 2 K.B. 287; *Burchell v. Gowrie and Blockhouse Collieries*, [1910] A.C. 614; *Dare v. Bognor U.D.C.* (1912), 76 J.P. 425; *Warren v. Agdeshman* (1922), 38 T.L.R. 588; *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp'n.*, [1941] 2 All E.R. 165; *Mona Oil Equipment and Supply Co. v. Rhodesia Railways, Ltd.*, [1949] 2 All E.R. 1014.

As to recovery by agent where prevented from earning remuneration by principal, see 1 HALSBURY'S LAWS (3rd Edn.) 201; and for cases see 1 DIGEST (Repl.) 632.

- C** As to breach of contract and payment of party injured on quantum meruit, see 8 HALSBURY'S LAWS (3rd Edn.) 202-206; and for cases see 12 DIGEST (Repl.) 370 et seq.

Case referred to:

- (1) *Planché v. Colburn* (1831), 8 Bing. 14; 1 Moo. & S. 51; 1 L.J.C.P. 7; 131 E.R. 305; 12 Digest (Repl.) 393, 3043.

- D** Also referred to in argument:

Cutter v. Powell (1795), 6 Term Rep. 320; 101 E.R. 573; 12 Digest (Repl.) 463, 3454.

Prickett v. Badger (1856), 1 C.B.N.S. 296; 26 L.J.C.P. 33; 3 Jur.N.S. 66; 5 W.R. 117; 140 E.R. 123; 1 Digest (Repl.) 585, 1872.

- E** *Moffatt v. Laurie* (1855), 15 C.B. 583; 24 L.J.C.P. 56; 24 L.T.O.S. 259; 1 Jur.N.S. 283; 3 W.R. 252; 139 E.R. 553; 1 Digest (Repl.) 599, 1931.

Green v. Bartlett (1863), 14 C.B.N.S. 681; 2 New Rep. 279; 32 L.J.C.P. 261; 8 L.T. 503; 10 Jur.N.S. 78; 11 W.R. 834; 1 Digest (Repl.) 579, 1850.

Simpson v. Lamb (1856), 17 C.B. 603; 25 L.J.C.P. 113; 26 L.T.O.S. 203; 2 Jur.N.S. 91; 4 W.R. 323; 139 E.R. 1213; 1 Digest (Repl.) 564, 1801.

- F** **Rule Nisi** to set aside a verdict of WILLIAMS, J., in an action by the plaintiff, a stockbroker, for payment for work done in allotting shares on behalf of the defendants.

In 1862, the defendants formed a company for the purpose of purchasing some estates in India upon which coffee and tea were to be grown. They issued their prospectus stating that their capital was to be £50,000 in £5 shares, and that the purchase-money of the estates was £30,000, one-third part of which was to be taken by the vendor. In October, 1862, a resolution was passed by the board, by which it was resolved that the plaintiff should be appointed stockbroker to the company on the following terms, viz. £100 paid down, and £400 in addition on the allotment of the whole of the shares of the company. In accordance with this resolution the plaintiff began to act in his capacity of stockbroker, and succeeded in disposing of a very large number of shares. On Jan. 20, 1863, the directors determined that the remaining unallotted shares (between 700 and 800) should be allotted on Feb. 24, 1863, and if not otherwise disposed of, should be taken up by themselves.

- G** The estates in India belonged to a Mr. Lascelles, who was resident in that country, and the contract for their purchase was entered into between the defendants and the father of Mr. Lascelles acting as agent for his son. On Feb. 19, 1863, Mr. Lascelles, the son, returned to England, and at once repudiated the contract, stating, however, that he would sell the estates to the defendants on such terms as they did not feel justified in agreeing to. The defendants therefore determined, without informing the plaintiff, to wind-up the company, and return the deposits with interest, which they did. On May 13, 1863, the plaintiff wrote to the secretary of the company demanding the additional £400, which the company refused to give, whereupon the present action was brought.

The action was tried before WILLIAMS, J., at Guildhall, when a verdict was found for the plaintiff, leave being reserved to the defendants to move to set that verdict aside and enter it for themselves, or a nonsuit, upon the ground that upon the evidence the plaintiff was not entitled to recover anything against the defendants, the court to draw inferences of fact, and to assess the amount of damages to be recovered if any.

Karslake, Q.C., and *Henry James* showed cause.
Prentice supported the rule.

ERLE, C.J.—This is an action brought by the plaintiff to recover the sum of £400 upon a contract entered into with the defendants, under which he was to be paid £100 down, and an additional £400 if all the shares in the defendants' company were allotted. It is clear, however, that all the shares were not allotted, therefore, the plaintiff, according to the terms of the contract, would not be entitled to the £400. But, according to the cases from *Planché v. Colburn* (1), downwards, if a party to a contract, by his own act, renders himself incapable of performing his part of it, the other may recover for what he has done under it. In this case I am of opinion that the defendants, by their own act, rendered it impossible that all the shares should be allotted. More than 9,000 had been allotted, therefore, there remained less than 1,000 to be allotted. The defendants chose to wind-up the company, and the plaintiff, therefore, was prevented by their act from concluding his contract and becoming entitled to the £400. The question then remains, To what amount of damages is the plaintiff entitled? Passing by the form of the declaration, we will apply the universal rule, and say that he is entitled to so much as he has lost by the wrongful act of the defendants. The defendants determined to wind-up the company, because the owner of the estates in India repudiated the act of his agent. If the defendants had entered into litigation in order to enforce the contract with Mr. Lascelles, it might have been that no one would have taken another share; therefore what the plaintiff lost was, if I may so say, a risk under which he might have taken nothing. If, however, they had chosen on the other hand to have threatened Mr. Lascelles, he might have given in, and then the plaintiff might have disposed of the remaining shares, and so become entitled to the whole of the £400. The defendants, therefore, are liable for so much as he has lost by their winding-up the company, and I hold them responsible with less scruple because, though they have acted honourably throughout, they knew that Lascelles had repudiated the act of his agent in the early part of 1863, and they yet went on disposing of their shares after such knowledge, and never communicated the fact of the repudiation, and the plaintiff, who heard of it by accident, then brought his action. Making, therefore, the best estimate we can, we think the verdict should stand for the plaintiff, with £250 for compensation.

WILLES, J.—I am of the same opinion. If a person does an act which practically renders the performance of a contract impossible, and by so doing deprives the other party who would have taken some benefit under it of such benefit, then the person so acting renders himself liable to the other. This case is not governed by any rule of law peculiar to principal and agent, but by the ordinary one. The company agreed to pay the plaintiff a certain sum if all the shares were allotted, and in the ordinary course of things they probably would have been allotted if nothing had been done by them to prevent it. On Jan 21, 1863, the defendants saw the plaintiff, and tried to induce him to take a less sum; in fact, they asked him to take £350, which, however, he refused to do. Some of the defendants wanted him to take shares, and the matter was eventually agreed to be postponed. No doubt the defendants thought the shares would have been applied for, or they would not have agreed to give the

A plaintiff so large a sum. Then came the intelligence in February that Lascelles would not ratify the agreement. It seems a pity that the defendants, who appear to have acted with good faith towards all parties, did not call in the plaintiff and inform him of the repudiation by Lascelles, and take steps to enforce the performance by Lascelles of the contract; but if they had, it may be that no person would have taken the shares if legal expenses were to be incurred. The defendants have, however, by winding-up the company, rendered it practically impossible for the contract to be performed by the plaintiff, and the result therefore must be, that he should receive a certain sum, less an allowance for the risk he might have run of all the shares not being taken; and although it is hard to say what that sum should be, either as damages or payment for his work, I think the sum of £250 would be a very proper one.

C **BYLES, J.**—I am of the same opinion. Counsel supporting the rule says that the defendants contracted that they would do nothing to prevent the shares being allotted; but the proximate and immediate cause of their not being allotted was, that they wound-up the company. I do not say that the defendants may not have a right to go behind that cause, but we cannot do so, and that precludes us from saying more about the damages. Perhaps, looking at the circumstances of the case, if the defendants had done what has been suggested, the company would most likely have continued rather than not.

KEATING, J., concurred.

Rule accordingly.

E

CRANE v. LONDON DOCK CO.

F [COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn and Shee, JJ.), April 21, 25, 28, 1864]

[Reported 5 B. & S. 313; 4 New Rep. 94; 33 L.J.Q.B. 224;

10 L.T. 372; 28 J.P. 565; 10 Jur.N.S. 984; 12 W.R. 745;

122 E.R. 847]

G *Sale of Goods—Market overt—Need for whole transaction to take place in market—Sale by sample.*

To constitute a sale in market overt a transaction from its commencement to its conclusion must take place in market overt. The privilege is not conferred, though the contract is made in market overt, if the delivery is out of the market. The goods sold must be in the market during the whole time that the incidents of sale are taking place. A sale of goods by sample is not a sale in market overt.

H A quantity of opium having been stolen from the defendants' premises, a person called on the plaintiff, a drug merchant, at his premises in the city of London, and showed him samples of opium which he offered for sale. A contract for the sale of the opium was entered into. By the custom of the city of London, of which judicial notice was taken, that part of every shop within the city to which the public was admitted without special invitation was market overt, between sunrise and sunset on all days except Sundays and holidays, for the sale by the shopkeeper of the goods he professed to sell. Two days later before sunset the vendor brought the opium to the plaintiff's premises which were closed. The vendor, thereupon, took the opium to other premises of the plaintiff where the plaintiff carried on the business of an oil and colourman. Delivery of the opium was made at these second premises. The opium was subsequently moved to the first mentioned premises where the plaintiff carried

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on the business of drug merchant. Payment for the opium was made at these premises. The plaintiff did not know that the opium was stolen. In due course the plaintiff deposited the opium with a third person as security for a loan and upon a claim being made by the defendants an interpleader summons was taken out.

Held: the sale of opium was not a sale in market overt and the plaintiff had no property in the opium as against the defendants.

Notes. Considered: *Hargreave v. Spink*, [1892] 1 Q.B. 25. Referred to: *Clayton v. Le Roy*, [1911] 2 K.B. 1031; *Bishopsgate Motor Finance Corp., Ltd. v. Transport Brakes, Ltd.*, [1949] 1 All E.R. 37.

As to sale in market overt, see 25 HALSBURY'S LAWS (3rd Edn.) 392-394; and for cases see 33 DIGEST (Repl.) 489-493.

Cases referred to:

- (1) *Tewkesbury Corp. v. Diston* (1805), 6 East, 438; 2 Smith, K.B. 508; 102 E.R. 1355; 33 Digest (Repl.) 469, 206.
- (2) *Hill v. Smith* (1812), 4 Taunt. 520; 128 E.R. 432, Ex. Ch.; 33 Digest (Repl.) 469, 208.
- (3) *Market-Overt Case* (1596), 5 Co. Rep. 83 b.; 77 E.R. 180; sub nom. *Bishop of Worcester's Case*, Moore, K.B. 360; sub nom. *Palmer v. Wolley*, Cro. Eliz. 454; sub nom. *Anon.*, Poph. 84; 1 And. 344; 33 Digest (Repl.) 491, 467.
- (4) *Rohde v. Thwaites* (1827), 6 B. & C. 388; 9 Dow. & Ry. K.B. 293; 108 E.R. 495; sub nom. *Rhode v. Thwaites*, 5 L.J.O.S.K.B. 163; 39 Digest 488, 1072.

Also referred to in argument:

- Moseley v. Pierson* (1790), 4 Term Rep. 104; 100 E.R. 918; 33 Digest (Repl.) 470, 212.
- Wells v. Miles* (1821), 4 B. & Ald. 559; 106 E.R. 1041; 33 Digest (Repl.) 470, 211.
- Lyons v. De Pass* (1840), 11 Ad. & El. 326; 9 C. & P. 68; 3 Per. & Dav. 177; 9 L.J.Q.B. 51; 4 Jur. 505; 113 E.R. 439; sub nom. *Scilly v. Lyon*, 4 J.P. 41; 33 Digest (Repl.) 491, 473.
- Wilkinson v. King* (1809), 2 Camp. 335, N.P.; 33 Digest (Repl.) 491, 476.
- Wait v. Baker* (1848), 2 Exch. 1; 17 L.J.Ex. 307; 154 E.R. 380; 39 Digest 488, 1075.
- Startup v. Macdonald* (1843), 6 Man. & G. 593; 7 Scott, N.R. 269; 12 L.J.Ex. 477; 1 L.T.O.S. 172; 134 E.R. 1029, Ex. Ch.; 39 Digest 587, 1891.
- Bannerman v. White* (1861), 10 C.B.N.S. 844; 31 L.J.C.P. 28; 4 L.T. 740; 8 Jur.N.S. 282; 9 W.R. 784; 142 E.R. 685; 39 Digest 450, 776.
- Taylor v. Chambers* (1605), Cro. Jac. 68; 79 E.R. 58; 33 Digest (Repl.) 491, 479.

Rule Nisi to set aside a verdict of the court in favour of the defendants in an interpleader action brought to determine the ownership of certain opium which had been stolen from the defendants and sold to the plaintiff. The plaintiff alleged that the opium had been sold in market overt.

The plaintiff was a drug merchant with his place of business in Pudding Lane which is situated in the City of London. He also carried on the business of an oil and colourman at premises in Love Lane, also in the City of London. In the year 1860, certain quantities of opium were stolen from the warehouses of the defendants. In July, 1861, one Richardson called on the plaintiff at his premises in Pudding Lane informing him that he had a quantity of opium for sale. On this occasion Richardson had no sample with him, but subsequently, on July 15, 1861, he again called and then he had samples. The plaintiff agreed to buy 153 lbs. of opium and a contract was signed by Richardson for the delivery of the same according to sample. On July 17, 1861, before sunset, but after the shop was closed, the opium was brought to the plaintiff's premises in Pudding Lane, but as the shop was closed, the opium was taken to the premises in Love Lane, where it was delivered to the plaintiff.

A On July 18, 1861, the plaintiff removed the opium to his premises in Pudding Lane where Richardson was paid £45 on account by the plaintiff, who had not then examined the opium. On July 21, 1861, the plaintiff paid the balance of the purchase price to Richardson at Pudding Lane.

B On Aug. 19, 1862, the plaintiff obtained an advance from one Dalton, and as security for the advance, he deposited the opium in Dalton's name in the warehouse of one Wilkinson. Afterwards Wilkinson was served with a notice by the defendants not to part with the opium, and he was also served with notices by the plaintiff and Dalton to deliver the opium to them. Wilkinson took out an interpleader summons and an issue having been directed to try the right to the opium, it came on for trial before SIR ALEXANDER COCKBURN, C.J., when the jury found that the opium had been stolen from the defendants, C that the plaintiff did not know that it had been stolen when he bought it. A verdict was accordingly directed to be entered for the defendants, leave being reserved to the plaintiff to move to set it aside and enter it for himself, if the court should be of opinion that the sale to the plaintiff took place in market overt.

D *Giffard, Poland and Murphy* showed cause.
Bovill, Q.C., Serjeant Parry and Hannen in support of the rule.

SIR ALEXANDER COCKBURN, C.J.—I am of the opinion that this rule should be discharged. We must in this case take the facts as they have been found by the jury, that the opium belonged to the defendants and that it was feloniously stolen from their possession and bought by the plaintiff without any knowledge by him of the robbery. The question then that arises is whether this was a sale in market overt so as to vest the property in the opium in the plaintiff? The two important questions in the case must, I think, be decided in the plaintiff's favour before he can be entitled to this privilege; one is, whether F his shop being in the city of London was market overt? The other is whether the purchase and sale of the opium in his shop was in its circumstances a sale in market overt? According to the view which I take of the second question, it is unnecessary to decide the first; but were it necessary to do so, it must certainly be said, in the plaintiff's favour, that several cases have occurred in which the sale has taken place in the shop of a purchaser and in which G the point was not noticed either by the counsel or the judges, raising, therefore, a strong presumption that the objection was not thought a tenable one. But for this presumption I should have thought it a matter of great difficulty. I feel, however, that the defendants are clearly entitled to our judgment upon the second point.

H Every contract of sale involves these incidents: a bargain between the parties, and the transfer of property, which, according to the circumstances of the case, may be either antecedent to the delivery or upon the delivery. I cannot understand how a sale can be said to take place in market overt unless the thing sold is in the market during the whole time that these incidents of the sale are taking place. The facts in this case are, that there was a sale by sample; the seller came to the shop of the purchaser and showed him a sample; the I purchaser agreed to purchase a quantity of opium if, when it should be delivered, it should correspond with the sample; the opium is in fact delivered elsewhere. The inception, therefore, of the contract took place in the shop of the plaintiff, which, for present purposes, is assumed to be market overt, but the delivery was made at another place, which, for the purposes of this sale, was not market overt, for it was not a place where opium was commonly sold. It was said that the contract was not yet completed, and that the property did not pass till the purchaser had an opportunity of seeing if the goods corresponded with the sample. But the delivery, so far, at least, as concerned the seller, took

place out of market overt, for it cannot be contended that the purchaser, having accepted the delivery in Love Lane, and having afterwards taken the opium to Pudding Lane, can be considered as conveying it there on behalf of the seller, so as to make it a constructive delivery at Pudding Lane. He may have examined it at Love Lane; he may have sold it there, but the removal of it to Pudding Lane was a matter entirely of his own convenience. By the delivery, therefore, at Love Lane, the seller completed his contract. It may be, as counsel supporting the rule contends, that the property did not pass until it was accepted in Pudding Lane, but to constitute a sale in market overt, the transaction from its commencement to its conclusion must take place in market overt, and the privilege is not conferred, though the contract is made in market overt, if the delivery is out of the market, notwithstanding he afterwards takes the goods into the market to see if they correspond with the sample.

To fully comprehend the rule applicable to the subject, we should go back to the period when these transactions were conducted with more simplicity than at the present time, when shops were rare, and the custom was to cry goods brought into the market to be sold, and to sell them then and there in the open street. If a person was robbed he would know where to go in order to reclaim his property, and he would have had easy means of knowing whether or not it was among the goods offered for sale. This law, according to the circumstances of the times, was wisely established for the benefit of the purchaser. If the owner did not pursue his property to the place where it would be commonly sold, the law would protect the purchaser against any claim he might afterwards set up; but the law required the contract to be begun, continued and ended in market overt. This was the view taken of the subject by LORD ELLENBOROUGH and of MANSFIELD, C.J., the former saying, in *Tewkesbury Corp'n. v. Diston* (1) (6 East, at p. 451):

"The policy of the law which binds property of another by sale in market overt requires that every part of the transaction, as well the contract of sale as the delivery, shall take place in the open market; otherwise it shall not bind the property of third persons."

And MANSFIELD, C.J., says, in *Hill v. Smith* (2) (4 Taunt. at p. 533):

"All the doctrine of sales in market overt militates against the idea of a sale by sample, for a sale in market overt requires that the commodity should be openly sold and delivered in the market; and LORD COKE so says [in *Market-Overt Case* (3)] and that every part both of the treaty and completing of the sale must be in the market overt."

These dicta, it is true, were not absolutely necessary to the points decided in the cases in which they are found; but it is no small matter to have the concurrent opinion of two such judges, more particularly when their opinion is in perfect agreement with the reason of the law, which founds the principle upon the fact that all fair publicity is given to the transaction, that the goods are open to public view, that the owner may know where to look for them, and that if he seeks he may discover them, none of which incidents occur where the sale is by sample, which was a mode of sale unknown in early times, the more especially when the delivery is out of market, and the goods only came into it by the act of the buyer. For these reasons I think our judgment should be for the defendants.

BLACKBURN, J.—I am of the same opinion, and I agree with my Lord that it is not necessary to decide the question whether or not the shop was market overt for the purchase by the shopkeeper of goods brought there for sale, though I am by no means prepared to say that, wherever a shopkeeper exposes goods for sale, even in a locality where the privilege exists, his shop is

A thereby made market overt for the purchase by him of similar goods. The important question here is whether or not this was a sale in market overt.

B The privilege which the law gives to sales in market overt was so given from the policy of encouraging markets and commerce by conferring safety upon purchasers; but that safety could be gained only if the purchase was made under such circumstances as would lead the purchaser to conclude it was a sale in market overt; that is, the bargain as to goods exposed for sale must be made in such a manner that one would naturally say, "no man would dare to expose and sell stolen goods thus." It is a principle running through all the cases upon the subject, that the goods must be corporally present and exposed to view at the time of purchase; and this is assumed, both by LORD ELLENBOROUGH and MANSFIELD, C.J., to be of the essence of the transaction. If the contract is made out of market overt, and the goods are afterwards delivered in the market, that is not a sale in market overt, and it is so laid down in 2 INST. 713 by LORD COKE. The binding contract itself must be made under such circumstances that the seller could not dare at the time to sell stolen goods, which would be otherwise if the goods were not then present. Here the contract was made out of market overt, for it was not made with respect to goods then and there physically present and exposed. I found my judgment in this case very much upon the principle of the relation back of the delivery to the time when the contract was made, for the contract was not to supply any particular goods, but to supply goods equal to the sample, and indeed the seller was not bound to have supplied the actual opium, but may have supplied any opium of the same quality. In *Rohde v. Thwaites* (4), which was a case of a contract for the sale of goods very similar to the present one, HOLROYD, J., said (6 B. & C. at p. 393):

F "I am of opinion that the selection of the sixteen hogsheads by the plaintiff, and the adoption of that act by the defendant, converted that which before was a mere agreement into an actual sale; and that the property in the sugars thereby passed to the defendant."

Then as to the delivery: this was a contract to supply opium anywhere; that is, at no certain place; and when it was brought to the plaintiff at Love Lane, he could not have refused to have accepted it. It is, therefore, clear to me that this sale did not take place in market overt, and consequently the plaintiff cannot recover.

G **SHEE, J.**—I am entirely of the same opinion. To protect a buyer of stolen goods, the sale must have taken place in market overt; now this was not such a sale. We should look to the state of things which prevailed when this privilege had its origin to discover its reason; and if we do so, we see that the owner of stolen property might have been considered to have been to some extent an accomplice in his own misfortune, by reason of his laches in not making inquiry for his goods where they would probably have been offered for sale. He was, however, protected by various rules: the property must have been sold in market overt; it must have been in a place proper for the sale of articles of commerce of the kind; and the sale must have taken place in daylight, so that the goods may have been seen, and the inception of the contract and the contract itself be wholly made in market overt. In this way, and by these rules, a real protection was afforded. But in this case the goods were not in market overt when they were sold; the contract was not made throughout in market overt, and the goods were delivered out of the market. I am of opinion, therefore, that the plaintiff has not brought himself within the privilege, and that the defendants are entitled to our judgment.

Rule discharged.

POPE v. WHALLEY

[COURT OF QUEEN'S BENCH (Blackburn and Mellor, JJ.), February 4, 1865]

[Reported 6 B. & S. 303; 5 New Rep. 323; 34 L.J.M.C. 76;
11 L.T. 769; 29 J.P. 134; 11 Jur.N.S. 444; 13 W.R. 402;
122 E.R. 1208]

Shop—More than mere place for sale—Storage space—Stable structure—Protection against weather.

On an information under s. 13 of the Markets and Fairs Clauses Act, 1847, charging the appellant with selling or exposing for sale outside a market articles in respect of which tolls were authorized to be taken in the market justices found that a structure not within market limits in a borough, which was used by the appellant for exposing for sale laces, tapes, buttons and combs, was not a "shop" within the exception in the section because (i) it was not of a stable and substantial character; (ii) it was merely a stall altered so as to evade the Act; (iii) it was unusual and inconvenient for the customer to go inside; and (iv) there was no adequate protection against rain or thieves at night.

Held: although no one of the reasons given by the justices was conclusive by itself, they rightly considered them together, and, accordingly, the structure was not a "shop" within s. 13 of the Act of 1847.

Per MELLOR, J.: "Shop" means something more than a mere place of sale, and it implies that there should be room for storing goods according to the nature of the business carried on, though the absence of the latter is not decisive where, from the perishable nature of the articles, it may not be necessary to have room to store them.

Notes. Applied: *Great Eastern Rail. Co. v. Goldsmid* (1884), 9 App. Cas. 927; *Haynes v. Ford*, [1911] 2 Ch. 237. Referred to: *Fearon v. Mitchell* (1872), L.R. 7 Q.B. 690; *Manchester Corp'n. v. Lyons Brothers* (1882), 47 L.T. 677; *Pike v. Jones* (1922), 128 L.T. 373; *Summers v. Roberts*, [1943] 2 All E.R. 757.

As to exemptions from market tolls, see 25 HALSBURY'S LAWS (3rd Edn.) 407-409; and for cases see 33 DIGEST (Repl.) 484-486. For the Markets and Fairs Clauses Act, 1847, s. 13, see 14 HALSBURY'S STATUTES (2nd Edn.) 1057.

Cases referred to:

- (1) *Macclesfield Corp'n. v. Chapman* (1843), 12 M. & W. 18; 13 L.J.Ex. 32; 2 L.T.O.S. 103; 7 J.P. 707; 7 Jur. 1041; 152 E.R. 1093; 33 Digest (Repl.) 479, 342.
- (2) *Mosley v. Walker* (1827), 7 B. & C. 40; 9 Dow. & Ry.K.B. 863; 5 L.J.O.S.K.B. 358; 108 E.R. 640; 33 Digest (Repl.) 458, 93.
- (3) *Moseley v. Chadwick* (1782), 3 Doug. K.B. 117; 99 E.R. 568; sub nom. *Mosley v. Chadwick*, 7 B. & C. 47, n.; 33 Digest (Repl.) 478, 328.

Also referred to in argument:

- R. v. Caversham (Inhabitants)* (1825), 4 B. & C. 683; 7 Dow. & Ry.K.B. 160; 3 Dow. & Ry.M.C. 429; 107 E.R. 1214.
- R. v. Hill* (1843), 2 Mood. & R. 458, N.P.; 15 Digest (Repl.) 1136, 11,425.
- Yarmouth Corp'n. v. Groom* (1862), 1 H. & C. 102; 32 L.J.Ex. 74; 7 L.T. 161; 8 Jur.N.S. 677; 158 E.R. 818; 33 Digest (Repl.) 472, 260.
- R. v. Carter* (1843), 1 Car. & Kir. 173; 15 Digest (Repl.) 1136, 11,423.
- R. v. Sanders* (1839), 1 C. & P. 79; 15 Digest (Repl.) 1136, 11,421.

- A** *Bewdley Case, Watson v. Cotton* (1847), 5 C.B. 51; 2 Lut. Reg. Cas. 53; 17 L.J.C.P. 68; 10 L.T.O.S. 165; 12 J.P. 154; 11 Jur. 1106; 136 E.R. 792; 20 Digest (Repl.) 16, 90.
- Wiltshire v. Willet* (1861), 11 C.B.N.S. 240; 31 L.J.M.C. 8; 5 L.T. 355; 26 J.P. 312; 10 W.R. 44; 142 E.R. 788; 33 Digest (Repl.) 485, 397.
- B** *Wiltshire v. Baker* (1861), 11 C.B.N.S. 237; 31 L.J.M.C. 10, n.; 5 L.T. 355; 10 W.R. 89; 142 E.R. 787; 33 Digest (Repl.) 484, 387.
- Llandaff and Canton District Market Co. v. Lyndon* (1860), 8 C.B.N.S. 515; 30 L.J.M.C. 105; 2 L.T. 771; 25 J.P. 295; 6 Jur.N.S. 1344; 8 W.R. 693; 141 E.R. 1267; 33 Digest (Repl.) 484, 385.

C **Case Stated** by justices on a conviction under s. 13 of the Markets and Fairs Clauses Act, 1847.

The following facts were proved or admitted. Wigan was an ancient borough, having an ancient market and market place, and the mayor, aldermen and burgesses of the borough were the owners of the tolls, picage and stallage of such market. There was a local board of health constituted for such borough under the Public Health Act, 1848, and within the borough. The Local Government Act and the Markets and Fairs Clauses Act, so far as related to markets, had been adopted and applied. The ancient market-days were Monday and Friday in each week, but, under the byelaws, Tuesday and Saturday, as well as Monday and Friday in each week, had been constituted market-days. By the byelaws, it was ordered that the market should be held in the Market Place, Standishgate Street, Wallgate, and Dicconson Street within the borough.

E On and prior to Sept. 16, 1864, the respondent was the lessee of the market tolls, picage and stallage under the corporation of the borough. A market was held within the borough on Friday, Sept. 16, and on that date the appellant exposed laces, tapes, buttons and combs for sale within the borough, but not within the limits of the market as fixed by the byelaws, but within a yard at the back of, and appurtenant to, the Crofters' Arms public-house. The place where the articles were exposed for sale was composed as follows. The main supports consisted of poles or pieces of wood which had formerly been used as a stall in the Wigan market place, but which had been let into the ground of the Crofters' Arms Yard, and used as a stall there. The stall so used consisted of the upright posts fixed in the ground, of cross pieces of wood, on which the counter-boards were supported, and a wooden roof projecting a considerable distance beyond the counter-boards on each side, so as to shelter the seller on one side and the customers on the other. The sellers were protected behind a wooden frame-work.

G Subsequent to the conviction of John Beesley, under a similar charge, for exposing goods for sale on a similar stall, the appellant's stall, along with others, had undergone the following alterations, viz., from the floor up to the level of the counter-boards at one end slabs of wood, or undressed board, had been nailed to the posts. From these boards up to the square of the structure, a loose window-frame had been placed at one end, and a fixed window-frame from that up to the roof adjoining the window and slabs. There was a moveable shutter or door giving access to the back of the counter-boards where the seller stood. The other end of the structure and the side behind where the seller stood were entirely boarded up. In front, from the counter-boards to the ground, slabs or boards were nailed to the upright posts, and from the counter-boards to the roof there was a loose shutter extending the whole length (except the breadth of a door) at one end, which was removed during business hours. The door at the end of the loose shutters was on hinges, and had a lock on it, and could be locked or unlocked at the outside. The place inside where the seller stood was about 2 ft. 6 in. broad. There was in that breadth a floor made of boards where the seller stood, but under the counter-boards and in front where the buyer stood the surface of the ground was bare and uncovered, save by the

counter-boards and roof. The structures of the appellant and others were placed side by side in a row, and were set back to back, so that the fronts of the stalls faced each other, affording a double space for buyers, sheltered in some measure from wet by the projecting roofs meeting each other. The moveable glass window and the loose shutters had no hinges, but were so made that they could be taken down, and, when put up again, fastened inside. A

The dimensions of these structures were as follows: the height from the ground to the square was 6 ft. 6 in., and from the ground to the centre of the roof 9 ft. 6 in., the window frame at the end was nearly 4 ft. wide, and the breadth of the structure was 6 ft. 10½ in., including the projection over the roof on each side of the counter-boards where the seller and buyer stood. The length of the structure was about 13 ft., and the space between two stalls fronting each other was entirely open at all times and was common to the customers of both stalls. There were shelves in the appellant's structure, and it was proved that some of the structures of the same kind and in the same yard were papered, but no evidence of being papered was given as regarded that of the appellant. The structures did not adjoin, neither were they in any manner connected with any house or other building of a substantial character. They were of a slight and unsubstantial character, and were not proof against the weather. The cost of the structure was from £4 to £5, and it was made at the expense of the landlady of the public-house, who let each stall by the week, the appellant having taken the stall from the landlady of the public-house by the week at the rent of 2s. per week. The other occupiers of these structures were not, and never had been, rated to the poor and highway rates in respect of the structures. As regards the use of the structure, the appellant and other holders of similar structures had access to them whenever they thought fit. They exposed goods for sale there every day in the week. The customers as a rule stood in front and outside the structure when they made purchases, but evidence was given that customers could go into the narrow space of 2 ft. 6 in., where sellers stood, if they chose. The stall-holders generally removed their goods at night, though some evidence was given that, in some instances, goods were left there all night, though the witnesses would not state that the structures were such as would render it safe to leave anything valuable all night. As regards the appellant, it was not proved that any person went inside her structure to purchase, or that she ever left goods on the premises all night, neither was the contrary proved. B C D E F

It was contended on the part of the appellant that the structure was the appellant's own shop within the meaning of the exception in s. 13 of the Markets and Fairs Clauses Act, 1847. G

The justices were of opinion that, in point of law and fact, the structure where the appellant exposed goods for sale was not, either in its nature, construction or use, such as to constitute it a shop within the meaning of the exception in s. 13 because: (i) of its want of a stable and substantial character; (ii) it was a mere alteration of what had undoubtedly been a stall, in order to evade the provisions of the Markets and Fairs Clauses Act; (iii) although it was possible for a customer to go inside for the purpose of buying, yet it was obvious, from the very narrow space behind the counter-boards (about 30 inches in breadth), and from the fact of the shutter in front being regularly removed for the purpose of selling goods, that such was never intended, and in practice could not be the case, and that the user of this structure must necessarily be the same as of a stall where the seller stood inside and the buyer outside; (iv) the structure was not of such a nature as either to protect goods against rain, or render it safe to have goods of value on the premises during the night without being otherwise protected. The justices convicted the appellant, and the appellant now appealed. H I

D. D. Keane (Cottingham with him) for the appellant.
Field, Q.C. (*Le Breton* with him) for the respondent.

BLACKBURN, J.—I think that the judgment of the magistrates should be affirmed. The question turns entirely on the construction of s. 13 of the Markets and Fairs Clauses Act, 1847, which provides :

“After the market place is open for public use every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits [i.e., the boundaries of the borough], except in his own dwelling place or shop, any articles in respect of which tolls are by the Special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s.”

What is meant by the word “shop,” in which the seller may sell so as to avoid the penalty imposed by that section? The object of the Act was to protect the interests of the market, and the intention of the Act in reference to such an object may be inferred by considering what was the law before the passing of this Act as to a grant of a market. *Macclesfield Corpn. v. Chapman* (1) shows that it was the better opinion that an ordinary grant of a market did not of itself confer the right to restrain persons from selling in their own shops within the limits of the franchise on market days; such a right could exist only by immemorial custom, and it was not an incident to a grant by charter. In *Mosley v. Walker* (2), it was said by BAYLEY, J. (7 B. & C. at p. 53), that in *Mosley v. Chadwick* (3), it was decided

“that the lord having a right of market in a particular place, a stranger could not lawfully set up what in reality was a different market in that place.”

That was the test where the Crown granted a right of franchise by modern charter. If someone set up what was really a different market within the limits of the franchise, then the person setting it up was liable to an action for the injury which he thereby caused to the grantee. The substantial meaning of s. 13 is that, whenever it appears that the seller sells in a shop which is private and permanent, he is to be within the exception, just as before the Act he would not have been liable to an action; but whenever a man does not sell in his private shop, but sets up a private market of his own, and so would have been liable before the Act to an action at common law, in that case the section imposes a penalty.

In the present case, what the justices had to consider was whether the appellant's place was her permanent and real private shop? If it was, it was within the exception; but if what the appellant did amounted to setting up a private market, it is not within the exception. There is no one element in the Case which is conclusive of the character of the place, but its nature is well summed up in the reasons which the justices give for their decision. Those reasons were, first, because it was not of a stable and substantial character; secondly, because it was a mere alteration to evade the Act; thirdly, because it was unusual and inconvenient for the customer to go inside; and, fourthly, because there was no adequate protection against rain or thieves at night. The short terms for which these places were let would also be an element to be considered, and, in my opinion, the justices have come to the right conclusion; and if I had to come to a conclusion on the facts, I should be of the same opinion as they were.

MELLOR, J.—I think that everything that could be said against the decision of the justices has been urged, but I am bound to say that, in my opinion, if we look at the object of the Markets and Fairs Clauses Act, 1847, the intention was plainly to introduce into local Acts certain clauses (just as was done in the Railway Clauses Consolidation Act), drawn up in the form of a general Act, which should be adapted to almost all circumstances. The object of this Act was to establish fairs and markets, and, as that is for the benefit of the district.

this enactment is to prevent the infringement of the privileges, and to secure that benefit. It is very reasonable when the legislature said that, after the market is opened, none but licensed hawkers should sell within the prescribed limits, that it should desire to protect bona fide sales by persons in their own dwelling-places or shops. I agree with BLACKBURN, J., that each of the reasons given by the justices is not conclusive by itself, but I think that they rightly considered that these reasons, taken together, were important elements for their decision; and I think that they came to a right conclusion.

As to the true definition of the word "shop," I think that it means something more than the mere place of sale, and that it implies that there should be room for storing goods according to the nature of the business carried on—for storing linen and woollen goods, for instance, if it is a draper's business. At the same time, the absence of this is not decisive against a place being a shop in all cases, because a fishmonger's place may be undoubtedly a shop, though from the perishable nature of the articles it may not be necessary to have room to store them. However that may be (and it is not necessary to decide that here), I think that the justices have come to the right conclusion, and that the conviction should be affirmed.

Appcal dismissed.

SAXBY v. MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAIL. CO.

[COURT OF COMMON PLEAS (BOVILL, C.J., BYLES, KEATING AND MONTAGUE SMITH, JJ.), January 15, 1869]

[Reported L.R. 4 C.P. 198; 38 L.J.C.P. 153; 19 L.T. 640;
17 W.R. 293]

Water—Stream—Defendants owners of bed—Obstruction placed in stream by third party—Liability of defendants for nuisance.

The defendants were the owners of the soil of a stream, to the water of which the plaintiff was entitled. A third person replaced an obstruction in the stream which had previously been removed by the defendants. The defendants gained no benefit by the obstruction and declined to remove it again.

Held: although the defendants were the owners of the soil, they were not responsible to the plaintiff for the act of the third person, nor for the continuance of the nuisance.

Notes. Considered: *Barker v. Herbert*, [1911-13] All E.R. Rep. 509. Approved: *Edwards v. Birmingham Navigations*, [1924] 1 K.B. 341. Referred to: *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; *Slater v. Worthington's Cash Stores (1930), Ltd.*, [1941] 3 All E.R. 28.

As to who is liable to be sued for nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 155 et seq.; and for cases see 36 DIGEST 313 et seq.

Cases referred to in argument:

Penruddock's Case (1598), 5 Co. Rep. 100, b.; Jenk. 260; 77 E.R. 210; 36 Digest (Repl.) 305, 517.

R. v. Watts (1703), 1 Salk. 357; 91 E.R. 311; sub nom. *R. v. Watson*, 2 Ld. Raym. 856; 26 Digest (Repl.) 495, 1791.

Gandy v. Jubber (1864), 5 B. & S. 78; 3 New Rep. 569; 33 L.J.Q.B. 151; 9 L.T. 800; 28 J.P. 517; 10 Jur.N.S. 652; 12 W.R. 526; 122 E.R. 762; on appeal (1865), 5 B. & S. 485; 9 B. & S. 15; 29 J.P. 645; 13 W.R. 1022; 122 E.R. 911, Ex. Ch.; 31 Digest (Repl.) 382, 5102.

Reedie v. London and North Western Rail. Co., Hobbit v. Same (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201; 34 Digest (Repl.) 27, 65.

Rule Nisi obtained by the plaintiff for a new trial on the ground of misdirection in an action tried by CHANNELL, B., at Chester Spring Assizes, 1868, brought by the plaintiff against the defendants for obstructing and diverting the flow of water from a stream to certain works of the plaintiff.

The first count of the plaintiff's declaration alleged that the plaintiff was possessed of certain print works, land and premises, and by reason thereof was entitled to the use of the flow of a stream or watercourse for working the works, and for the more beneficial use and enjoyment thereof; and that the defendants obstructed and diverted, to wit, by means of a weir and plants and other obstructions, the water of the stream away from the print works, land, and premises, and the plaintiff was thereby injured. The second count was not relied on at the trial, and the third did not materially differ from the first. The pleas were Not Guilty, and that the plaintiff was not possessed and entitled, as alleged. The plaintiff was possessed of the Furness Print Works, and one Welch was the proprietor of the Whaley Bridge Print Works, both of which were worked by the water of the River Goit, which for some distance divides Cheshire from Derbyshire. In 1793, the defendants, or their assignors, obtained an Act of Parliament for the construction of the Peek Forest Canal, part of which was along the bed of the river, and the soil thereof was in possession of the defendants. The two mills were till recently in the occupation of the same person, and before the possession was divided an obstruction was placed by the owner in a part of the river of which the soil belonged to the defendants. When the two mills were worked by different persons, the defendants had, at the request of the proprietors of the Furness Works, removed this obstruction. It had, however, been subsequently replaced, probably by Mr. Welch, as he was the owner of one of the banks of the stream, and was the only person who could be benefited by it. It was not, however, proved who had replaced the obstruction, but it was admitted that it had not been done by the defendants. The defendants' only connection with and interest in the matter was their being the owners and occupiers of the soil of the river, and their being bound by Act of Parliament to keep in repair the artificial bed of the stream. Some letters between the parties were put in evidence, the effect of which was that the defendants declined to take any steps in the matter.

CHANNELL, B., nonsuited the plaintiff on the ground that there was no evidence of obstruction or diversion by the defendants. The plaintiff obtained a rule nisi for a new trial on the ground of misdirection.

McIntyre for the defendants showed cause against the rule.

Mellish, Q.C., and *Bowen* supported the rule.

BOVILL, C.J.—I am of opinion that the ruling of CHANNELL, B., at the trial was right, and that there was no evidence of obstruction or diversion of the stream by the defendants to be submitted to the jury. With regard to the act complained of, it is admitted that it was not done by the defendants, and it appears that it was done against their will; at all events they neither ordered, approved, nor adopted it. Counsel supporting the rule says that they were responsible for the continuance of the wrongful obstruction, and that it ought to have been left for the jury to say what damage the plaintiff had suffered from its continuance after the defendants had notice. They never in any

shape or way approved of nor sanctioned the obstruction, and it was of no benefit to the defendants. The plaintiff says that they might, however, have removed it, but so also might have the plaintiff. There were two parties who had this power to remove; the plaintiff, if he obtained the consent of the defendants, and perhaps even without their consent; and the defendants, because the obstruction was on their soil. The plaintiff, though he had the power, declined to exercise it, and the defendants, having no interest in the matter, also declined to interfere. It is impossible to say that there was any evidence in support of the allegations in the declaration.

BYLES, J.—I also am of opinion that CHANNELL, B., was correct. If the defendants had created the nuisance, or continued it in such a way that the plaintiff had no remedy, they would have been liable; but they neither created it nor continued it. They merely said, "We will not incur any expense in the matter; you can put a stop to it at any time you like." By taking this course, they could not be said to have been obstructing or diverting the stream.

KEATING, J.—I am of the same opinion. I do not understand, however, that the court will by this decision infringe any general rule about nuisances. There is no evidence of a continuance by the defendants, i.e., of a continuance creating a privity between the defendants and the people who originally created it.

MONTAGUE SMITH, J.—I am of the same opinion, and I place my conclusion on the narrow ground that there was no such wrongful continuance on the defendants' part as to render them liable to the plaintiff.

Rule discharged.

R. v. ROBERTS

[COURT OF QUEEN'S BENCH (Blackburn and Quain, JJ.), November 17, 1878]

[Reported L.R. 9 Q.B. 77; 43 L.J.Q.B. 12; 29 L.T. 674;
22 W.R. 60; 12 Cox, C.C. 574; 37 J.P. Jo. 756]

Criminal Law—Costs—Costs of prosecution—Payment out of money found on prisoner—Bankruptcy of prisoner between arrest and conviction—Forfeiture Act, 1870 (33 & 34 Vict., c. 23), s. 3.

The prisoner was convicted of felony and an order was made under s. 3 of the Forfeiture Act, 1870, that payment of the costs of the prosecution be made out of money found in his possession at the time of his arrest. Between the dates of his arrest and conviction, the prisoner had been adjudged bankrupt.

Held: the trustee in bankruptcy took the prisoner's property subject to any contingency to which it was subject before the bankruptcy, and, accordingly, the order was rightly made.

Notes. The Forfeiture Act, 1870, s. 3, has been repealed. See now the Costs in Criminal Cases Act, 1952, s. 2.

Referred to: *Re Pascoe, Ex parte The Trustee in Bankruptcy and Northumberland County Council*, [1944] 1 All E.R. 281.

As to costs in criminal proceedings, see 10 HALSBURY'S LAWS (3rd Edn.) 546 et seq.; and for cases see 14 DIGEST (Repl.) 683 et seq. For the Costs in Criminal Cases Act, 1952, s. 2, see 32 HALSBURY'S STATUTES (2nd Edn.) 63.

Case referred to in argument :

Whitaker v. Wisbey (1852), 12 C.B. 44; 21 L.J.C.P. 116; 19 L.T.O.S. 156; 16 Jur. 411; 6 Cox, C.C. 109; 138 E.R. 817; 14 Digest (Repl.) 344, 3340.

Rule Nisi calling on the justices of the Central Criminal Court to show cause why a writ of certiorari should not issue to bring up an order made at the sessions holden on May 5, 1873, whereby it was ordered that the costs incurred in the prosecution of William Alexander Roberts, for feloniously forging an order for the payment of £11,500 should be paid out of moneys found on Roberts on his apprehension, as far as such moneys should extend.

From the affidavits filed, it appeared that Roberts was taken into custody on April 4, 1873, on a charge of having forged and altered a cheque for £11,500. On April 24, he was adjudicated a bankrupt, and on May 8 a trustee was appointed. On the same day, but later on that day, Roberts was found guilty of felony at the Central Criminal Court, and sentenced to twelve years' penal servitude. On June 9, the Central Criminal Court made an order for the payment of the costs of the prosecution out of the moneys found on Roberts, on his apprehension, and then taken from him, under s. 3 of the Forfeiture Act, 1870.

Giffard, Q.C., and *Poland* showed cause against the rule.

Metcalfe, Q.C. (with him *Graham*) in support of the rule.

BLACKBURN, J.—I think that the rule should be discharged. I wish to guard against being supposed to say that, simply because money is found on the person of a prisoner at the time of his apprehension, the criminal court may make an order for the payment of the costs of the prosecution out of it. I am inclined to think that, if moneys belonging to someone else are found in his possession, e.g., if the person arrested is a banker's clerk carrying a bag of gold to the bank, the banker who is the owner of the money would have a right to interfere in such a case against any order being made. I also wish to guard myself against being supposed to decide that, if the prisoner was adjudicated bankrupt by reason of an act of bankruptcy committed before his arrest, the trustee might not have a right to intervene. Nothing appears in the present case to raise this point. At the time of his arrest, the prisoner was in possession of moneys which he might have disposed of in any way he pleased. Section 3 of the Forfeiture Act, 1870, provides that such moneys shall be subject to the power of the criminal court to make an order for the payment out of them of the costs of the prosecution. That power may be exercised by the court notwithstanding every effort which the prisoner may make, while *sui juris*, to make away with the moneys. In case of bankruptcy intervening—not by reason of an act of bankruptcy antecedent to the arrest—the trustee takes what was the property of the bankrupt, subject to all the rights of third parties previously existing. I think that, in the present case, there did exist, at the time of the adjudication of bankruptcy, a vested right of lien, or hold, by virtue of the statute, on the moneys found on the person of the prisoner at the time of his arrest, and that, consequently, the order was rightly made.

QUAIN, J.—I am of the same opinion. Section 3 of the Forfeiture Act, 1870, expressly enacts that

“the payment of such costs and expenses, or any part thereof, may be ordered by the court to be made out of any moneys taken from such person on his apprehension.”

The facts of this case show that the moneys, out of which the order for paying the costs of the prosecution was made, were taken from the prisoner on his apprehension. The money, when so taken, became from that time liable to have an order made for the payment of the costs of the prosecution out of it. It

has been argued that the liability was done away with by the bankruptcy of the prisoner subsequent to his apprehension. I am of opinion that it was not, and that the property taken by the trustee was subject to whatever contingency it was subject to before the bankruptcy. Whatever lien or hold on the property existed before the bankruptcy cannot be affected by the bankruptcy in the slightest degree. I think that the rule should be discharged.

Rule discharged.

APPLEBY v. MYERS

[COURT OF EXCHEQUER CHAMBER (Martin, B., Blackburn, J., Bramwell, B., Shee and Lush, JJ.), May 16, 17, June 20, 21, 1867]

[Reported L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669]

Contract—Frustration—Contract to perform work for fixed sum—Accidental fire preventing complete performance of contract—Rights of parties.

The plaintiff contracted to supply and erect machinery on the defendant's premises and to keep it in repair for two years, the price for the work and materials to be paid on completion. After part of the work had been completed, and other parts were in the course of completion, an accidental fire broke out in the defendant's premises, destroying the premises and the machinery on them.

Held: as neither party was in fault, both parties were excused from further performance of the contract, but, on the construction of the contract, the plaintiff was not entitled to recover until the whole work had been completed.

Notes. Explained and Distinguished: *Anderson v. Morice* (1876), 1 App. Cas. 713. Applied: *Howell v. Coupland* (1876), 1 Q.B.D. 258. Explained: *Thorn v. London Corpn.* (1876), 1 App. Cas. 120. Considered: *O'Neil v. Armstrong, Mitchell & Co.*, [1895-9] All E.R. Rep. 1073. Followed: *The Madras*, [1898] P. 90. Considered: *Foreman Proprietary v. Liddesdale*, [1900] A.C. 190; *Blakeley v. Muller*, *Hobson v. Pattenden*, [1903] 2 K.B. 760, n.; *Elliott v. Crutchley*, [1903] 2 K.B. 476. Applied: *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K.B. 756. Considered: *Chandler v. Webster*, [1904] 1 K.B. 493; *Parkin v. South Hetton Coal Co.* (1907), 97 L.T. 98; *Dakin v. Lee*, [1916] 1 K.B. 566; *Horlock v. Beal*, [1916] 1 A.C. 486; *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916-17] All E.R. Rep. 104. Applied: *Scottish Navigation Co. v. Souter*, *Admiral Shipping Co. v. Weidner*, *Hopkins*, [1917] 1 K.B. 222. Considered: *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122. Referred to: *Stubbs v. Holywell Rail. Co.* (1867), 15 W.R. 869; *Ford v. Cotesworth* (1870), post p. 473; *The Teutonia*, *Duncan v. Koster* (1872), 26 L.T. 48; *Nickoll and Knight v. Ashton*, [1900-3] All E.R. Rep. 928; *Herne Bay Steamship Co. v. Hutton* (1903), 88 L.T. 269; *Clark v. Lindsay* (1903), 88 L.T. 198; *Krell v. Henry*, [1903] 2 K.B. 740; *Austin Friars Steam Shipping Co. v. Strack*, [1905] 2 K.B. 315; *Re Hull and Meux* (1905), 92 L.T. 74; *Porter v. Tottenham Urban District Council*, [1914] 1 K.B. 663; *St. Enoch Shipping Co. v. Phosphate Mining Co.* (1915), 21 Com. Cas. 192; *Foster's Agency v. Romaine* (1916), 32 T.L.R. 331; *Lloyd Royal Belge Soc. Anon. v. Stathatos* (1917), 33 T.L.R. 392; *Jebeaupin v. Crispin*, [1920] All E.R. Rep. 353; *Isaacs v. McAllum*, [1921] 3 K.B. 377; *Larrinaga v. Société Franco-Américaine des Phosphates de Médulla*, Paris,

[1923] All E.R. Rep. 1; *Trollope (Geo.) & Sons v. Martyn Bros.* (1934), 50 T.L.R. 554; *A.-G. of Trinidad and Tobago v. Gordon Grant & Co.*, [1935] A.C. 532; *Chandler Bros. v. Boswell*, [1936] 3 All E.R. 179; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; *Hoenig v. Isaacs*, [1952] 2 All E.R. 176; *Gold v. Patman and Fotheringham, Ltd.*, [1958] 2 All E.R. 497.

As to excuses for non-performance of building contract, see 3 HALSBURY'S LAWS (3rd Edn.) 443 et seq.; and for cases see 7 DIGEST (Repl.) 417 et seq. As to payment, see 3 HALSBURY'S LAWS (3rd Edn.) 471 et seq.; and for cases see 7 DIGEST (Repl.) 375 et seq.

Cases referred to :

- (1) *Roberts v. Havelock* (1832), 3 B. & Ad. 404; 110 E.R. 145; 41 Digest 494, 3232.
- (2) *Menetone v. Athawes* (1764), 3 Burr. 1592; 97 E.R. 998; 44 Digest 1298, 36.
- (3) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, 3242.
- (4) *Cutter v. Powell* (1795), 6 Term Rep. 320; 101 E.R. 573; 12 Digest (Repl.) 130, 810.
- (5) *Jesse v. Roy* (1834), 1 Cr.M. & R. 316; 4 Tyr. 626; 3 L.J.Ex. 268; 149 E.R. 1101; 12 Digest (Repl.) 481, 3583.
- (6) *Munro v. Butt* (1858), 8 E. & B. 738; 4 Jur.N.S. 1231; 120 E.R. 275; 7 Digest (Repl.) 378, 166.
- (7) *Sinclair v. Bowles* (1829), 9 B. & C. 92; 4 Man. & Ry.K.B. 1; 7 L.J.O.S.K.B. 178; 109 E.R. 35; 7 Digest (Repl.) 378, 165.

Also referred to in argument :

- Adlard v. Booth* (1835), 7 C. & P. 108; 12 Digest (Repl.) 130, 813.
Gillett v. Mauwman (1808), 1 Taunt. 137; 127 E.R. 784; 12 Digest (Repl.) 617, 4769.
Bromby v. Smith, 3 Alabama Rep. N.S. 123.
Williams v. Lloyd (1628), W.Jo. 179; 82 E.R. 95; 3 Digest (Repl.) 66, 76.
Bayne v. Walker (1815), 3 Dow. 233; 3 E.R. 1049, H.L.; 36 Digest (Repl.) 78, 421.
Clay v. Yates (1856), 1 H. & N. 73; 25 L.J.Ex. 237; 27 L.T.O.S. 126; 2 Jur.N.S. 908; 4 W.R. 557; 156 E.R. 1123; 12 Digest (Repl.) 268, 2068.
Rugg v. Minett (1809), 11 East 210; 103 E.R. 985; 39 Digest 405, 404.
Wilson v. Knott, 3 Humph. Tennessee Rep. 437.

Appeal by the defendant from a decision of the Court of Common Pleas, reported L.R. 1 C.P. 615, in favour of the plaintiff on a Special Case stated by consent and without pleadings.

The action was brought to recover £419 for work and materials under the following circumstances. On Mar. 30, 1865, the plaintiff entered into an agreement with the defendant to supply and put up certain machinery on the defendant's premises, viz., boiler, engine, shafting, lifts, drying-room, copper pans, tanks, pump and steamboxes, the total cost of which, had the work been completed under the contract, would have amounted to £459. The contract concluded with the following words :

"We offer to make and erect the whole of the machinery of the best materials and workmanship of their respective kinds, and to put it to work for the sums above named respectively, and to keep the whole in order, under fair wear and tear, for two years from date of completion; all brick-work, carpenters', and masons' work and materials are to be provided for us, but the drawings and general instructions required for them to work will be provided by us, subject to the architect's approval.

(Signed) APPLEBY BROS.

On July 4 a fire accidentally broke out on the defendant's premises, which entirely destroyed them and the works which had then been erected by the

plaintiff in part performance of the contract. At the time of the fire, the works contracted to be erected had not been completed. The premises on which the works were to be erected were the property of the defendant, in his occupation, and under his entire control, and the plaintiff had access thereto only for the purpose of performing his contract. At the time of the fire, portions of some of the items in the contract were erected and fixed, and some of the materials for others were on the premises. The defendant had not completed the carpenters' and masons' work to be prepared by him under the agreement. The tank had been erected by the plaintiff and was used by the defendant by taking water therefrom for the purpose of his business, but the other apparatus connected with it was not completed. The plaintiff's workmen were engaged in continuing the erection and completion of the same at the time of the fire. The question for the opinion of the court was whether, under the above circumstances, the plaintiff was entitled to recover for the whole or any portion of the contract price. The Court of Common Pleas held that the agreement being that the machinery was to be fixed to the buildings of the defendant, so that the parts of it when fixed would become his property and subject to his dominion, there was an implied term that he should provide the buildings and keep them in a fit state to enable the plaintiff to perform his part of the contract, and that the plaintiff was, therefore, entitled to recover the value of the work done at the time of the fire.

Hannen (Lumley Smith with him) for the defendant.

Holl (Macnamara with him) for the plaintiff.

Cur. adv. vult.

June 21, 1867. **BLACKBURN, J.**, read the following judgment of the court.— This case was partly argued before us at the last sittings, and the argument was resumed and completed at the present sittings. Having had the advantage of hearing the very able arguments of counsel, and having during the interval had the opportunity of considering the judgment of the court below, there is no reason that we should further delay expressing the opinion at which we have all arrived, which is, that the judgment of the court below is wrong, and ought to be reversed.

The whole question depends on the true construction of the contract between the two parties. We agree with the court below in thinking that it sufficiently appears that the work which the plaintiff agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiff to perform the work on them, and we agree with them in thinking that if by any default on the part of the defendants these premises were rendered unfit to receive the work, the plaintiff would have had the option to sue the defendants for this default, or to treat the contract as rescinded, and sue on a quantum meruit. But we do not agree with them in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, and excusing both from further performance of the contract, but giving a cause of action to neither.

It was argued before us that, inasmuch as this was a contract of that nature which would in pleading be described as a contract for work, labour, and materials, and not as one of bargain and sale, the labour and materials necessarily became the property of the defendant as soon as they were worked into his premises and became part of them, and, therefore, were at his risk. We think that, as to the great part at least of the work done in this case, the materials had not become the property of the defendant; for we think that the plaintiff, who was to complete the whole for a fixed sum and keep it in repair for

two years, would have had a perfect right, if he thought that a portion of the engine which he had put up was too slight, to change it and to substitute another in his opinion better calculated to keep in good repair during the two years, and that without consulting or asking the leave of the defendant. But even on the supposition that the materials had become unalterably fixed to the defendant's premises we do not think that under such a contract as this, the plaintiff could recover anything until the whole work was completed. It is quite true that materials worked by one into the property of another became part of that property. This is equally true whether it be fixed or moveable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or ship, and, therefore, generally, and in the absence of something to show a contrary intention, the bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether, in such a case, the non-completion is because the shipwright did not choose to go on with the work, as was the case in *Roberts v. Havelock* (1), or because, in consequence of a fire, he could not go on with it, as in *Menetone v. Athawes* (2).

But, though this is the prima facie contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workmen to agree to complete the whole, and be paid when the whole is complete, and not till then; and we think that the plaintiff in the present case had entered into such a contract. Had the accidental fire left the defendant's premises untouched, and only injured a part of the work which the plaintiff had already done, we apprehend that it is clear that the plaintiff, under such a contract as the present, must have done that part over again, in order to fulfil his contract to complete the whole, and "put it to work for the sums above-named respectively." As it is, according to the principle laid down in *Taylor v. Caldwell* (3), he is excused from completing the work, but he is not, therefore, entitled to any compensation for what he has done, but which has without any fault of the defendant perished. The case is in principle like that of a shipowner who has been excused from the performance of his contract to carry goods to their destination because his ship has been disabled by one of the excepted perils, but who is not, therefore, entitled to any payment on account of the part performance of the voyage, as there is not anything to justify the conclusion that there has been a fresh contract to pay freight pro rata.

On the argument, much reference was made to the civil law. The opinions of the greatest lawyers collected in the *Digest* afford us very great assistance in tracing out any question of doubtful principle, but they do not bind us, and we think that, on the principles of English law laid down in *Cutter v. Powell* (4), *Jesse v. Roy* (5), *Munro v. Butt* (6), *Sinclair v. Bowles* (7), and other cases, the plaintiff, having contracted to do an entire work for a specific sum, can receive nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

We think, therefore, as already said, that the judgment should be reversed.

Appeal allowed.

BAYLEY v. MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Kelly, C.B., Martin, Cleasby and Pigott, BB., Blackburn, Mellor and Lush, JJ.), February 8, 1873]

[Reported L.R. 8 C.P. 148; 42 L.J.C.P. 78; 28 L.T. 366]

Master and Servant—Liability of master for act of servant—Act by servant within scope of authority—Railway—Responsibility of company for act of porter.

The plaintiff, a passenger on one of the defendants' trains, was violently pulled from his carriage, just after the train had started, by one of the defendants' porters who was under the erroneous belief that the plaintiff was travelling in the wrong train. The defendants' byelaws, of which the porter had a copy, provided that porters were not to remove passengers from wrong trains or carriages, but by their rules, of which the porter also had a copy, porters were given a general direction to do all in their power to promote the defendants' interests and it was part of the porter's duty to prevent passengers from travelling by the wrong trains, as far as they were able to do so.

Held: the defendants were liable to the plaintiff for the porter's act, because there was evidence that he was acting within the authority given to him by the defendants.

Notes. Distinguished: *Richards v. West Middlesex Waterworks Co.* (1885), 15 Q.B.D. 660; *Dyer v. Munday*, [1895-9] All E.R. Rep. 1022. Referred to: *Bolingbroke v. Swindon Local Board* (1874), L.R. 9 C.P. 575; *Jefferies and Atkey v. Derbyshire Farmers* (1920), 36 T.L.R. 825; *Poland v. John Parr & Sons*, [1926] All E.R. Rep. 177; *McKean v. Raynor Bros., Ltd. (Nottingham)*, [1942] 2 All E.R. 650; *Warren v. Henlys, Ltd.*, [1948] 2 All E.R. 935.

As to liability of master for acts of his servant, see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq.; and for cases see 34 DIGEST (Repl.) 155 et seq.

Case referred to:

- (1) *Seymour v. Greenwood* (1861), 7 H. & N. 355; 158 E.R. 511; sub nom. *Greenwood v. Seymour*, 30 L.J.Ex. 327; 4 L.T. 835; 25 J.P. 693; 8 Jur.N.S. 214; 9 W.R. 785, Ex. Ch.; 8 Digest (Repl.) 124, 800.

Also referred to in argument:

- McKenzie v. McLeod* (1834), 10 Bing. 385; 4 Moo. & S. 249; 3 L.J.C.P. 79; 131 E.R. 953; 34 Digest (Repl.) 163, 1133.
- Eastern Counties Rail. Co. v. Broom* (1851), 6 Exch. 314; 6 Ry. & Can. Cas. 743; 20 L.J.Ex. 196; 16 L.T.O.S. 465; 15 Jur. 297; 155 E.R. 562, Ex. Ch.; 8 Digest (Repl.) 128, 820.
- Roë v. Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1851), 7 Exch. 36; 6 Ry. & Can. Cas. 795; 21 L.J.Ex. 9; 155 E.R. 845; 8 Digest (Repl.) 126, 810.
- Goff v. Great Northern Rail. Co.* (1861), 3 E. & E. 672; 30 L.J.Q.B. 148; 3 L.T. 850; 25 J.P. 326; 7 Jur.N.S. 286; 121 E.R. 594; 8 Digest (Repl.) 126, 811.
- Edwards v. London and North Western Rail. Co.* (1870), L.R. 5 C.P. 445; 39 L.J.C.P. 241; 22 L.T. 656; 18 W.R. 834; 34 Digest (Repl.) 170, 1190.
- Poulton v. London and South Western Rail. Co.* (1867), L.R. 2 Q.B. 534; 8 B. & S. 616; 36 L.J.Q.B. 294; 17 L.T. 11; 31 J.P. 677; 16 W.R. 309; 8 Digest (Repl.) 127, 812.
- Allen v. London and South Western Rail. Co.* (1870), L.R. 6 Q.B. 65; 40 L.J.Q.B. 55; 23 L.T. 612; 35 J.P. 308; 19 W.R. 127; 11 Cox, C.C. 621; 34 Digest (Repl.) 169, 1183.

A *Pennsylvania Rail. Co. v. Vandirer*, 42 Pennsylvania State Reports.

Hibbard v. New York and Erie Rail. Co. 15 New York Reports, 455.

Limpus v. London General Omnibus Co. (1862), 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147; 11 W.R. 149; 158 E.R. 993; sub nom. *General Omnibus Co., Ltd. v. Limpus*, 9 Jur.N.S. 333, Ex. Ch.; 34 Digest (Repl.) 161, 1120.

B **Appeal** by the defendants against a decision of the Court of Common Pleas (WILLES, BYLES and BRETT, JJ.), reported L.R. 7 C.P. 315, discharging a rule to set aside a verdict found for the plaintiff, and to enter a verdict for the defendant, or a nonsuit.

C The declaration contained two counts, charging first, that the defendants assaulted the plaintiff and pulled him out of a railway carriage of the defendants, whereby he was wounded, etc.; and secondly, that the plaintiff was a passenger of the defendants, and that the defendants so negligently etc., conducted themselves in carrying him, that he was, whilst such passenger, carelessly, improperly, and wrongfully pulled off a carriage of the defendants by a certain servant of the defendants, whereby he was wounded, etc. The defendants pleaded Not

D Guilty. The action was tried before CHANNELL, B., and the facts as then proved were stated in a Case of which the following is the substance: The plaintiff had taken a ticket by the defendants' railway from Guide Bridge station to Stockport station, intending to get thence to Macclesfield. He could not have travelled direct to Macclesfield on that night by that train, but would have had to change trains at Woodley and cross the town at Stockport. The plaintiff had often

E travelled that route before. There was also from Guide Bridge a more direct route to Macclesfield on the line of another company using the Guide Bridge station in common with the defendants. The plaintiff proceeded to take his seat in a carriage forming part of a train starting for Stockport. On his doing so, one of the porters in the employ of the defendants asked where he was going, and he said (as the fact was), "to Woodley, and thence to Stockport and Macclesfield." The porter, exclaiming that he was in the wrong train, violently pulled him out of the carriage just as the train was moving off, whereby he fell down and received the injuries complained of. The plaintiff was in fact, in the right train, and in that by which he intended to travel.

G It was part of the duties of the porters to prevent passengers going by wrong trains as far as they were able to do so. Certain rules and byelaws of the defendants were also put in, and it was proved that the porters were supplied with copies. Among the rules was one that porters were to do all in their power to promote the comfort of passengers and the interests of the defendants; and r. 101 provided:

H "If the clerk in charge or guard has reason to suppose that any passenger is without a ticket, or is not in the proper carriage, he must request the person to show him his ticket, have any irregularity corrected, and the excess paid if any is due . . ."

There were also byelaws prohibiting smoking on pain of being removed from the defendants' premises, and enjoining such a removal in case of drunkenness, or wilfully interfering with the comfort of other passengers; and byelaw 6 provided:

I "It is the duty of the porters of the company if passengers are in a wrong train or carriage, to inform them of the fact, and request them to alight before the train starts, and in default of their doing so to report them to the guard with the view of their being charged any excess fare which may be due under the circumstances, but not to remove them from the train or carriage."

It was objected on the part of the defendants that the porter had no authority from the defendants, express or implied, to drag the plaintiff out of the carriage

under these circumstances; and that it was in fact in contravention of the rules, and not within the scope of his employment, but a wilful and illegal act of his own, done on his own responsibility for which the defendants were not liable. The learned judge left the case to the jury, reserving leave to move. The jury found for the plaintiff. A rule obtained pursuant to the leave reserved was unanimously discharged by the Court of Common Pleas on July 5, 1872. From this the defendants now appealed, the question for the opinion of the court being whether, on the facts of the case, the defendants were or were not liable for the act of the porter which caused the injury to the plaintiff.

Hughes (Field, Q.C., and Horatio Lloyd with him) for the defendants.
McIntyre, Q.C., for the plaintiff.

KELLY, C.B.—Counsel for the defendants, to adopt the language of one of the byelaws cited in the case before us, has done his best to promote the interests of this company, but it must be without avail. When we look for the principle which governs all the cases, the result is that, where a servant, acting within the scope of his authority, does even that which he is told not to do, his master, who gave him the general authority, is responsible. The defendants had given a general authority to their servants to prevent passengers from travelling in wrong carriages as far as possible; and it was the duty of each servant to act on this general authority and to prevent travellers from so travelling accordingly. It could not be said that a servant was not acting within the scope of his authority when, in order to prevent this, he pulled a passenger out of a carriage by force; for there might be circumstances—where a carriage is too full for instance—in which a porter might really think it his duty to use force. The cases in which the servant has been held not to have acted within the scope of his authority are cases where the act complained of was an isolated act, done in disobedience of an express or implied injunction, and are on that ground distinguishable from the present case. There is, indeed, here a statement in byelaw 6 that it is not the duty of the porters to remove passengers from wrong trains or carriages; but where a porter finds inconsistent directions, such as this and the other to do his best to prevent persons from travelling in wrong carriages, he may well follow one and disregard the other. This porter was interfering in a state of things in which, acting on the discretion which the defendants had given him, it was his duty to interfere. Consequently, the defendants are responsible for what he did.

MARTIN, B.—I am of the same opinion, but I think that the byelaws cited have nothing to do with the question, which is one partly of law and partly of fact, and is governed by the ordinary law of master and servant.

BLACKBURN, J.—I am of the same opinion. The law is clear that, where a servant acts within the scope of his authority, the master is responsible for everything that he does, even in very great abuse of that authority. *Seymour v. Greenwood* (1) is a typical case. There the master of an omnibus was held liable for the act of his servant in removing a passenger supposed to be drunk, because, said the Exchequer Chamber (7 H. & N. at p. 358),

“the master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself.”

The only question is, was there evidence here that the servant, though abusing his authority, was still acting within it. I am clearly of opinion that there was

evidence of an authority to remove, in order to "promote the interests" of the defendants, a person supposed to be in a wrong carriage. A railway company should take care to employ none but steady trustworthy men, not likely to abuse the power given to them.

MELLOR and LUSH, JJ., and PIGOTT and CLEASBY, BB., concurred.

Appeal dismissed.

Re MOSELEY GREEN COAL AND COKE CO., LTD. BARRETT'S CASE

[COURT OF APPEAL IN CHANCERY (Lord Westbury, L.C.), November 16, 23, 1864,
March 22, 1865]

[Reported 4 De G.J. & Sm. 756; 5 New Rep. 496; 34 L.J.Bcy. 41;
12 L.T. 193; 13 W.R. 559; 46 E.R. 1116]

Company—Winding-up—Set-off—Mutual dealings—Date when account to be taken—Claim against company arising subsequently to winding-up in respect of anterior matter—Payment by surety after winding-up of debt due from company to third party.

While it is contrary to the policy of the law to permit a debtor to a bankrupt's estate, or to an estate that is being wound-up, to buy up counterclaims subsequently to the bankruptcy or the winding-up order for the purpose of making a case of set-off, yet it is otherwise where there is an actual ownership of a counterclaim, which, though arising subsequently to the bankruptcy or the winding-up order, is a consequence of some anterior matter.

A company entered into a contract for the purchase of mines which were subject to a mortgage for £7,000, and B., a shareholder in the company, was a surety to the mortgagee for the mortgagor-vendor. Part of the agreement was that the company should pay off the mortgage debt in May, 1862, but the company, failing to do this, handed to the mortgagee a promissory note for £7,000 at six months, dated in September, 1862. In October, 1862, a winding-up order was made, and in February, 1863, the mortgagee pressing for his money, B. induced his sister to pay off the mortgage debt and take a transfer of the securities, including the promissory note, which shortly after fell due and was dishonoured. B. having been settled on the list of contributories, obtained a transfer of the company's note from his sister, giving her his own promissory note instead, and then asserted his right to set off his claim against the company in respect of the promissory note pro tanto against the sum due from him for calls.

Held: the contract of suretyship, being incurred by B. anterior to the winding-up order, gave retroactive force to his possession and ownership of the note so as to enable him to refer it back to that contract or relation before the winding-up order was made, and B. was, accordingly, entitled to a set-off.

Notes. In so far as this case decided that a contributory can in a winding-up set off a debt owing to him from the company against a call, it must be regarded as overruled by *Re Overend, Gurney & Co., Grissell's Case* (1866), 1 Ch. App. 528. The decision still appears relevant, however, in ascertaining the extent to which a debtor of a company or of a bankrupt can set-off, in the winding-up or bankruptcy, debts due to him from the company or bankrupt.

The Joint Stock Companies Amendment Act, 1858, s. 17, has been repealed. As to a contributory's right of set-off, see now the Companies Act, 1948, s. 259; and as to a debtor's right of set-off, see *ibid.* s. 317, and the Bankruptcy Act, 1914, s. 31.

Considered: *Re Fenton (No. 1), Ex parte Fenton Textile Association, Ltd.*, [1930] All E.R. Rep. 15. Distinguished: *Re A Debtor (No. 66 of 1955), Ex parte The Debtor v. The Trustee of the Property of Waite*, [1956] 2 All E.R. 94.

As to set-off by contributory, see 6 HALSBURY'S LAWS (3rd Edn.) 648; as to set-off by debtors of company in winding-up, see *ibid.* 661, 747; as to set-off in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 480; and for cases see 4 DIGEST (Repl.) 445 et seq. For the Companies Act, 1948, ss. 259, 317, see 3 HALSBURY'S STATUTES (2nd Edn.) 665, 698. For the Bankruptcy Act, 1914, s. 31, see 2 HALSBURY'S STATUTES (2nd Edn.) 365.

Cases referred to in argument :

Hawkins v. Whitten (1829), 10 B. & C. 217; 5 Man. & Ry. K.B. 219; 8 L.J.O.S.K.B. 135; 109 E.R. 431; 4 Digest (Repl.) 447, 3932.

Marsh v. Chambers (1745), 2 Stra. 1234.

Dickson v. Evans (1794), 6 Term Rep. 57; 101 E.R. 433; 4 Digest (Repl.) 447, 3928.

Ex parte Hale (1797), 3 Ves. 304; 30 E.R. 1024; 4 Digest (Repl.) 316, 2861.

Ex parte Stephens (1805), 11 Ves. 24; 32 E.R. 996, L.C.; 4 Digest (Repl.) 424, 3762.

Re Hearn, Ex parte Blagden (1815), 19 Ves. 465; 2 Rose, 249; 34 E.R. 589, L.C.; 4 Digest (Repl.) 427, 3793.

Appeal by Mr. Osman Barrett from a decision of Mr. Commissioner GOULBURN holding that he was not entitled to set off, against a call made by the official liquidator as liquidator of the Moseley Green Coal & Coke Co. Ltd., a claim against the company upon a promissory note of the company.

On an earlier occasion, Mr. Commissioner GOULBURN ordered the name of Mr. Barrett to be placed on the list of contributories of the company in respect of 250 shares, and the Lord Chancellor affirmed this order (4 De G. J. & Sm. 416). Immediately afterwards notice was given by the official liquidator of his intention to apply to the commissioner for a balance order for the sum of £1,000, being the amount of a call of £5 a share upon the 250 shares, after giving Mr. Barrett credit for £250, which had been paid when the 250 shares were taken. Mr. Barrett sought to discharge his liability for this amount by reason of his claim to a set-off in respect of a promissory note of the company for £7,000, given under the following circumstances: Mr. Corbett was the original proprietor of certain coal-mines. On Jan. 31, 1861, he entered into an agreement with the company to sell the mines to them for £30,000, to be paid for by 3,600 paid-up shares of the company of £5 each, and £12,000 in cash. The company failed to carry out the terms of that arrangement, and on Mar. 6, 1862, a new agreement was come to between Mr. Corbett and the company, whereby the amount of the purchase-money was reduced to the sum of £4,425, of which £250 had been already paid. The mines were further subject to a mortgage by Mr. Corbett to Mr. John Wheeley Lea for £7,000. The amount, therefore, to be paid by the company under this latter arrangement was £4,175, besides the £7,000 debt due from Mr. Corbett to Mr. Lea. The latter arrangement was embodied in a deed dated Mar. 6, 1862, which was executed by all parties. By the terms of that deed the company were to pay off the mortgage-debt of £7,000 to Mr. Lea, on May 7, 1862.

Mr. Barrett, jointly with Mr. Bennett, were sureties to Mr. Lea on Mr. Corbett's behalf for payment of that mortgage-money, they having given to Mr. Lea their joint and several promissory note for the amount. The mortgage was not paid at the time specified, and the company applied to Mr. Lea for an extension of time for payment. Mr. Barrett and Mr. Bennett, being sureties for the amount, were also applied to for a similar consent, as their liability

would have been discharged if Mr. Lea had consented to give time without such consent. Mr. Barrett consented, as also did Mr. Lea, and the company were to give their promissory note for the amount at six months. Accordingly a promissory note, dated Sept. 5, 1862, and framed in conformity with the company's articles of association (having been drawn by two of the directors, countersigned by the secretary and sealed with the company's seal), was handed to Mr. Lea; the consideration for the note as between the company and Mr. Lea and Mr. Barrett being the giving time to the company for payment of the mortgage-debt of £7,000. In October, 1862, an order for winding-up the company was made, and the note falling due in the March following was dishonoured. Mr. Bennett, who was co-surety with Mr. Barrett for the amount, had died in the meantime, leaving Mr. Barrett his executor. Mr. Lea required payment of his mortgage money, and Mr. Barrett prevailed on his sister Miss Louisa Barrett to pay off Mr. Lea's mortgage-debt, and take a transfer of his securities. On Feb. 23, 1863, when the transfer was made, the note was assigned to Miss Barrett along with the other securities, and was endorsed by Mr. Lea to her; Mr. Barrett being still liable as surety for payment of the amount to the transferee. When the judgment of LORD WESTBURY, L.C., was given against Mr. Barrett on the question of his liability as a contributory, it was considered that if Mr. Barrett obtained a transfer from his sister of the mortgage securities, including the note, he would be entitled to set off the amount of that note pro tanto against the liability of the balance due on the call in respect of the shares, and, accordingly, on June 13, 1864, he entered into an agreement with his sister for the transfer to him of the mortgage securities, including the promissory note, which was then endorsed by Miss Barrett to her brother. The learned commissioner (GOULBURN), on July 13, 1864, refused to allow the set-off; and made an order on Mr. Barrett to pay £1,000, being the balance of £1,250, after deducting the £250. The ground of his Honour's decision was, that Mr. Barrett's claim in respect of the £7,000 was not an "independent contract or dealing with the company" within the meaning of s. 17 of the Joint Stock Companies Amendment Act, 1858. Mr. Barrett appealed.

By the Joint Stock Companies Amendment Act, 1858, s. 17 :

"In fixing the amount payable by any contributory, in pursuance of the Joint Stock Companies Acts or any of them, he shall be debited with the amount of all debts due from him to the company, including the amount of the call, and shall be credited with all sums due to him from the company on any independent contract or dealing between him and the company, and the balance, after making such debit and credit as aforesaid, shall be deemed to be the sum due."

Cole, Q.C., and *Swanston* for Mr. Barrett.

Willcock, Q.C., and *Roxburgh* for the official liquidator.

LORD WESTBURY, L.C.—It appears that this company entered into a contract for the purchase of certain mines. There is no doubt that such a contract was within the compass of the powers given to the directors. Upon these mines there was a mortgage of £7,000 due to Mr. Lea. In respect of some anterior transaction Barrett had become a surety to Lea for the due repayment of the sum of £7,000. The company, in respect of that contract, by a deed between them and the vendor, who was the mortgagor of Lea, contracted that they would pay off. They did not perform that contract, and it is plain that, in consequence of their non-compliance with that engagement, they gave Mr. Lea, in September, 1862, their promissory note for £7,000, being the amount due to him, and part also of the unpaid purchase-money for the mine. I am of opinion that the directors had a right to give that promissory note to Mr. Lea. At the time of the winding-up order, Mr. Lea held that note; and there

is no doubt that he was a bona fide holder of the note. Subsequently to the winding-up order, first of all, Miss Barrett pays off Mr. Lea, and takes from him a transfer of his mortgage, and at the same time the promissory note is endorsed and delivered over to her. Then there is an agreement between her and her brother, which is bona fide, and not impeached, by which Miss Barrett agrees to transfer to her brother and hand over to him the promissory note, taking from him his own promissory note by way of consideration.

The question is: Was that a transaction then first created and made; or was the brother, in respect of the anterior debt of £7,000, entitled, by paying off Lea's mortgage, to claim the benefit of the possession of Lea's securities? I am at present disposed to attribute the payment made to the assignee of the mortgagee by the brother, to that liability which he had originally contracted prior to the winding-up order. Then the question comes to this: if an individual be surety for a creditor of a company anterior to a winding-up order, and afterwards, in respect of that suretyship, pays the debt, and becomes entitled to the benefit of the securities, among which is a promissory note, is he or is he not, in respect of the ownership of that promissory note, entitled to set it off against any claim which the company may have against him? I think he must be held to be precisely in the same state in which the creditor stood at the time when the note was made; and if I remit him back to the right which his principal had, then I refer his right to set-off to the state of things which existed at the time of the winding-up order; and not to a state of things which has arisen in consequence of any contract or proceeding which has taken place subsequently to the winding-up order.

I wish it, however, to be considered that what I have said is merely for the purpose of explaining the manner in which I regard it, in order that counsel may see the point on which my proposed decision may turn, and to give them an opportunity of investigating the authorities on the subject.

The matter being ordered to stand for a week.

Nov. 23, 1864. **LORD WESTBURY, L.C.**—Counsel for the official liquidator is not in a condition to contend that if Mr. Barrett had been a holder of the company's promissory note at the time of the winding-up order he would not have been entitled to a set-off. Then comes the mischievous thing, in winding-up as in bankruptcy, of permitting a debtor to purchase up counter claims subsequently to the winding-up order for the purpose of making a case of set-off; and then, whether there is not an exception in the case when there is an actual ownership of a counter claim, which, though arising subsequently to the winding-up order or the bankruptcy, yet is a consequence of some anterior matter. Then comes the material question in the present case: Does the contract of suretyship, incurred as it was by Barrett anterior to the winding-up order, with its attendant rights, give such retroactive force to Barrett's possession and ownership of the note as to enable him to refer it back to that contract or relation, before the winding-up order was made? My present impression is that it will; that he is a bona fide possessor of the note, and, therefore, that he has a right to a set-off.

Mar. 22, 1865. **THE LORD CHANCELLOR** this day intimated that the opinion which he had before stated was that to which he wished to adhere; and the following order was made:

Discharge the commissioner's order, and declare that Mr. Barrett is entitled to set off against the £1,000 mentioned in such order an equal amount of the £1,000 due on the company's promissory note for £7,000; and that to the extent of the sum so set-off, the mortgage is to be deemed satisfied. The deposit to be returned, and the costs of both parties of the appeal and before the commissioner to come out of the estate.

AUSTIN v. GREAT WESTERN RAIL. CO.

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn, Shee and Lush, JJ.), April 18, 1867]

[Reported L.R. 2 Q.B. 442; 8 B. & S. 327; 36 L.J.Q.B. 201;
16 L.T. 320; 31 J.P. 533; 15 W.R. 863]

Carriage of Passengers—Railway—Negligence—Liability to child for whom no fare paid—Railway Regulation Act, 1844 (7 & 8 Vict., c. 85), s. 6.

The plaintiff, a child between three and four years old, and his mother were passengers on one of the defendants' railway trains. The plaintiff's mother took a ticket for herself but paid nothing for the plaintiff. The plaintiff was injured during the course of the journey. By the Railway Regulation Act, 1844, s. 6, the defendants were bound to carry children under three years old on that train without charge, but for children between three and twelve years old they were entitled to charge half the adult fare. The jury negatived fraud on the part of the plaintiff's mother, and found for the plaintiff.

Held: the contract being to carry both the plaintiff and his mother, the defendants were liable to the plaintiff.

Notes. The Railway Regulation Act, 1844, s. 6, has been repealed. See now the British Transport Commission (Passenger) Charges Scheme, 1959. The British Transport Commission (Passenger) Charges Scheme, 1959, ceased to have effect by s. 43 of the Transport Act, 1962, but it continues in force by virtue of s. 44 as amended by various Orders: see the notes to s. 43 and s. 44 of the Act in 42 HALSBURY'S STATUTES (2nd Edn.) pp. 605, 606. By the Nationalised Transport (London Fares) Order 1962, S.I. 1962 No. 1880, the Scheme was further amended and re-named "The London Fares Scheme 1962"; see the notes to ss. 43 and 44 of the Transport Act, 1962, *ibid.*; see also s. 43 (7) of the 1962 Act and the note to that sub-section *ibid.* at p. 606, which states that the British Transport Commission in practice reimburses or indemnifies anyone injured while travelling on a free pass or privilege ticket.

Considered: *Foulkes v. Metropolitan District Rail. Co.* (1880), 5 C.P.D. 157. Referred to: *Taylor v. Manchester, Sheffield and Lincolnshire Rail. Co.*, [1891-4] All E.R. Rep. 857; *Meux v. Great Eastern Rail. Co.* (1895), 14 R. 620; *East Indian Rail. Co. v. Kalidas Mukerjee* (1901), 84 L.T. 210; *Harris v. Perry*, [1903] 2 K.B. 219; *Lyles v. Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; *Shrimpton v. Hertfordshire County Council* (1910), 74 J.P. 305; *Pratt v. Patrick*, [1923] All E.R. Rep. 512; *Halliwell v. Venables*, [1930] All E.R. Rep. 284.

As to the degree of care necessary by carriers of passengers, see 4 HALSBURY'S LAWS (3rd Edn.) 174 *et seq.*; and for cases see 8 DIGEST (Repl.) 103 *et seq.*

Case referred to:

- (1) *Marshall v. York, Newcastle and Berwick Rail. Co.* (1851), 11 C.B. 655; 21 L.J.C.P. 34; 18 L.T.O.S. 94; 16 Jur. 124; 138 E.R. 632; 8 Digest (Repl.) 132, 849.

Also referred to in argument:

- Waite v. North Eastern Rail. Co.* (1858), E.B. & E. 719; 27 L.J.Q.B. 417; 4 Jur.N.S. 1300; affirmed (1859), E.B. & E. 728; 28 L.J.Q.B. 258; 32 L.T.O.S. 334; 5 Jur.N.S. 936; 7 W.R. 311; 120 E.R. 682, Ex. Ch.; 8 Digest (Repl.) 97, 641.

- Cahill v. London and North Western Rail. Co.* (1861), 10 C.B.N.S. 154; 30 L.J.C.P. 289; 4 L.T. 246; 7 Jur.N.S. 1164; 9 W.R. 653; 142 E.R. 409; affirmed (1862), 13 C.B.N.S. 818; 31 L.J.C.P. 271; 8 Jur.N.S. 1063; 10 W.R. 391; 143 E.R. 322, Ex. Ch.; 8 Digest (Repl.) 137, 888.

- Great Northern Rail. Co. v. Shepherd* (1852), 8 Exch. 30; 7 Ry. & Can. Cas. 310; 21 L.J.Ex. 286; 155 E.R. 1246; sub nom. *Shepherd v. Great Northern Rail. Co.*, 19 L.T.O.S. 324; 8 Digest (Repl.) 128, 821.
- Lygo v. Newbold* (1854), 9 Exch. 302; 2 C.L.R. 449; 23 L.J.Ex. 102; 22 L.T.O.S. 226; 2 W.R. 158; 156 E.R. 130; 36 Digest (Repl.) 70, 376.
- Great Northern Rail. Co. v. Harrison* (1854), 10 Exch. 376; 23 L.J.Ex. 308; 23 L.T.O.S. 247; 18 Jur. 792; 2 W.R. 626; 2 C.L.R. 1136; 156 E.R. 489, Ex. Ch.; 8 Digest (Repl.) 103, 675.

Action by the plaintiff, an infant between three and four years old, to recover damages for injuries sustained by reason of negligence on the part of the defendants in carrying him on their railway as a passenger. The defendants pleaded a special plea to the effect that the plaintiff was an infant above the age of three years, incapable of taking care of himself, and was under the care of his mother, who fraudulently and falsely represented that he was under the age of three years, and that nothing was paid to the defendants for the carrying of the plaintiff.

At the trial before PIGOTT, B., at the Monmouth Spring Assizes, the following facts were proved. The plaintiff, a child aged three years and two months old, and his mother were passengers by one of the defendants' "parliamentary" trains, and the mother took a ticket for herself, but paid nothing for the plaintiff. At the time the mother took her ticket, the defendants did not ask her about the plaintiff's age, nor did they tell her that she ought to take a ticket at half price for the plaintiff. The defendants admitted that the accident which happened to the plaintiff during the journey was due to their servants' negligence. Under these circumstances, the defendants contended that they were not liable, claiming immunity under the Railway Regulation Act, 1844, s. 6, which enacts that

"children under three years of age, accompanying passengers by such [parliamentary] train, shall be taken without any charge; and children of three years and upwards, but under twelve years of age, at half the charge for an adult passenger."

The jury negatived fraud on the part of the mother, and found a verdict for the plaintiff for £50, leave being reserved to the defendants to move to enter a verdict for them.

Huddleston, Q.C. (A. S. Hill with him) moved accordingly.

SIR ALEXANDER COCKBURN, C.J.—I am of opinion that there should be no rule. The contract was to carry both the mother and plaintiff child; it was entered into by the mother on behalf of herself and the child, and, if the law gives the defendants any remedy against the mother for making any misrepresentation, whether fraudulent or innocent, they may avail themselves of it. But this does not, under the circumstances, affect the right of the plaintiff to recover for damages sustained by reason of the negligence of the defendants.

BLACKBURN, J.—I am also of opinion that the plaintiff is entitled to recover, and it seems to me that the question is concluded by the decision in *Marshall v. York, Newcastle and Berwick Rail. Co.* (1). There, the plaintiff was held entitled to recover, not because there was a contract between himself and the company, but by reason of a duty cast on the company, irrespective of the contract. We must take it, therefore, that, in the present case, the plaintiff is not to be prejudiced by what the jury have found to be an honest mistake on the part of his mother, and I think that, under the circumstances, a duty was cast on the defendants to use reasonable and proper care in carrying the plaintiff. Suppose, instead of being injured only, the plaintiff had been killed in consequence of gross

A negligence on the part of the engine driver, can it be contended that the latter would not have been indictable for manslaughter? I see, therefore, no reason for disturbing the verdict.

B **SHEE, J.**—I am also of opinion that the plaintiff was entitled to recover, There was one entire contract on the part of the defendants to carry both the mother and the child; the contract was necessarily made with the mother only, and the plaintiff is not to be prejudiced by any innocent misrepresentation or suppression of fact on her part.

C **LUSH, J.**—I also prefer to rest my decision on the ground that the contract was to carry both the mother and child. Whatever remedy, if any, the defendants may have against the mother under the circumstances, there is nothing to affect the plaintiff's right to recover.

Rule refused.

D

BRINSMEAD v. HARRISON AND ANOTHER

E [COURT OF COMMON PLEAS (Willes and Montague Smith, JJ.), June 22, 23, 1871]

[Reported L.R. 6 C.P. 584; 40 L.J.C.P. 281; 24 L.T. 798;
19 W.R. 956]

*Conversion—Wrongful detention of plaintiff's goods by two defendants jointly—
Judgment obtained by plaintiff against one defendant—Judgment unsatisfied
—Rights of plaintiff against other defendant.*

F T. and H. jointly wrongfully detained the plaintiff's goods. The plaintiff obtained judgment against T., which was unsatisfied. The plaintiff then brought the present action against H. The court having held that the plaintiff, by obtaining judgment against T., was barred from suing H. in respect of the same wrongful detention, the question arose whether the plaintiff could sue H. in
G respect of the wrongful detention of the goods since the date of the judgment against T.

Held: a judgment in trover without satisfaction did not vest the property in the defendant; it was merely an assessment of the value of the goods which the defendant might pay and thereby make the property his own; accordingly, while the judgment was unsatisfied the plaintiff remained the owner of the goods and could sue in respect of wrongful acts other than that for which the previous
H judgment was obtained.

Notes. Two distinct points arose in this case. The first was whether a judgment against one joint tortfeasor barred an action against the others for the same wrong, even though the judgment remained unsatisfied. The court of Common Pleas
I (WILLES, J., and SMITH, J.) held that the subsequent action was barred: see L.R. 6 C.P. 584; and the decision on this point was affirmed by the Court of Exchequer Chamber (KELLY, C.B., BLACKBURN, MELLOR and LUSH, JJ., reported L.R. 7 C.P. 547), but it has subsequently been abrogated by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1), which provides (inter alia) that "where damage is suffered by any person as a result of a tort (whether a crime or not), judgment recovered against any tortfeasor in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage." The decision of the court on this point

is, therefore, not reported here. The second point which arose was whether the obtaining of an unsatisfied judgment in trover vested the property in the defendants, so as to prevent the plaintiff bringing another action in respect of the detention of the property subsequent to the judgment obtained in the first action. The Court of Common Pleas here held as a matter of law that it did not; but the plaintiff at the trial subsequently failed to establish the facts on this point, and it did not, therefore, arise on the appeal to the Court of Exchequer Chamber.

Applied: *Re Ware, Ex parte Drake* (1877), 5 Ch.D. 866. Distinguished: *Bradley and Cohn v. Ramsay* (1912), 106 L.T. 771. Applied: *Re A. Gunsbourg & Co., Ltd., Ex parte Cook*, [1920] All E.R. Rep. 492. Considered: *Ellis v. John Stenning & Son*, [1932] All E.R. Rep. 597; *Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162. Applied: *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496. Referred to: *South Bedfordshire Electrical Finance v. Bryant*, [1938] 3 All E.R. 580; *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583; *George Wimpey & Co. v. B.O.A.C.*, [1954] 3 All E.R. 661.

As to conversion generally, see 38 HALSBURY'S LAWS (3rd Edn.) 775-776; as to successive conversions, see *ibid.* 797; as to transfer of property by a satisfied judgment, see *ibid.* 802; and for cases see 43 DIGEST 530-531. For the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, see 25 HALSBURY'S STATUTES (2nd Edn.) 359.

Cases referred to:

- (1) *King v. Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest (Repl.) 293, 591.
- (2) *Buckland v. Johnson* (1854), 15 C.B. 145; 2 C.L.R. 784; 23 L.J.C.P. 204; 23 L.T.O.S. 190; 18 Jur. 775; 2 W.R. 565; 139 E.R. 375; 43 Digest 531, 667.
- (3) *Adams v. Broughton* (1737), 2 Stra. 1078; Andr. 18; 93 E.R. 1043; 21 Digest (Repl.) 301, 640.
- (4) *Anon.* (1505), Jenk. 189; 145 E.R. 126; 43 Digest 530, 661.
- (5) *Cooper v. Shepherd* (1846), 3 C.B. 266; 4 Dow. & L. 218; 15 L.J.C.P. 237; 7 L.T.O.S. 282; 10 Jur. 758; 136 E.R. 107; 43 Digest 530, 666.
- (6) *Barnett v. Brandao* (1843), 6 Man. & G. 630; on appeal sub nom. *Brandao v. Barnett* (1846), 12 Cl. & Fin. 787; 3 C.B. 519; 8 E.R. 1622, H.L.; 43 Digest 516, 536.
- (7) *Morris v. Robinson* (1824), 3 B. & C. 196; 5 Dow. & Ry.K.B. 34; 107 E.R. 706; 43 Digest 536, 708.
- (8) *Holmes v. Wilson* (1839), 10 Ad. & El. 503; 113 E.R. 190; 43 Digest 374, 26.

Action in which the plaintiff, Brinsmead, claimed against the defendants, Harrison and another, the return of his pianoforte or its value, and £10 for its detention.

In the fourth plea the defendants alleged that the detention in the declaration mentioned was committed by them under the direction of and jointly with one Ann Mouatt Thompson, and not otherwise, and that the plaintiff theretofore, in this court, sued the said Ann Mouatt Thompson for that the plaintiff delivered to the said Ann Mouatt Thompson the goods in the declaration mentioned to be re-delivered to the plaintiff upon demand, and after the said bailment, and while she held the same, she disabled herself from re-delivering the same to the plaintiff by parting with the possession of the said goods to one Mr. Newton, and also by selling the same to the purchaser thereof to hold to him as his absolute property; and also for that the said Ann Mouatt Thompson converted to her own use and wrongfully deprived the plaintiff of the use and possession of the said goods, and plaintiff claimed damages in respect thereof; and such proceedings were thereupon had in that action that the plaintiff afterwards, by the judgment of the said court, recovered against the said Ann Mouatt Thompson £41 10s. damages and his costs of suit in that behalf, and that the said judgment still

A remained in force; and there never was any detention of the said goods other than what was done jointly with the said Ann Mouatt Thompson, for which damages were recovered as aforesaid. It was stated in the margin of this plea that the judgment mentioned was signed on June 19, 1870; and the number of the roll was given.

B To the plea the plaintiff replied that the alleged judgment against the said Ann Mouatt Thompson was, at the commencement of this suit, and still remained wholly unsatisfied, and the plaintiff had always been, and still was, wholly unable to obtain satisfaction of the same. The plaintiff also new-assigned that he sued not only for the detention of the said pianoforte therein admitted, but also for the detention thereof upon other and subsequent occasions—to wit, after the alleged recovery, and until the commencement of this suit, and until now.

C These replications were demurred to on the ground that whether the judgment was satisfied or not was immaterial; that the justification pleaded showed that the property was changed by the matters pleaded; and that the plaintiff could have no cause of action in respect of any detention subsequent to the judgment. The judgment is only reported on the latter point.

D *Powell, Q.C.* (with him *Joyce*) for the defendants.
L. Kelly for the plaintiff.

Cur. adv. vult.

June 23, 1871. **WILLES, J.**, read the following judgment of the court.—We decided yesterday on the authority of *King v. Hoare* (1), that final judgment **E** against one of two wrongdoers was a bar to an action against the other for the same wrong. There remains an entirely different question for our consideration which arises upon the new-assignment, that is, whether final judgment in trover without satisfaction changes the property so as to vest it in the defendant, or whether the judgment is merely an assessment by the court of the value of the goods, upon the payment of which the property is transferred. Obviously this **F** is a different question from that which we have already disposed of, and we are of opinion that no such change in the property is produced by the mere judgment. It is not a proceeding in rem; it may be a proceeding *prima facie* to recover the value of the goods, but it is not so altogether; for if the goods be returned the damages would be greatly reduced. It would be an absurdity to say that this **G** vested the property in the defendant against the whole world. The only reasonable conclusion, as it seems to me, is to treat the judgment as an assessment of the value of goods, which the defendant may pay and thereby make the property his own. By any other construction we should be taking away, in the case of an insolvent defendant, the plaintiff's right to recover his goods by the only remedy which he has against the persons who have wronged him.

H There have been differences of opinion on this point. The authority mainly relied on by counsel for the defendants was the dictum of *JERVIS, C.J.*, in *Buckland v. Johnson* (2) cited in the argument of that case, in which that learned judge cited *Adams v. Broughton* (3), which he said (15 C.B. at p. 157),

I “seems to be a very distinct authority to show that the property is changed by the recovery in the former action. There the plaintiff had brought trover against one Mason, wherein he obtained judgment by default, and afterwards had final judgment, whereupon a writ of error was brought. He then brought another action of trover against Broughton for the same goods for which the first action was brought against Mason. Strange moved on an affidavit that the goods converted amounted to more than £10, and that the defendant might be held to special bail, and he urged, in answer to an objection made by *PAGE, J.*, that by a judgment obtained by the plaintiff in trover the goods are become the defendant's; that a special property only is thereby vested in him; and in the present case it is evidence only of

a property as between the plaintiff and Mason, but not as between the present parties. But the court said: 'The property of the goods is entirely altered by the judgment obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had, and this against all the world.' And, therefore, the motion was denied."

That case, to my mind, is far from satisfactory; it was an application for special bail, and it was unnecessary there, to go so far as to say that there was a change of property; it was sufficient if it merged the remedy.

The same may be said of the dictum of JERVIS, C.J., in *Buckland v. Johnson* (2). That was an action upon money counts and for trover, and there was a plea to the count for money had and received,

"that the said money was received for and as and being the proceeds of the sale of the goods in the last count thereafter mentioned; that after the accruing of the causes of action in the count mentioned the plaintiff sued A. for money had and received, and in trover, and recovered a judgment against him for £100 and costs; and that the causes of action, in respect of which the plaintiff so recovered that judgment against A., included all the causes of action to which this plea is pleaded."

That plea was held to afford a complete answer to the claim of the plaintiff in the action; but it was wholly unnecessary to decide as suggested by JERVIS, C.J., that by the judgment in the action of trover the property in the goods was changed by relation from the time of the conversion. That should be taken as a mere dictum, and it is only stated in the headnote as a semblance.

On the other hand there is a series of authorities for saying that recovery without satisfaction is no answer to an action of this kind. It was laid down in *Anon.* (4) (Jenk. at p. 189):

"A. in trespass against B. for taking a horse recovers damages; by this recovery and execution done thereon, the property of the horse is vested in B. *Solutio pretii emptionis loco habetur.*"

That case was acted upon in *Cooper v. Shepherd* (5); and it agrees with the note of the editors to *Barnet v. Brandao* (6) (6 Man. & G. at p. 640). To the same effect is the law laid down by HOLROYD, J., in *Morris v. Robinson* (7) (3 B. & C. at p. 206); and the same is to be found in 2 WMS. SAUNDERS (47 C. c., note (z)). All these cases are cited by the learned reporters in a note to *Holmes v. Wilson* (8) (10 Ad. & El. at p. 511). They say:

"By a recovery in trespass for taking, or trover for converting personal chattels, followed by satisfaction, the property is altered, and vests in the defendant; for *solutio pretii emptionis loco habetur*. . . . But it is otherwise where the damages were not estimated on the footing of the full value; and this it seems may be shown in a replication to the plea of the former recovery."

Our judgment, therefore, will be for the plaintiff on the point which we took time to consider, viz., whether the plaintiff can recover in this action for the detention subsequent to the judgment obtained against Mrs. Thompson. With reference to the future trial, it must be recollected that the defendants will not be liable except for wrongful acts, other than that for which the previous judgment was obtained.

Order accordingly.

A

Re CATHCART. Ex parte CAMPBELL

[COURT OF APPEAL IN CHANCERY (James, L.J.), July 9, 1870]

[Reported 5 Ch. App. 703; 23 L.T. 289; 18 W.R. 1056]

B

Solicitor—Professional privilege—Evidence by solicitor—Disclosure of client's address.

A solicitor examined as a witness is not protected by professional privilege from disclosing his client's residence by the mere circumstance that it became known to him only in his character of solicitor. For him to be entitled to protection the client's residence must have been made known to him in professional confidence for the purpose of obtaining professional advice.

C

Bankruptcy—Evidence—Witness called to give information of estate or dealings of bankrupt—Question as to residence of other person likely to be able to give such information.

D

A witness summoned for examination as a person believed to be capable of giving information regarding the estate or dealings of a bankrupt may properly be asked the residence of some other person who is likely to be able to give such information.

Statute—Construction—Repetition in later statute of words in earlier statute construed by court—Presumption that legislature has designedly repeated words with meaning given them by court.

E

Where certain words in an Act of Parliament have received judicial interpretation and the legislature repeats those words in a subsequent Act it must be taken to have adopted that interpretation.

F

Notes. The Bankruptcy Acts, 1731 and 1861, have been repealed. Section 216 of the Act of 1861 has been replaced by s. 25 of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 352, 353).

Followed: *Craucour v. Salter* (1881), 18 Ch.D. 30. Approved: *Bursill v. Tanner* (1885), 16 Q.B.D. 1. Followed: *Re Arnott, Ex parte Chief Official Receiver* (1888), 60 L.T. 109. Applied: *Young v. Gentle*, [1915] 2 K.B. 661; *Colchester Brewing Co. v. Tendring (Essex) Licensing Justices*, [1916-17] All E.R. Rep. 836. Referred to: *Marshall (or Wilkinson) v. Wilkinson*, [1943] 2 All E.R. 175.

G

As to solicitor's privilege as a witness in an examination in bankruptcy see 2 HALSBURY'S LAWS (3rd Edn.) 408; and for cases see 5 DIGEST (Repl.) 666 et seq. As to confidentiality of communications between solicitor and client, and as to judicial interpretation of earlier statute in pari materia, see 36 HALSBURY'S LAWS (3rd Edn.) 51 and 403 respectively; and for cases see 42 DIGEST 667 et seq.

H

Cases referred to:

- (1) *Re Ehrenstrom, Ex parte Vogel* (1818), 2 B. & Ald. 219; 106 E.R. 347; 5 Digest (Repl.) 667, 5854.
- (2) *Ex parte Alexander* (1863), 1 De G.J. & Sm. 311.

I

Appeal by A. Campbell from an order made by Mr. Registrar SPRING RICE that he was bound to answer a question which had been put to him in the course of his examination as a witness.

Mr. R. A. E. Cathcart was adjudicated a bankrupt on Feb. 23, 1870, under the Bankruptcy Act, 1861. He was the son of Sir John Cathcart, and he was entitled in remainder, subject to the life estate of the father, to certain real estates which had been settled by the father. A. Campbell was a writer to the signet in Scotland, and was agent to Sir John Cathcart, and to the bankrupt. On Feb. 23, 1870, an order was made by the registrar, pursuant to the Bankruptcy Act, 1861, s. 216, for the examination in Edinburgh of J. Wilkie and

A. Campbell, as persons who were believed to be capable of giving information in regard to the estate and dealings of the bankrupt. In pursuance of this order Campbell attended to be examined before the sheriff substitute of the county of Edinburgh. In the course of his examination he was asked this question—"Where is Sir John Cathcart residing at present?" The witness objected to answer on the ground that Sir John Cathcart's residence was known to him only because he was his solicitor. The sheriff substitute decided that the witness must answer the question, but at the request of the witness he reported the matter to the Court of Bankruptcy. The registrar in bankruptcy was of the same opinion, and decided that Campbell must answer the question. From this decision Campbell appealed.

De Gex, Q.C., and G. W. Lawrance for Campbell.

T. E. Winslow and Finlay Knight for the creditors' assignee.

JAMES, L.J.—I am of opinion that the objection to answer must fail on both grounds. The first ground taken is, that the residence was only known to this gentleman because he is the solicitor, or rather the writer to the signet, or professional adviser, of Sir John Cathcart. That is not sufficient, according to my view of the law, to protect a solicitor from answering. What a solicitor is privileged from speaking of is that which is communicated to him sub sigillo confessionis, that is to say, some fact which the client communicates to the solicitor for the purpose of obtaining the solicitor's professional advice and assistance, the principle being that a man must be at full liberty to have proper professional aid in a matter in which he is likely to be thrown into litigation. But the solicitor may know the client's residence, and may know it even simply in connection with the professional business in which he has been acting for him, but that would not make it a privileged or confidential communication. He may know, because the client said, "I have got a lease to execute, you must send it me there and I will execute it," or because he may have received letters dated from such a place, telling him where he may send to see him on some day for the purpose of making a communication. All those are collateral facts which the solicitor knows without anything like professional confidence in any respect, and therefore the mere statement, "I know the residence, but only know it in my character as solicitor," as it may be here, because he may have had no other communication, does not amount, to my mind, to anything like sufficient to warrant the solicitor in refusing to answer so simple a question as where his client is residing. I stated in the course of the argument that if this gentleman's residence has been concealed, and if he is hiding for some reason or other, and the solicitor says: "I have only known it because he has communicated that fact to me, and not communicated it to the rest of the world; that he has communicated it to me as his solicitor for the purpose of being advised by me in the matter," that would make it a matter of professional confidence. It appears to me, therefore, that the ground taken that he is his solicitor is not sufficient.

The second ground is this. It is said it is not a question concerning the acts, estates, or dealings of the bankrupt. It is difficult to bring it within the words of the Act of Parliament. But substantially the same words were used in the Bankruptcy Act, 1731 (5 Geo. 2, c. 30), s. 16, and the Court of Queen's Bench in *Ex parte Vogel* (1) put a very salutary interpretation on them so that they were able to allow the question, and I am glad to follow them; because it would be idle to say that when you have to ask as to a bankrupt's concerns, and dealings, you are not allowed to ask the residence of the person who can give you the information. If A. B. was known to be present when a murder was committed, but cannot be found, but C. D. knows where A. B. is, of course a magistrate would not have the slightest hesitation in compelling C. D.

A to come before him and tell him where A. B. was. In this case it is—where is the father? It is not, as in *Ex parte Vogel* (1)—where was the wife? Of course it is very possible that the next step may be—tell me where the father is as I want to summon him? It is said that the result may be torturing the father by questions regarding the son's dealings and transactions, but the law does allow that torture to exist, and notwithstanding LORD WESTBURY'S disapprobation in *Ex parte Alexander* (2), which has been referred to, the law has remained the same—and the clause having been imported into the Bankruptcy Act, 1861. Notwithstanding that, since then it has been thrown into the crucible without any modification.

I must, therefore, assume that the legislature, notwithstanding that objection, has thought fit to maintain that power as far more likely to do good than to do harm; that is to prevent fraud, which is one of the great objects of the legislature, and it is considered better to press persons to appear as witnesses in a court of justice rather than to give the chance to fraudulent persons to escape the consequences of their frauds. That being the law, and the law having been confirmed by the legislature, I have nothing to do with those considerations so forcibly expressed by LORD WESTBURY, but simply to give effect to what I believe to be the true meaning and principle of the law. That true meaning and principle of the law is this, that where certain words in an Act of Parliament have received judicial construction by a court like the Court of Queen's Bench, and the legislature has repeated those words without any alteration, I conceive the legislature to have designedly repeated those words according to the meaning which a court of competent jurisdiction has given to them, and, therefore, I consider that the legislature in point of fact, having repeated those words in a subsequent Act of Parliament, has adopted the construction which the Court of Queen's Bench has put upon them. I am of opinion, therefore, that both grounds of objection must fail.

Appeal dismissed.

F

G

R. v. INHABITANTS OF BRIGHTON

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Wightman, Crompton and Blackburn, JJ.), June 5, 8, 26, 1861]

[Reported 1 B. & S. 447; 30 L.J.M.C. 197; 5 L.T. 56; 25 J.P. 630;
9 W.R. 831; 121 E.R. 782]

H

Marriage—Validity—Prohibited degrees—Relationship through illegitimacy.

A marriage within the prohibited degrees is unlawful and void, whether the relationship be legitimate or illegitimate.

A man married his deceased wife's niece whose mother was an illegitimate child of the deceased wife's mother.

I

Held: notwithstanding that the parties were only related by the natural ties of consanguinity, the marriage was within the prohibited degrees and void.

Notes. Section 2 of the Marriage Act, 1835, has been replaced by s. 1 of the Marriage Act, 1949 (28 HALSBURY'S STATUTES (2nd Edn.) 653), as amended by the Marriage (Enabling) Act, 1960 (*ibid.*, vol. 40, p. 393). By the latter Act a marriage between a man and the niece of his former wife is validated but the present case is reported on the general question of the effect of illegitimacy on the validity of a marriage.

Applied: *Re Phillips, Re Howard, Charter v. Ferguson*, [1919] 1 Ch. 128. A
 Referred to: *Re M.*, [1955] 2 All E.R. 911.

As to the rights and liabilities of a bastard, see 3 HALSBURY'S LAWS (3rd Edn.) 103 et seq.; and for cases see 3 DIGEST (Repl.) 426 et seq. As to marriage within the prohibited degrees, see 19 HALSBURY'S LAWS (3rd Edn.) 782 et seq.; and for cases see 27 DIGEST (Repl.) 44.

Cases referred to:

- (1) *Ellerton v. Gastrell* (1719), 1 Com. 318; 98 E.R. 1090; 27 Digest (Repl.) 42, 202.
- (2) *Haines v. Jeffreys* (1696), 1 Com. 2; Cóm. 356; 1 Ld. Raym. 68; 92 E.R. 928; sub nom. *Haines v. Jescott*, 5 Mod. Rep. 168; 27 Digest (Repl.) 44, 222.

Also referred to in argument:

R. v. Chadwick, R. v. St. Giles in the Fields (Inhabitants), St. Giles in the Fields v. St. Mary, Lambeth (1848), 11 Q.B. 173; Cripps' Church Cas. 34; 17 L.J.M.C. 33; 10 L.T.O.S. 155; 11 J.P. 839; 12 Jur. 174; 2 Cox, C.C. 381; 116 E.R. 441; 27 Digest (Repl.) 43, 210.

Case Stated by Middlesex Quarter Sessions confirming an order for removal of a pauper from the parish of New Brentford, Middlesex, to the parish of Brighton, Sussex.

Elizabeth Morgan, the pauper, was alleged to be settled in Brighton by reason of her marriage with John Morgan, whose settlement in Brighton was admitted, and who was dead at the date of the order of removal. The pauper's maiden name was Jones, and she was the legitimate daughter of Daniel Jones and Ann, his wife. The pauper's mother, Ann, was the illegitimate child of Elizabeth Bartlett. After her birth Elizabeth Bartlett married Thomas Haines, and had by him, among other legitimate children, a daughter named Mary, who was legally married, in 1835, to John Morgan, and died on Nov. 19, 1842. On Oct. 19, 1843, John Morgan was married to the pauper at Chepstow, in Monmouthshire. The question for the opinion of the court was whether the marriage celebrated between John Morgan and the pauper was valid.

Metcalfe and *Poland* for the respondents.

Denman and *H. Matthews* for the appellants.

Cur. adv. vult.

June 26, 1861. **SIR ALEXANDER COCKBURN, C.J.**, read the following judgment of the court.—In consequence of my unavoidable absence at the close of the argument, my learned brothers did not deliver judgment, wishing to have my concurrence in the judgment as one of the entire court, and not on account of any doubt they entertained as to the judgment that ought to be pronounced.

It is a case of settlement, and the question is whether the marriage with the niece of a deceased wife is a valid marriage, and I now state as the united opinion of the court, that the marriage is not lawful, and consequently that the settlement fails. In that we are guided by the express decision of the court in *Ellerton v. Gastrell* (1), where all the authorities are collected, and in which it appears, that upon the review of many cases, all ending in the same result, the court were of opinion that such a marriage was within the prohibited degrees. The Marriage Act, 1835, s. 2, makes marriages within the prohibited degrees not merely voidable, but void, and we must consider that Act as having been passed, with reference to the known and ascertained state of the law, as administered by the ecclesiastical courts of this country, sanctioned and confirmed by the decision of this court, in this instance, in the particular case to which I have referred. That being so, we entertain no doubt,

A that upon that authority and the Marriage Act, 1835, this marriage is void, and consequently that the settlement fails.

B Another point made is whether one of the parties, being illegitimate, the illegitimacy makes any difference with reference to the validity or the invalidity of the marriage. We disposed of that on the argument by stopping the counsel on the point, and I only advert to it now because in a newspaper report of this case, it was stated that the court had taken time to consider that part of the case. That was clearly an error, and contrary to what fell from the court, because I remember stating, somewhat emphatically perhaps, that I thought it would be a great public scandal if it was thought that this court entertained for a single moment the supposition that legal consanguinity was necessary, as well as natural consanguinity, to make such a marriage void. If, indeed, that C has not been too plain to admit of a moment's doubt, there is abundant authority for it in *Haines v. Jeffreys* (2), in which the court, with equal determination, repudiated the doctrine that illegitimacy could at all affect the question of the validity of a marriage within the prohibited degrees and held that it would be very mischievous if a bastard should not be accounted within D the prohibited degrees for by that rule a man might marry his own daughter.

Order of sessions quashed.

FORD AND OTHERS v. COTESWORTH AND ANOTHER

F [COURT OF EXCHEQUER CHAMBER (Kelly, C.B., Martin, Channell and Cleasby, BB., Keating, Montague Smith and Brett, JJ.), June 18, 1870]

[Reported L.R. 5 Q.B. 544; 10 B. & S. 991; 39 L.J.Q.B. 188;
23 L.T. 165; 18 W.R. 1169; 3 Mar. L.C. 468]

G *Shipping—Charterparty—Implied term—No express time provided for unloading—Cargo to be unloaded in the customary manner—Delay caused by vis major—Reasonable time for unloading implied—Implication of term requiring reasonable dispatch by parties.*

H Where a charterparty is silent as to the time to be occupied in the discharge of the cargo at the port of unloading a term is to be implied in the contract that the charterer and the shipowner shall each use reasonable dispatch in performing his part of that undertaking which by the custom of the port falls on him. Any loss by delay in discharging the cargo which is caused by some unforeseen occurrence over which the charterer has no control will not be the responsibility of the charterer.

I The defendants chartered the plaintiffs' ship to carry a cargo to Lima and there to deliver the cargo in the usual and customary manner. There was no stipulation as to the time within which the cargo was to be unloaded. The ship arrived at Callao, the port of Lima, and proceeded to unload her cargo in the manner usual there. On the rumoured approach of the Spanish fleet to bombard the town, the authorities prohibited the further landing of goods and the discharge of the cargo was suspended. The ship remained for seven days and was then ordered away so as to be out of danger of bombardment. On the return of the ship the remainder of the cargo was discharged. It was found by the jury that there had been no unreasonable delay in discharging the cargo either in the ordinary way or under the extraordinary state of affairs which existed at the port.

Held: the defendants were not liable for demurrage in respect of the seven days during which the discharge of the cargo was suspended by order of the authorities at Callao. A

Notes. The adjustment of rights and liabilities of parties to frustrated contracts, as respects discharge after July 1, 1943, is dealt with by the Law Reform (Frustrated Contracts) Act, 1943 (4 HALSBURY'S STATUTES (2nd Edn.) 662).

Followed: *Cunningham v. Dunn* (1878), 3 C.P.D. 443. Considered: *Nelson v. Dahl* (1879), 12 Ch.D. 568; *Postlethwaite v. Freeland* (1880), 5 App. Cas. 599; *Hick v. Raymond and Reid*, [1891-4] All E.R. Rep. 491; *Van Liewen v. Hollis Bros. & Co., Ltd.*, [1918-19] All E.R. Rep. 930; *Ralli v. Compania Naviera Sota y Aznar*, [1920] All E.R. Rep. 427. Distinguished: *Cantiere Navale Triestina v. Russian Soviet Naptha Export Agency*, [1925] All E.R. Rep. 530. Referred to: *Argos (Cargo Ex) Gaudet v. Brown, The Hewsons, Geipel v. Cornforth* (1873), L.R. 5 P.C. 134; *Theiss v. Byers* (1876), 24 W.R. 611; *Fowler v. Knoop* (1878), 47 L.J.Q.B. 473; *Wright v. New Zealand Shipping Co.* (1879), 4 Ex.D. 165; *Castlegate Steamship Co. v. Dempsey*, [1892] 1 Q.B. 854; *Lyle Shipping Co. v. Cardiff Corpn.*, [1900] 2 Q.B. 638; *Ardan Steamship Co. v. Weir*, [1905] A.C. 501; *Smith, Conev and Barrett v. Becker and Gray* (1915), 112 L.T. 914; *Foster's Agency v. Romaine* (1916), 32 T.L.R. 331; *Blackburn Bobbin Co. v. Allen* (1918), 87 L.J.K.B. 1085; *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Akt. and Hungarian General Creditbank*, [1939] 2 K.B. 678. B

As to time for performance of a charterparty, see 8 HALSBURY'S LAWS (3rd Edn.) 163 et seq.; and for cases see 12 DIGEST (Repl.) 438. C

Case referred to: D

(1) *Appleby v. Myers* (1867), ante p. 452; L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex. Ch.; 12 Digest (Repl.) 696, 5334. E

Also referred to in argument:

Randall v. Lynch (1809), 2 Camp. 352, N.P.; 22 Digest (Repl.) 499, 5517.

Paradine v. Jane (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236. F

Barker v. Hodgson (1814), 3 M. & S. 267; 105 E.R. 612; 12 Digest (Repl.) 439, 3347.

Barret v. Dutton (1815), 4 Camp. 333; 171 E.R. 106; 41 Digest 566, 3905.

Kearon v. Pearson (1861), 7 H. & N. 386; 31 L.J.Ex. 1; 10 W.R. 12; 158 E.R. 523; 41 Digest 452, 2839. G

Rodgers v. Forresters (1810), 2 Camp. 483; 170 E.R. 1226, N.P.; 41 Digest 548, 3753.

Burmester v. Hodgson (1810), 2 Camp. 488; 170 E.R. 1228, N.P.; 41 Digest 548, 3754.

Hill v. Idle (1815), 4 Camp. 327; 1 Stark. 111; 171 E.R. 104, N.P.; 41 Digest 549, 3769. H

Appeal by the plaintiffs from a decision of the Court of Queen's Bench (SIR ALEXANDER COCKBURN, C.J., BLACKBURN and LUSH, JJ.), reported L.R. 4 Q.B. 127, discharging a rule nisi to enter a verdict for the plaintiffs for £105 or such further sum as the court should direct, or for a new trial on the grounds (i) that the cargo was not discharged within a reasonable time, and (ii) that the verdict was against the weight of evidence in finding that there had been no delay beyond the ordinary usage of the port. I

The plaintiffs and the defendants agreed by charterparty that the plaintiffs' ship, the *Craigie Lea*, then in Liverpool, should immediately be made ready to receive the cargo and should be loaded according to the defendants' order and proceed with all convenient speed to Lima or Valparaiso, or as near as the ship could safely get, and there deliver the cargo in the usual and customary manner, agreeably to bills of lading, and so end the voyage. The

A ship was loaded by the defendants and by their orders proceeded to Callao, the port of Lima, and proceeded to discharge the cargo in the usual manner there but the authorities there prevented the further unloading through fear of a threatened bombardment by the Spanish fleet. After seven days, was then ordered away to be out of danger and on return of the ship the discharge of the cargo which had been suspended was completed. The plaintiffs claimed that the defendants' consignees did not or would not unload the ship with due or reasonable speed nor within reasonable time and that in consequence of the delay the plaintiffs had lost homeward freights and suffered loss etc. and claimed demurrage. The defendants pleaded denials.

B The jury at the trial found that there had been no unreasonable delay in discharging the cargo, whether the ordinary or extraordinary state of events which existed at the port was looked at; and a verdict was entered for the defendants. The plaintiffs appealed.

Field, Q.C. (with him *Philbrick*) for the plaintiffs.

Milward, Q.C. (with him *C. Russell*) for the defendants.

D **KELLY, C.B.**—I am of opinion that the judgment of the court below ought to be affirmed. It appears that the plaintiffs and the defendants entered into a charterparty which contained a clause that the plaintiffs' vessel should proceed from Liverpool to Lima or Valparaiso, or as near as she could safely get, and there deliver the cargo in the usual and customary manner, agreeably to bills of lading, and so end the voyage. The question which we are called
E upon to decide is, what is the meaning of such a contract.

Prima facie it is a positive undertaking to unload the cargo at the port of destination. But the undertaking is to unload the cargo in the usual and customary manner, that is, to do all that is usual and necessary in unloading the cargo according to the custom of the port of destination. The usual mode of delivering such a cargo at the port of Callao appears to be for the
F consignees to send launches or lighters to the vessel, and then for the ship-owner or master to convey, or to assist in conveying, the goods from their place of deposit in the vessel, and to place them over the ship's side into the lighters; and after the goods have been placed in these lighters, it is the consignee's duty to take them ashore to the Custom House. It appears that in consequence of an anticipated bombardment of Callao by the Spanish fleet,
G the authorities of the town made an order forbidding the landing of goods at the Custom House, and that in consequence of this order there was a delay on the part of the defendants or their consignees in sending lighters to the vessel. The action is brought for demurrage by reason of this delay on the part of the defendants.

H I am of opinion that we ought to treat the delivery of the cargo at the port of destination as one entire unbroken act in which both parties have to concur. The defendants have to procure lighters, and the plaintiffs have to assist in getting the cargo out of the ship, and in the present instance the plaintiffs have been as much prevented from fulfilling their duty as the defendants. It has been contended that it was possible for the defendants to have procured lighters, and that the cargo might have been left floating
I in them after having been taken out of the ship. But it is quite plain that the Peruvian government would have known that the goods had been taken from a vessel in port, and would not have allowed them to be unloaded. It was, therefore, the effect of the order by the foreign authorities to disable the defendants from performing their part of the contract, and although it was not sufficient to prevent the plaintiffs from going through the form of lifting the cargo out of the ship, yet I think that the whole process of landing it was prevented by a cause over which the defendants had no control, and consequently that this action is not maintainable.

MARTIN, B.—I am of the same opinion. The authorities on the subject are collected in MAUDE AND POLLOCK ON SHIPPING (2nd Edn.), p. 266, where it is said that, A

“if the parties enter into a positive contract that the goods shall be taken out of the ship within a certain number of days from her arrival the contract must be construed strictly, and demurrage becomes payable for any delay beyond the period fixed upon, which is not owing to the default of the shipowner, even although it may be caused by an accident or impediment over which the freighter has no control, as for instance, by the necessity for the removal of superincumbent goods, by the crowded state of the docks, or by custom house or government restraints or regulations; and this has been held to be so, even although no notice of the ship's arrival has been given to the consignees or to the indorsees of the bill of lading, for although this rule may appear to operate hardly as against the consignees, they might have protected themselves by express stipulation.” B C

I have no doubt that this is the true principle where the merchant has entered into a positive undertaking to load or to discharge a cargo; and in such a case the liability of the merchant is created by his own act. But here the question is, what is the implied contract in the absence of any express stipulation; and I am not aware that there is any authority for imposing on the defendants a liability so utterly unreasonable as that which is suggested. In *Appleby v. Myers* (1) where a contract to erect machinery upon the defendant's premises was interrupted by a fire, the court held that it was a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither. D E

In the present case I think that the contract of the merchant must be read as if it were a contract to unload the cargo according to the custom of the port. In accordance with this custom, the ship was anchored at a little distance from the town, but, in consequence of a threatened bombardment of the port, the goods could not, during seven days, be landed at the Custom House. But it is said that the merchant might have received them in lighters and allowed them to float about during all this time. Such a proposition is absurd. The performance of the contract was prevented by a vis major, and the defendants were exonerated from their liability. F G

For my own part I do not see why the clause as to restraints of princes and rulers should not apply to a case like the present. But it is unnecessary to give any decision on this point. H

CHANNELL and **CLEASBY, BB., KEATING, MONTAGUE SMITH** and **BRETT, JJ.**, concurred.

Appeal dismissed.

A

BIDDLE v. BOND

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn and Mellor, JJ.), January 23, February 25, 1865]

B

[Reported 6 B. & S. 225; 5 New Rep. 485; 34 L.J.Q.B. 137;
12 L.T. 178; 29 J.P. 565; 11 Jur.N.S. 425; 13 W.R. 561;
122 E.R. 1179]

Auctioneer—Sale of goods—Duty to account for proceeds of sale—Claim of third party set up in action for account.

C

Bailee—Estoppel of bailee—Right to set up claim of third party against bailor's demand for re-delivery—Bailment determined by equivalent to eviction by title paramount.

Where bailment is determined by what is equivalent to an eviction by title paramount, the bailee is not estopped from denying the title of the bailor and may set up the claim of a third person in an action by the bailor.

D

The plaintiff distrained on the goods of R. for rent and sent them to the defendant, an auctioneer, for sale by auction. Just before the sale began R. served a notice on the defendant alleging that the distress was illegal and requiring the defendant not to sell. The defendant, who had no time to make inquiry, sold the goods, but refused to pay the proceeds to the plaintiff and set up R.'s title in an action by the plaintiff.

E

Held: the defendant was entitled to dispute the plaintiff's title and defend the action on the right and title of R. and by his authority.

Notes. Applied: *Leese v. Martin* (1873), L.R. 17 Eq. 224. Explained and Distinguished: *Kingsman v. Kingsman* (1880), 6 Q.B.D. 122; *Re Sadler, Ex parte Davies* (1881), 19 Ch.D. 86. Explained and Applied: *Rogers v. Lambert* (1890), 24 Q.B.D. 573. Explained: *Henderson v. Williams*, [1895] 1 Q.B. 521. Distinguished: *Blaustein v. Maltz, Mitchell & Co.*, [1937] 1 All E.R. 497. Referred to: *Ross v. Edwards* (1895), 73 L.T. 100; *Karflex, Ltd. v. Poole*, [1933] All E.R. Rep. 46; *Re Samuel* (No. 2), [1945] Ch. 408; *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1949] 1 All E.R. 946; *Remnant v. Savoy Estate, Ltd.*, [1949] 2 All E.R. 286; *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621; *Rahimtoola v. H.E.H. The Nizam of Hyderabad*, [1957] 3 All E.R. 441.

F

G

As to the duties of auctioneer in respect of the goods, see 2 HALSBURY'S LAWS (3rd Edn.) 83 et seq., and for cases see 3 DIGEST (Repl.) 32 et seq. As to estoppel of bailee, see 2 HALSBURY'S LAWS (3rd Edn.) 138 et seq., and for cases see 3 DIGEST (Repl.) 106 et seq.

H

Cases referred to:

- (1) *Cheesman v. Exall* (1851), 6 Exch. 341; 20 L.J.Ex. 209; 37 Digest (Repl.) 8, 36.
- (2) *Wilson v. Anderton* (1830), 1 B. & Ad. 450; 9 L.J.O.S.K.B. 48; 109 E.R. 855; 3 Digest (Repl.) 123, 414.
- (3) *Stonard v. Dunkin* (1809), 2 Camp. 344, N.P.; 3 Digest (Repl.) 109, 315.
- (4) *Gosling v. Birnie* (1831), 7 Bing. 339; 5 Moo. & P. 160; 9 L.J.O.S.C.P. 105; 131 E.R. 131; 3 Digest (Repl.) 108, 310.
- (5) *Hawes v. Watson* (1824), 2 B. & C. 540; 4 Dow. & Ry.K.B. 22; 2 L.J.O.S.K.B. 83; 107 E.R. 484; 3 Digest (Repl.) 109, 317.
- (6) *Sheridan v. New Quay Co.* (1858), 4 C.B.N.S. 618; 28 L.J.C.P. 58; 33 L.T.O.S. 238; 5 Jur.N.S. 248; 140 E.R. 1234; 8 Digest (Repl.) 35, 201.
- (7) *Shelbury v. Scotsford* (1602), Yelv. 23; 80 E.R. 17; 3 Digest (Repl.) 107, 302.
- (8) *Hardman v. Willcock* (1831), 9 Bing. 382, n.; 131 E.R. 659; 3 Digest (Repl.) 32, 233.

I

- (9) *Bellotley v. Reed* (1843), 4 Q.B. 511; 3 Gal. & Dav. 561; 12 L.J.Q.B. 172; A 7 Jur. 507; 114 E.R. 999; 3 Digest (Repl.) 106, 298.
- (10) *Thorne v. Tilbury* (1858), 3 H. & N. 534; 27 L.J.Ex. 407; 31 L.T.O.S. 206; 157 E.R. 581; 3 Digest (Repl.) 107, 306.

Also referred to in argument :

- Load v. Green* (1846), 15 M. & W. 216; 15 L.J.Ex. 113; 7 L.T.O.S. 114; 10 Jur. B 163; 153 E.R. 828; 5 Digest (Repl.) 851, 7156.
- White v. Garden* (1851), 10 C.B. 919; 20 L.J.C.P. 166; 15 Jur. 630; 138 E.R. 364; 39 Digest 533, 1447.
- Wilton v. Dunn* (1851), 17 Q.B. 294; 21 L.J.Q.B. 60; 17 L.T.O.S. 155; 15 Jur. 1104; 117 E.R. 1292; 35 Digest (Repl.) 390, 868.
- Hickman v. Machin* (1859), 4 H. & N. 716; 28 L.J.Ex. 310; 33 L.T.O.S. 206; C 5 Jur.N.S. 576; 157 E.R. 1023; 35 Digest (Repl.) 391, 875.
- Taylor v. Plumer* (1815), 3 M. & S. 562; 2 Rose, 457; 105 E.R. 721; 1 Digest (Repl.) 653, 2267.
- Farebrother v. Ansley* (1808), 1 Camp. 343; 3 Digest (Repl.) 40, 290.
- Adamson v. Jarvis* (1827), 4 Bing. 66; 12 Moore, C.P. 241; 5 L.J.O.S.C.P. 68; 130 E.R. 693; 3 Digest (Repl.) 39, 280. D
- Neate v. Harding* (1851), 6 Exch. 349; 20 L.J.Ex. 250; 17 L.T.O.S. 80; 155 E.R. 577; 12 Digest (Repl.) 632, 4884.
- Rodgers v. Maw* (1846), 15 M. & W. 444; 4 Dow. & L. 66; 16 L.J.Ex. 137; 7 L.T.O.S. 260; 153 E.R. 924; 12 Digest (Repl.) 585, 4528.
- Allen v. Hopkins* (1844), 13 M. & W. 94; 13 L.J.Ex. 316; 3 L.T.O.S. 204; 153 E.R. 39; 39 Digest 430, 601. E

Rule Nisi for an order to enter a verdict for the defendant, in an action in which the plaintiff claimed to recover from the defendant, an auctioneer, the proceeds of the sale of goods sent to him by the plaintiff to be sold in the usual way of the defendant's business. The defendant pleaded to general issue.

The plaintiff had distrained upon the goods of one Robbins for rent alleged to be due. Robbins was in possession of the premises not under an agreement for a tenancy, but one of sale and purchase. The goods were removed from the premises and sent to the defendant, an auctioneer, for sale by auction. When the sale was about to begin Robbins served a notice on the defendant that the distress was void, that there was no rent in arrear, that the relation of landlord and tenant did not exist between the plaintiff and him, and desiring him not to sell the goods. From the shortness of the notice there was no time for inquiry; and for this cause only the defendant proceeded with the sale. After the sale the defendant refused to pay the proceeds to the plaintiff, setting up the claim of Robbins. The plaintiff then brought this action. F

At the trial of the action before WILES, J., at the Guildford Summer Assizes, 1864, the jury found that the distress was illegal, and the verdict was entered for the plaintiff for £44 2s. 6d., with leave reserved to the defendant to move to enter the verdict for him if the court should be of opinion that he was entitled to set up as against the plaintiff the right of Robbins to the goods. A rule nisi was obtained accordingly by the defendant. G

Thrupp showed cause.

Serjeant Parry and *Morgan Howard* supported the rule. I

Cur. adv. vult.

Feb. 25, 1865. **BLACKBURN, J.**, read the following judgment of the court.—In this case, from the judge's notes, it appears that some goods belonging to Robbins were siezed by the plaintiff under a distress for rent of a house alleged to be demised to Robbins. The goods had been removed by the plaintiff and delivered by him to the defendant, to sell as his (the plaintiff's) auctioneer,

A and the defendant proceeded to sell them in the ordinary way. When the sale was about to begin, Robbins served a notice on the defendant, that the distress was void, as the relation of landlord and tenant did not exist between him and the plaintiff, and that there was no rent in arrear, and by the notice Robbins required the defendant not to sell the goods, or, if he had sold them, to retain the proceeds for him, Robbins. The defendant proceeded to sell the goods; but we think that the inference from the evidence is, that he did this only because the notice was served so late that he had not time to make any inquiry before the sale came on. He received the proceeds of the sale, but refused to pay them over to the plaintiff. He did not pay the proceeds to Robbins, the real owner; but, from the evidence of Robbins, who was called as a witness for the defendant, we draw the inference of fact that the defendant withheld the proceeds from the plaintiff, and defended this action, relying upon the right and the authority of Robbins, and not hostilely against him. It appeared at the trial that the relation between the plaintiff and Robbins was not that of landlord and tenant, but of vendor and vendee; and, consequently, that the distress was altogether void and tortious.

D The question, therefore, comes to be whether the defendant can, under such circumstances, set up the *jus tertii* or not; and on that question we are of opinion that he can do so, and consequently the rule to enter the verdict for the defendant must be made absolute. We do not question the general rule that a person who has received goods from another as his bailee, or agent, or servant, must restore or account for that property to the person from whom he received it. We agree with what was said by MARTIN, B., in *Cheesman v. Exall* (1) (6 Exch. at p. 346), that:

"There are numerous cases in connection with wharves and docks in which, if the party entrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business."

F But the bailee has no better title than the bailor, and, consequently, if a person entitled as against the bailor to the property claims it, the bailee has no defence against him: see *Wilson v. Anderton* (2). Such was the position of the defendant in the present case. If Robbins had chosen to sue him in trover, or, waiving the tort, had sued for money had and received, the defendant would have had no defence. He was, therefore, compelled to yield to Robbin's claim, and it would certainly be a hardship on him if, without any fault of his own, the law left him without any defence against the plaintiff for so yielding.

G We do not, however, think that such is the law. Several cases were cited on the argument at the Bar, and more might have been cited such as *Stonard v. Dunkin* (3), *Gosling v. Birnie* (4), and *Hawes v. Watson* (5), to show that where a bailee, by attorning to a purchaser of the goods, has in effect represented to him that the property has passed to him (though such was not the fact), and has thereby induced him to alter his position and pay the price to his vendee, has been held estopped from denying the property of the person to whom he has thus attorned, by setting up a title in a third person inconsistent with the representation on which he had induced the plaintiff to act. We in no way question that those cases were rightly decided, but in all of them the estoppel proceeded upon the representation which was analogous to a warranty of title for good consideration to the purchaser. In the ordinary class of bailments such as the present, the representation is by the bailor to the bailee that he may safely accept the bailment, and so far as any weight is to be given to the representation it makes against the estoppel. This is pointed out by PARKE, B., in *Cheesman v. Exall* (1) (6 Exch. at p. 344), in the case of a plea, and is indicated as one of the grounds on which the Court of Common Pleas proceeded in their judgment in *Sheridan v. New Quay Co.* (6),

which was the case of a carrier. The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant who, having accepted the possession of land from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount. This was decided as early as 1602, in *Shelbury v. Scotsford* (7). There the plaintiff sued in assumpsit against the bailee of a horse, for the breach of his contract to re-deliver it; the defendant pleaded that J. S., the true owner of the horse, took it from the defendant. After verdict for the defendant the plaintiff moved in arrest of judgment, but

"by Fenner and Yelverton, contra: for the matter alleged by the defendant does in law discharge the promise by reason of the former property of the horse in J. S., and then it is as an eviction of the horse out of the defendant's possession, which discharges the promise as well as an eviction of the lessee for years discharges all rents, bonds and covenants in any sort depending upon the interest."

In *Wilson v. Anderton* (2), LITTLEDALE, J. (without referring to *Shelbury v. Scotsford* (7), but evidently having it on his mind) states the law to the same effect. And accordingly, in *Hardman v. Wilcock* (8), in *Cheeseman v. Ezall* (1), and in *Sheridan v. New Quay Co.* (6), a bailee was permitted, under circumstances similar to the present, to set up the *jus tertii*. It is true that in the two first of these cases the plaintiffs had obtained the goods by a fraud upon the person whose title was set up, whilst in the present case there is nothing in the evidence to show that the plaintiff, though a wrong-doer, did not honestly believe that he had a right to distrain. But we do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them. We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury v. Scotsford* (7), namely, that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in *Betteley v. Reed* (9) by LORD DENMAN, C.J. (4 Q.B. at p. 517):

"To allow a depositary of goods or money who has acknowledged the title of one person to set up the title of another who makes no claim, or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever."

Nor is it enough that an adverse claim is made upon him so that he may be entitled to relief under an interpleader. We assent to what is said by POLLOCK, C.B., in *Thorne v. Tilbury* (10) (3 H. & N. at p. 537), that a bailee can set up the title of another only, "if he defends upon the right and title, and by the authority of that person." Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences.

Rule absolute.

RÜCKER v. SCHOLEFIELD

[VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), December 13, 1862]

[Reported 1 New Rep. 180; 7 L.T. 504]

Practice—Parties—Death of party before hearing—Ascertainment of death after hearing and before order entered—Completion of order in absence of personal representative.

After the hearing of a cause, but before the order was entered, it was ascertained that one of the defendants had died abroad before the hearing.

Held: under s. 44 of the Chancery Amendment Act, 1852, the court might direct the order to be completed in the absence of the personal representative of the deceased party.

Notes. The Chancery Amendment Act, 1852, has been repealed and the representation of a deceased person interested in proceedings is dealt with by R.S.C. (Revision) 1962, Ord. 15, r. 15 (ANNUAL PRACTICE (1964) 276).

As to death of party with no personal representative, see 30 HALSBURY'S LAWS (3rd Edn.) 396 and Supp.; and for cases see DIGEST (Practice) 445 and Supp.

Application by the trustees for direction as to entry of the order in their summons when it became known that one of the defendants had died abroad before the hearing.

A summons by the trustees of a marriage settlement, for a declaration of the rights of the several parties claiming interests thereunder, and an appointment executed in pursuance of a power therein, had come on for hearing on Nov. 14, 1862, and a decree had been made declaring the rights of the several parties. Before the order was entered it was ascertained that one of these parties in whose favour the decree as to his rights had been made, had died in China before the hearing. It was alleged that this party had died intestate, and no personal representative had yet been appointed.

Wickens for the trustees.

PAGE-WOOD, V.-C.—The defect in the record is cured by the provisions of s. 44 of the Chancery Amendment Act, 1852, and I direct a statement to be inserted in the order, to the effect that the particular defendant had died intestate and that the court had proceeded in the absence of any person representing the deceased's estate.

Order accordingly.

CLARKE AND OTHERS v. WATSON AND OTHERS

[COURT OF COMMON PLEAS (Erle, C.J., Williams, Willes and Keating, JJ.), January 25, 1865]

[Reported, 18 C.B.N.S. 278; 5 New Rep. 283; 34 L.J.C.P. 148; 11 L.T. 679; 13 W.R. 345; 144 E.R. 450]

Building Contract—Payment—Payment on certificate—Surveyor's certificate—Wrongful refusal to give—Right of action for payment by contractors against building owners in absence of fraud—Proper course to be taken by contractors.

By the terms of a building contract contractors undertook to execute works for the defendants for a certain sum, to be paid on production by the contractors to the defendants of the certificate of the defendants' surveyor that the whole of the works had been duly and efficiently performed and completely finished to his satisfaction. The contractors alleged that they had done all things necessary to entitle them to the surveyor's certificate, but he had "wrongfully and improperly neglected and refused" to give the certificate and that the defendants had not paid the amount payable on such certificate. In an action by the contractors against the defendants to recover the amount payable,

Held: in the absence of any fraud or collusion between the defendants and the surveyor, the contractors had no right of action on the contract against the defendants.

Per Curiam: The proper course was for the contractors to call on the employers to appoint another surveyor, and, if this was refused, the contractors would have a right of action against the employers.

Notes. Considered: *Re Rio de Janeiro Flour Mills and Granaries and De Morgan, Snell & Co.* (1891), 8 T.L.R. 108; *Kellett v. New Mills U.D.C.* (1900), 2 Hudson's B.C., 4th Edn., 298; *Re Nott and Cardiff Corpn.*, [1918] 2 K.B. 146. Applied: *Eaglesham v. McMaster*, [1920] All E.R. Rep. 674. Referred to: *Roberts v. Bury Improvement Comrs.* (1869), 38 L.J.C.P. 367; *Botterill v. Ware Guardians* (1886), 2 T.L.R. 621; *Smith v. Howden Union and Fowler* (1890), Hudson's B.C., 8th Edn., 238; *Neale v. Richardson*, [1938] 1 All E.R. 753.

As to dispensing with surveyor's certificate, see 3 HALSBURY'S LAWS (3rd Edn.) 469 et seq.; and for cases see 7 DIGEST (Repl.) 372 et seq.

Case referred to:

(1) *Harrison v. Great Northern Rail. Co.* (1852), 21 L.J.C.P. 89.

Also referred to in argument:

Batterbury v. Vyse (1863), 2 H. & C. 42; 2 New Rep. 79; 32 L.J.Ex. 177; 8 L.T. 283; 9 Jur.N.S. 754; 11 W.R. 891; 159 E.R. 19; 7 Digest (Repl.) 373, 139.

Milner v. Field (1850), 5 Exch. 829; 20 L.J.Ex. 68; 155 E.R. 363; 7 Digest (Repl.) 372, 137.

Grafton v. Eastern Counties Rail. Co. (1853), 8 Exch. 699; 1 C.L.R. 573; 12 Digest (Repl.) 469, 3503.

Demurrer in an action on a building contract brought by the plaintiffs, the contractors, against the defendants, the employers, for the balance due under the contract on production of the surveyor's certificate, the defendants' surveyor having improperly refused to issue such certificate.

By an agreement in writing made between the plaintiffs, as contractors, and the defendants, as employers, the plaintiffs agreed to do certain works in conformity with certain plans, drawings, sections and specifications to the satisfaction and approval of the engineer of the local board of health, should such be necessary, for £312 15s., of which £156 7s. 6d. was to be paid on production

by the plaintiffs to the defendants of the certificate of W. Lambert, the defendants' surveyor, that the plaintiffs had duly and efficiently completed, according to the surveyor's judgment, three-fourths of the works in extent and value; £78 3s. 9d. on production of the surveyor's certificate that the whole of the works had been duly and efficiently performed and completely finished to his satisfaction and to the satisfaction of the engineer of the local board of health, if necessary; and the balance of £78 3s. 9d. at the expiration of four months from the date of the surveyor's certificate of completion provided that certain roads and drains should then be certified by the surveyor to be in good repair and condition. The plaintiffs alleged that, although £156 15s. had been paid and everything necessary on their part had been done to entitle them to the certificate of the defendants' surveyor, he had wrongfully and improperly neglected and refused to give his certificate and that the defendants had not paid the £78 3s. 9d. payable on such certificate and the plaintiffs further alleged that though more than four months had elapsed since the surveyor ought to have given his certificate and everything had been done on their part to entitle them to the certificate of the defendants' surveyor and that the roads and drains were in good repair and condition the surveyor had wrongfully, etc., refused to give his certificate and that the defendants had not paid the balance of £78 3s. 9d. The plaintiffs brought an action against the defendants to recover the amount due under the contract, totalling £156 7s. 6d., on production of the surveyor's certificate. The defendants pleaded in defence that the plaintiffs had no right of action against them.

Henry James for the defendants.

Serjeant Parry (*Joyce* with him) for the plaintiffs.

[**WILLES, J.**—The proper course would be to call on the defendants to appoint some other surveyor, who would do the business required, not to sue the defendants for the price before it is due. If they refused to do so the plaintiffs would clearly have a right of action against them on the authority of *Harrison v. Great Northern Rail. Co.* (1).]

[**ERLE, C.J.**—I think that judgment should be for the defendants. The contract made with the defendants is that they should pay certain sums on the production of the certificate of their surveyor that the contractors had duly and efficiently completed certain portions of the work. Every man is master of the contract which he chooses to make, and it is of vast importance that contracts should be enforced according to the words and intention of the parties. No certificate was produced, but the plaintiffs say that the surveyor wrongfully and improperly neglected and refused to give his certificate. This is not sufficient. If the declaration had alleged that the defendants and their surveyor colluded to cheat the plaintiffs of the proper remuneration for their work, there are abundant authorities to show that the defendants would not be allowed to do so. The object of the declaration is to substitute the verdict of a jury for the certificate of the surveyor.]

WILLIAMS, J.—I am of the same opinion. In effect, the plaintiffs are attempting to recover a sum of money which by the contract is not yet due.

WILLES, J.—It is consistent with the declaration that the only wrong committed may have been an error of judgment on the part of the surveyor, while both parties agreed to be bound by his judgment.

KEATING, J., concurred.

Judgment for defendants.

R. v. MORRIS

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Kelly, C.B., Martin, B., Byles, Keating and Shee, JJ.), April 27, June 1, 1867]

[Reported L.R. 1 C.C.R. 90; 36 L.J.M.C. 84; 16 L.T. 636;
31 J.P. 516; 15 W.R. 999; 10 Cox, C.C. 480]

Criminal Law—Autrefois convict—Offences founded on same evidence—Summary conviction of assault—Subsequent indictment for manslaughter of person assaulted on same facts.

The previous conviction of a prisoner by a court of summary jurisdiction of an assault under the Offences against the Person Act, 1861, is not a bar to an indictment for the manslaughter of the party assaulted although it is founded on the same facts.

Notes. Considered: *R. v. Friel* (1890), 17 Cox, C.C. 325. Applied: *R. v. Thomas*, [1949] 2 All E.R. 662. Referred to: *Wemyss v. Hopkins* (1875), L.R. 10 Q.B. 378; *R. v. Miles*, [1886-90] All E.R. Rep. 715; *R. v. Dyson*, [1908-10] All E.R. Rep. 736; *R. v. Tonks*, [1916] 1 K.B. 443.

As to special pleas, and effect of summary conviction, see 10 HALSBURY'S LAWS (3rd Edn.) 404 et seq., 745; and for cases see 14 DIGEST (Repl.) 378 et seq. For the Offences against the Person Act, 1861, s. 45, see 5 HALSBURY'S STATUTES (2nd Edn.) 804.

Case referred to:

(1) *R. v. Salvi* (1857), 10 Cox, C.C. 481, n.; 14 Digest (Repl.) 383, 3734.

Also referred to in argument:

R. v. Walker (1843), 2 Mood. & R. 446; 7 J.P. 212; 14 Digest (Repl.) 384, 3749.

R. v. Elrington (1861), 1 B. & S. 688; 31 L.J.M.C. 14; 5 L.T. 284; 8 Jur.N.S. 97; 10 W.R. 13; 9 Cox, C.C. 86; 121 E.R. 870; sub nom. *R. v. Ebrington*, 26 J.P. 117; 14 Digest (Repl.) 384, 3751.

R. v. Stanton (1851), 17 L.T.O.S. 280; 5 Cox, C.C. 324; 14 Digest (Repl.) 384, 3750.

Case Stated for the opinion of the court by PIGOTT, B., a conviction for assault under whether the Offences against the Person Act, 1861, afforded a defence to an indictment for manslaughter resulting from the assault.

Thomas Morris was tried at the Stafford Spring Assizes, upon an indictment for the manslaughter of Timothy Lymer, by inflicting bodily injuries on him on June 25. It was proved, in evidence, that the prisoner had been summoned before the magistrates at the instance of Timothy Lymer, for the assaults which caused the death, and was convicted and sentenced to imprisonment with hard labour. He underwent that punishment. Timothy Lymer died on Sept. 1 from the injuries resulting from the above-mentioned assaults. It was contended under s. 45 of the Offences against the Person Act, 1861, that the conviction for the assaults afforded a defence to the indictment for manslaughter. There was a substantial question raised by the evidence, whether the manslaughter was the result of injuries inflicted by the prisoner Morris, or the prisoner Gibbons joined in the indictment, and whether they were acting in concert. PIGOTT, B., thought it desirable to let the prisoner Morris have the benefit of either of the defences, and for that purpose to let the questions of fact go to

the jury upon the plea of Not Guilty, and to reserve the question of law under s. 45, for the opinion of the court. The prisoner Gibbon was acquitted, and the prisoner Morris was convicted.

G. Browne for the prisoner.

No counsel appeared for the prosecution.

Cur. adv. vult.

KELLY, C.B.—In this case I have the misfortune to differ with my learned brethren who are of opinion that the conviction ought to be affirmed.

The prisoner was charged before the magistrates with an assault under the Offences against the Person Act, 1861, at the instance of the party aggrieved, and now deceased, Timothy Lymer. He was convicted and sentenced to imprisonment with hard labour, and has undergone that sentence. The assault, the unlawful act, with which he was charged is the same assault, and one and the same act as that which caused the death of Lymer, and of which he has been convicted under the present indictment. I think, therefore, that the case comes within the precise words of s. 45 of the Offences against the Person Act, 1861 which provides that in such a case

“he shall be released from all further or other proceedings, civil or criminal, for the same cause.”

It is true that the offence is now charged in other language; that which before the magistrates was described as an assault is now described as manslaughter; but it is one and the same act, and the cause of the prosecution before the magistrates and the cause of this prosecution are one and the same cause. The case, therefore, comes within the letter as well as the spirit of the Act of Parliament, and I think that to sustain the conviction would be directly to violate the maxim or principle of the law “*nemo debet bis vexari*” (here we might say *puniri*) “*pro eadem causa*.”

Cases may, indeed, be suggested in which there might be a failure of justice, as where an assault may have been treated lightly by a magistrate, and upon conviction a light sentence passed, and yet from the subsequent death of the party assaulted the offence might amount to murder. But such a case must be rare and exceptional, and I think we ought to presume that the magistrates will in all cases under this or any other Act of Parliament do their duty. And as where the charge is made at the instance of the party aggrieved, it may also be presumed that the whole of the evidence would be fully brought before the magistrates, and, upon conviction, an adequate punishment inflicted accordingly, I do not think that it was the intention of the legislature, or is consistent with natural justice, that the accident of the subsequent death of the party should subject the accused to a repetition of the trial and punishment. *R. v. Salvi* (1) is clearly distinguishable. There the prisoner was indicted for the murder of one Robertson, and pleaded a plea of autrefois acquit, the acquittal having been on an indictment for wounding with intent to kill. It was clear that this acquittal might have been pronounced upon the ground of the jury having negatived the intent to kill, and yet that the prisoner might well be guilty of the murder without an intent to kill the individual murdered, as if he had shot at another man, but unintentionally killed Robertson. The plea, therefore, of autrefois acquit was in that case properly overruled.

Here, however, the prisoner has been tried, convicted, and punished for the very same offence in all its parts, though under another name as that for which he is now indicted, and again convicted, and it seems to me that to allow this conviction to stand is to punish a man twice for the same cause, in violation of the before-mentioned maxim and of the express language of the Act of Parliament. I think, therefore, that the conviction ought to be quashed.

MARTIN, B.—I am of opinion that the conviction ought to be sustained. The facts are that Thomas Morris was convicted of an assault on Timothy Lymer, and committed to prison under the Offences against the Person Act, 1861, s. 42. He has undergone that punishment, and Timothy Lymer, the man assaulted, has since died in consequence of that assault. This indictment is for the manslaughter of that man; and the question is whether the suffering of the imprisonment for the assault is an answer to that indictment, and that depends on the meaning of the words "for the same cause" in the statute. I agree with the Lord Chief Baron that *R. v. Salvi* (1) is not expressly in point. Salvi had been acquitted of an assault with intent to murder, but convicted of an assault with intent to do grievous bodily harm, and the prosecutor having subsequently died from the assault, he was indicted for murder; and it was held that he might be properly so indicted, for that murder might be committed without any intent to kill, as, for instance, if a man, intending only to maim, caused death, that was murder. I think that that decision was correct. I should be sorry to draw a distinction between the words "for the same cause" in the plea of autrefois acquit, on which that case was adjudicated, and the same words in the Offences against the Person Act, 1861, s. 45. It would be a very serious thing if there were any distinction. The statute gives a release from all further or other proceedings, civil or criminal; and if a different construction were adopted it would follow that if an action were brought under Lord Campbell's Act in respect of the death of the person assaulted the conviction and punishment for the mere assault would be a bar to any claim for compensation. I apprehend that that cannot be so; and that the cause on which the justices adjudicated was not the same as that for which the prisoner has been convicted under this indictment: A new offence, in my opinion, arose when the man died. I, therefore, think that this conviction was right.

BYLES, J.—I am of opinion that the prior conviction for the assault under the Offences against the Person Act, 1861, s. 45, affords no defence to the subsequent indictment for manslaughter, the death of the deceased having occurred after the conviction, but being a consequence of the assault. The form and intention of the common law pleas of autrefois convict and autrefois acquit, show that they apply only where there has been a former judicial decision on the same accusation in substance, and where the question in dispute has been already decided. There has, in the present case, been no judicial decision on the same accusation, and the whole question now in dispute could not have been decided, for at the time of the hearing before the magistrates whether the assault would amount to culpable homicide or not, depended on the then future contingency whether it would cause death. *R. v. Salvi* (1), if not precisely in point, is nevertheless a strong authority for this view of the law. But reliance is placed on the words of the statute, "for the same cause." It is to be observed that that statute does not say for the same act, but "for the same cause." The word "cause" may undoubtedly mean "act," but it is ambiguous, and it may also, and perhaps with greater propriety, be held to mean "cause for the accusation." The cause for the present indictment comprehends more than the cause in the former summons before the magistrates, for it comprehends the death of the party assaulted. It is therefore, at least in one sense, not the same cause. But if these observations on the meaning of the word "cause," as used in the statute, should appear to savour too much of refinement, and to be used in support of a forced construction, it must be remembered that it is a sound rule to construe a statute in conformity with the common law rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law. An additional reason in this case for following the common law is the mischief which would result from a different construction. **MARTIN, B.**, has

already illustrated the mischief in civil cases by a reference to Lord Campbell's Act, and in criminal cases the mischiefs might be much greater. A murderer, for example, by suffering or obtaining a previous conviction for an assault, might escape the due punishment of his crime.

KEATING, J., and SHEE, J., concurred.

Conviction affirmed.

Re BROWN v. LONDON AND NORTH WESTERN RAIL. CO.

[COURT OF QUEEN'S BENCH (Wightman, Crompton and Blackburn, JJ.), June 25, 1863]

[Reported 4 B. & S. 326; 2 New Rep. 447; 32 L.J.Q.B. 318;
8 L.T. 695; 27 J.P. 711; 10 Jur.N.S. 234; 11 W.R. 884;
122 E.R. 481]

County Court—Jurisdiction—“Court in any district in which the defendants or one of the defendants shall carry on his business . . .”—Action against railway company—Cause of action arising at station—Jurisdiction of county court for district where station situated.

Corporation—Place of business—Head office.

A corporation **held** to carry on its business within the meaning of the County Courts Act, 1846, s. 60, at the place where its general business was managed and not at individual branches of the business. Thus a railway company carries on its business at its head office, and not at its stations, no matter how large they may be.

A cause of action arose against a railway company at Chester where one of its main stations was situated. The business of the railway company was managed from its head office in London. A summons was issued out of the county court for the Chester district, the action was tried there, and judgment was given for the plaintiff. An order for mandamus was subsequently asked for to compel the judge and registrar of the county court to levy execution on the judgment.

Held: the railway company carried on its business at London and the Chester County Court had no jurisdiction to try the action, and, therefore, an order for mandamus could not be made.

Notes. The County Courts Act, 1846, s. 60, has been repealed; see now County Court Rules, Ord. 2, r. 1.

Applied: *Le Tailleur v. South Eastern Rail. Co.* (1877), 3 C.P.D. 18. Considered: *Davis v. British Geon, Ltd.*, [1956] 2 All E.R. 404. Referred to: *Graham v. Lewis* (1888), 57 L.J.Q.B. 376.

As to the meaning of “carrying on business” for purpose of venue in County Court proceedings, see 9 HALSBURY'S LAWS (3rd Edn.) 95, 96, 166, 167; as to mandamus, see *ibid.*, p. 334; and for cases see 13 DIGEST (Repl.) 415 et seq., 495, 496.

Cases referred to:

- (1) *Adams v. Great Western Rail. Co.* (1861), 6 H. & N. 404; 30 L.J.Ex. 124; 3 L.T. 631; 9 W.R. 254; 158 E.R. 166; 13 Digest (Repl.) 418, 446.
- (2) *Shiels v. Great Northern Rail. Co.* (1861), 30 L.J.Q.B. 331; 4 L.T. 479; 7 Jur.N.S. 631; 9 W.R. 739; 13 Digest (Repl.) 418, 448.

Also referred to in argument :

Taylor v. Crowland Gas and Coke Co. (1855), 11 Exch. 1; 24 L.J.Ex. 233; 25 L.T.O.S. 55; 19 J.P. 295; 1 Jur.N.S. 358; 3 W.R. 368; 3 C.L.R. 865; 156 E.R. 720; 13 Digest (Repl.) 418, 447.

Corbett v. General Steam Navigation Co. (1859), 4 H. & N. 482; 28 L.J.Ex. 214; 33 L.T.O.S. 137; 23 J.P. 344; 7 W.R. 498; 157 E.R. 928; 13 Digest (Repl.) 418, 452.

Shiels v. Rait (1849), Cox, M. & H. 192; 12 L.T.O.S. 402; sub nom. *Sheils v. Rait*, 7 C.B. 116; 137 E.R. 116; 137 E.R. 47; 13 Digest (Repl.) 417, 440.

Minor v. London and North Western Rail. Co. (1856), 1 C.B.N.S. 325; 26 L.J.C.P. 39; 28 L.T.O.S. 144; 21 J.P. 343; 2 Jur.N.S. 1168; 5 W.R. 122; 140 E.R. 134; 13 Digest (Repl.) 418, 451.

Turner v. Evans (1853), 2 E. & B. 512; 21 L.T.O.S. 153; 17 Jur. 1073; 1 C.L.R. 563; 118 E.R. 860; 17 Digest (Repl.) 271, 747.

Rule Nisi calling on the judge and registrar of the county court for the Chester district to show cause why an order in the nature of a mandamus under the County Courts Act, 1856, s. 43, and the County Court Districts Act, 1858, s. 4, should not issue against them to compel them to proceed to levy execution upon a judgment obtained in that court.

The plaintiff was a harpist travelling from Ireland via Chester to London. At Chester, not having money to pay his fare to London, he left his harp by way of security with the railway company's servants, who then gave him a free pass to London. Afterwards he paid his fare to the company, who then transmitted to him his harp. The harp suffered considerable damage in the course of transmission. The plaintiff thereupon brought a plaint in the county court for the district of Chester to recover damages from the company as common carriers for the injury to his harp. The summons was served on the defendants at their offices at the Chester station, and they appeared to the summons. At the hearing, however, they objected to the jurisdiction of the court, on the ground that the defendants did not "dwell or carry on their business" in the Chester district within the meaning of the County Courts Act, 1846, s. 60. The judge overruled the objection, and the jury found a verdict for the plaintiff for £27. The Chester station was a joint one, and managed by a committee chosen from the officials of the defendants and the Great Western Railway Company. The defendants had a manager and a staff of officers at Chester, by whom the business of their line and station at Chester, and of a large district connected with Chester, was almost entirely carried on, subject, however, to the control and supervision of the company's principal office at Euston Square, but such control and supervision was in fact only exercised in matters of difficulty or importance. The Chester station was one of the largest and most important belonging to the defendants.

By the County Courts Act, 1846, s. 60, a summons may issue

"in any district in which the defendants or one of the defendants shall dwell or carry on his business at the time of the action brought; or by leave of the court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business at some time within six calendar months next before the time of action brought, or in which the cause of action arose, such summons may issue in either of the last-mentioned courts."

Harington showed cause.

M'Intyre supported the rule.

WIGHTMAN, J.—At the commencement of the argument, I felt some doubt whether the London and North Western Rail. Co. might not be considered to "carry on its business" at Chester sufficiently for giving jurisdiction within the

A meaning of the County Courts Act, 1846. But I am of opinion that it is not so, and to hold it to be so would be to introduce the greatest uncertainty and inconvenience. Where, then, do they carry on their business? It was admitted by counsel supporting the rule, that if Chester station had been a small, minor station, it could hardly be considered as a place at which the company's business was carried on; but he said that, if we looked at the magnitude of the Chester station, and the way in which the company's business was carried on there, it might be said that the company carried on their business there within the meaning of the County Courts Act, 1846. If the Act had said, "carry on his business, or part of his business," it would have been another matter; but the words of the section are general, and can only apply, as it seems to me, to the particular place at which the party carries on his general business, and not to the place where he carries on only a particular portion of it. The company carry on a portion of their business at Chester, no doubt; but in no sense can they be said to carry on their business at Chester. Upon the whole, therefore, I am of opinion that the case is not within the jurisdiction of the Chester County Court. The case is entirely one of jurisdiction, there having been no leave of the county court judge to issue the plaint out of the jurisdiction. The rule will, therefore, be discharged.

CROMPTON, J.—I am of the same opinion. If the company had asked for a prohibition, I am satisfied it ought to have been issued, and so I think they ought to succeed now. The case turns upon the County Courts Act, 1846, s. 60. In *Adams v. Great Western Rail. Co.* (1), which was a decision on the County Courts Act, 1846, s. 128, the Court of Exchequer held "dwelling" to mean the same thing as "carrying on business," and that where a corporation carries on business there it may be said to "dwell."

What, then, is the meaning of "carrying on business?" Counsel supporting the rule argued that a person's business may be said to be carried on generally wherever a great portion of it is carried on, and that, therefore, the railway company in this case may be said to carry on their business at Chester. I cannot put this construction upon the section. If it were the right one, then, wherever the cause of action arises, no matter how remote from the county court, the circumstances of the railway company having a station in the district would give the county court jurisdiction; so that a cause of action arising on a bond executed in London, or from an accident by which a person's leg was broken, might be tried in any remote county court in the district of which the company had a small station, though the cause of action did not arise within the jurisdiction. If the section does not mean the general business, any place where a person carries on any portion of his business would do to give jurisdiction, and, therefore, a party might go to the remotest and smallest place where a company has a station and sue it in that district. To my mind the section means, where the general business of the person sued is carried on. I agree with what is said by HILL, J., in *Shiels v. Great Northern Rail. Co.* (2), that a railway does not carry on business within the meaning of s. 60 of the County Court Act, 1846, at any place other than its principal office. I also agree with him that there may be cases in which a general business may be carried on in two places by a private trader or firm, but I do not think that the present case is one of them. To my mind, therefore, "business," under this section, means that general business of the company which is only carried on at the principal office. The rule must, therefore, be discharged without costs.

BLACKBURN, J.—I am of the same opinion. The question turns upon the construction of the County Courts Act, 1846, s. 60, which was passed to regulate the place in which a defendant may in certain cases be sued in the county courts. The idea of the legislature no doubt was, that if the sum in

dispute was small, it would be very convenient to try the matter, either where the defendant dwelt, or else where he carried on his business. The sort of case contemplated was, for example, that of a person who keeps a shop in Westminster, but dwells in a suburban villa, and the Act gave power to a plaintiff to sue such a person, either where he dwelt or where he traded. There may be cases indeed where a person carries on more businesses than one, and at more places than one. Thus he might be a partner in a firm at Liverpool for one purpose, and in a firm at Manchester for another. That, however, would be an exceptional case. Generally speaking, a man carries on one entire business in the place where he manages it. Pickfords, the carriers, send their servants into almost every place in the kingdom, but they can only truly be said to carry on their business at the place where it is managed.

In this case the railway company are carrying on one entire business, the whole of which it is admitted is managed and controlled by the officials at the Euston Station. At Chester there is a local superintendent and manager for the business of that part of the line, but he is under the control of the London directors. Can it then be said that the company carry on one business at London and another at Chester? I am of opinion that it cannot, and that the local superintendent manages only a branch of the general business. Chester, it is true, is a large station; but at every station, however small, a separate branch of business is carried on, and I cannot hold that the company carry on as many separate businesses as there are branches. I agree with HILL, J., in *Shiels v. Great Northern Rail. Co.* (2), that the company carry on their business at the place where it is managed, and in other places by their agents. If the cause of action arise in any particular district, then by leave of the court the action may be tried there, no matter where the defendant dwells or carries on his business. I agree that the rule should be discharged without costs.

Rule discharged.

THE INDIA

[COURT OF ADMIRALTY (Dr. Lushington), January 12, 26, 1864]

[Reported Brown. & Lush. 221; 3 New Rep. 442;
33 L.J.P.M. & A. 193; 12 L.T. 316; 2 Mar. L.C. 193]

Statute—Repeal—By implication—Inconsistency between earlier and later Acts—Presumption—Effect of non-user.

Although mere non-user is not sufficient to repeal a statute, the fact of non-user may be important in considering whether the statute has been repealed by implication. Although the presumption is against such a repeal, a statute will be repealed by implication if its provisions are wholly incompatible with a subsequent statute or where the subject-matter has been so dealt with by subsequent legislation that it cannot reasonably be said that the provisions of the earlier statute were intended to subsist.

Notes. Although all the statutes cited have been repealed, mostly by the Statute Law Revision Acts, this case is important because of the general principles applicable to repeal by implication.

Referred to: *R. v. L.C.C., Ex parte Entertainments Protection Association, Ltd.*, [1931] 2 K.B. 215; *Ernest Augustus of Hanover (H.R.H. Prince) v. A.-G.*, [1955] 1 All E.R. 746.

As to repeal of statute by implication, see 36 HALSBURY'S LAWS (3rd Edn.) 365 et seq.; and for cases see 42 DIGEST 763 et seq.

Action, by the bondholders, on a bottomry bond upon a foreign vessel engaged in the India trade.

In January, 1859, the *India*, a Monte Video vessel, left Monte Video bound for Calcutta with a cargo of horses; and in February following, the vessel being, in the course of the voyage, in Table Bay, the master borrowed some money on bottomry from a British subject there; and on his arrival at Calcutta he gave another bond, in favour also of British subjects, and payable at the Mauritius. The defence by the owner of the *India* was that both bonds were void, by reason of s. 2 of the Trade to East Indies Act, 1720 (7 Geo. 1, c. 21).

Deane, Q.C., and *Clarkson* for the bondholders, moved the court to reject the answer.

V. Lushington for the owner.

Cur. adv. vult.

Jan. 26, 1864. **DR. LUSHINGTON.**—No doubt exists that a British Act of Parliament does not become inoperative by mere nonuser, however long the time may have been since it was known to have been actually put in force; but the fact of non-user may be extremely important when the question is whether there has been a repeal by implication. What words will establish a repeal by implication, it is impossible to say. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express terms, on the other hand it is clear that it is not necessary that any express reference be made to the statute which is to be repealed. A prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one; or, if the two statutes together would lead to wholly absurd consequences; or, if the entire subject-matter has been so dealt with in subsequent statutes that, according to all ordinary reasoning, the particular provisions in the prior statute could not have been intended to subsist.

Before the passing of the Trade to East Indies Act, 1720, the whole of the East India trade was a strict monopoly in the hands of the East India Co. Not only had there been a series of Parliamentary charters, but foreign ships were further excluded from trading to British possessions in India by virtue of the Navigation Act, 1662 (13 Car. 2, c. 18). The Trade to East Indies Act, 1720, confirms the monopoly, the title being

“An Act for the further preventing His Majesty's subjects from trading to the East Indies under foreign commissions, and for encouraging and further securing the lawful trade thereof”;

s. 2 contains several provisions for preventing any foreign trade, and, among others, it prohibits all contracts of bottomry by British subjects on ships in the service of foreigners. It is manifest the sole object of this prohibition is the protection of the monopoly. The relaxation of this monopoly was a gradual process, both as to place and person. The monopoly continued longer as to China than as to the East Indies, and excluded foreigners longer than British subjects, other than the servants of the company.

The abolition, so far as it concerns British subjects, was effected by s. 2 of the China and India Trade, 1833 (3 & 4 Will. 4, c. 93), which declares that notwithstanding any provisions made for the purpose of protecting the exclusive rights of

the trade theretofore enjoyed by the company in any Act of Parliament contained, it should be lawful for any of His Majesty's subjects to carry on trade with any countries beyond the Cape of Good Hope to the Straits of Magellan. Then, with regard to foreigners, the Trade with India Act, 1797 (3 Geo. 3, c. 117), was passed, reciting the Navigation Act, 1662, and empowered the directors of the East India Co. to admit foreign ships to trade to the East Indies, notwithstanding the statute. The court of directors exercised this power by issuing a regulation which provides,

"that foreign ships belonging to every State or country in Europe or in America, so long as such States or countries respectively remain in amity with Her Majesty, may freely enter the British seaports and harbours in the East Indies, whether they come directly from their own country or from any other place, and shall there be hospitably received, and shall have liberty to trade there in imports and exports conformably to the regulations established or to be established in such seaports,"

and then follows a proviso that they shall not engage in the coasting trade. Since that period various other measures have been adopted to put the foreign trade of India on the same footing as the trade carried on in British vessels and by British subjects. By an Act of the government of India the duties on goods imported or exported in foreign or British vessels were equalised, and by another Act the coasting trade of India was thrown open to foreign vessels on the same terms as to British vessels. The trade, therefore, to India is now as open to foreign as to British vessels. If that be so, not only have all possible reasons for the prohibition contained in s. 2 of the Trade to East Indies Act, 1720, of bottomry upon foreign vessels engaged in the India trade, ceased to exist, but the continuance of that statute would be inconsistent with the state of trade as established by subsequent statutes. I, therefore, am of opinion that s. 2 of the Trade to East Indies Act, 1720, is repealed by implication.

Judgment for plaintiffs.

BROOK AND OTHERS v. BROOK AND OTHERS

[HOUSE OF LORDS (Lord Campbell, L.C., Lord Cranworth, Lord St. Leonards and Lord Wensleydale), February 25, 26, 28, March 1, 18, 1861]

[Reported 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703]

Conflict of Laws—Marriage—Validity—Solemnisation abroad—Legal in country of celebration—Illegal in country of domicile.

A marriage between persons domiciled in England which is solemnised in a foreign country in compliance with the law relating to marriage in that country is valid in England unless in its essentials the marriage is such that it would be void in England, as, for instance, if the parties were within the prohibited degrees of kindred and affinity.

Notes. Marriage between a man and his deceased wife's sister was legalised by the Deceased Wife's Sister's Marriage Act, 1907. This Act was repealed by the Marriage Act, 1949, s. 1 (1) of and Sched. 1 to which re-enact this provision of the Act of 1907.

Considered: *Howarth v. Mills* (1866), L.R. 2 Eq. 389. Explained: *Re Alison's Trusts* (1874), 31 L.T. 638. Considered: *Sottomayer v. De Barros*, [1874-80] All E.R. Rep. 94. Explained: *Pawson v. Brown* (1879), 13 Ch.D. 202. Considered: *Sottomayer v. De Barros* (1879), 41 L.T. 281; *Re Bozzelli's Settlement, Husey-Hunt v. Bozzelli*, [1902] 1 Ch. 751; *Ogden v. Ogden*, [1904-7] All E.R. Rep. 86. Explained: *Chetti v. Chetti*, [1908-10] All E.R. Rep. 49. Considered: *R. v. Dibdin*, [1910] P. 57; *Inverclyde v. Inverclyde*, [1931] P. 29; *Apt (otherwise Magnus) v. Apt*, [1947] 1 All E.R. 620; *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; *Pugh v. Pugh*, [1951] 2 All E.R. 680; *Ponticelli v. Ponticelli (otherwise Giglio)*, [1958] 1 All E.R. 357; *Cheni (otherwise Rodriguez) v. Cheni*, [1962] 3 All E.R. 873. Referred to: *Wing v. Taylor* (1861), 30 L.J.P.M. & A. 258; *Re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481; *Mitford v. Mitford and Von Kuhlmann*, [1923] All E.R. Rep. 214; *Nachimson v. Nachimson*, [1930] All E.R. Rep. 114; *Re Bischoffsheim, Cassel v. Grant*, [1947] 2 All E.R. 830.

As to the validity of foreign marriages, see 7 HALSBURY'S LAWS (3rd Edn.) 88-102; and for cases see 11 DIGEST (Repl.) 455 et seq. For the Marriage Act, 1949, see 28 HALSBURY'S STATUTES (2nd Edn.) 650.

Cases referred to:

(1) *Hill v. Good* (1674), Freem. K.B. 167; Vaugh. 302; 3 Keb. 166; 89 E.R. 120; 27 Digest (Repl.) 42, 194.

(2) *Harford v. Morris* (1776), 2 Hag. Con. 423; 161 E.R. 792; 27 Digest (Repl.) 38, 150.

(3) *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, 250.

(4) *R. v. Lolley* (1812), Russ. & Ry. 237; sub nom. *Sugden v. Lolley*, 2 Cl. & Fin. 567, n.; 11 Digest (Repl.) 486, 1108.

(5) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 6 State Tr. N.S. 79; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034, H.L.; 11 Digest (Repl.) 464, 973.

(6) *Compton v. Bearcroft* (1769), Bull. N.P. 113; 2 Hag. Con. 444, n.; 161 E.R. 799; 11 Digest (Repl.) 463, 967.

(7) *R. v. Chadwick, R. v. St. Giles in the Fields (Inhabitants), St. Giles in the Fields v. St. Mary, Lambeth* (1848), 11 Q.B. 173; Cripps' Church Cas. 34; 17 L.J.M.C. 33; 10 L.T.O.S. 155; 11 J.P. 839; 12 Jur. 174; 2 Cox, C.C. 381; 116 E.R. 441; 27 Digest (Repl.) 43, 210.

(8) *Steele v. Braddell* (1838), Milw. 1; 42 Digest 946, f.

- (9) *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; A 6 Jur.N.S. 561; 164 E.R. 917; 11 Digest (Repl.) 478, 1065.
 (10) *Greenwood v. Curtis*, 6 Mass. Rep. 358.
 (11) *Medway v. Needham* (1819), 16 Mass. Rep. 157.
 (12) *Sutton v. Warren* (1845), 10 Met. Mass. Rep. 451.
 (13) *Butler v. Freeman* (1756), Amb. 301; 27 E.R. 204, L.C.; 11 Digest (Repl.) 462, 956.

Appeal from an order of STUART, V.-C., reported 3 Sm. & G. 481, in an administration action.

A bill having been filed in the Court of Chancery to administer the estate under the will of William Leigh Brook, of Meltham Hall, Huddersfield, cotton-spinner, and one of the children having died, the other children claimed that the share of such deceased child had vested in them as next of kin. The Attorney-General, as representing the Crown (entitled to the property of an illegitimate person dying without leaving issue) denied the validity of the marriage of the testator. On June 7, 1850, the testator married, at Wansbeck, in the duchy of Holstein, in the kingdom of Denmark, Emily Armitage, who was the sister of his deceased wife, and became the mother of the deceased child. At that period and up to their respective deaths, the testator and Emily Armitage were domiciled in England, and they had no permanent residence in the country where they were married, either before or after the marriage. By the law of Denmark such a marriage was valid.

On April 17, 1858, STUART, V.-C., assisted by SIR CRESSWELL CRESSWELL, held that the marriage was invalid, and made a decretal order accordingly. The next of kin appealed.

The Marriage Act, 1835 (Lord Lyndhurst's Act), provided that all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be absolutely null and void. The Act, which did not extend to Scotland, was repealed by the Marriage Act, 1949, the provision of the Act of 1835 mentioned above being re-enacted by s. 1 of the Act of 1949.

Sir Fitzroy Kelly, Q.C., Malins, Q.C., and G. L. Russell for the appellants.

The Attorney-General (Sir Richard Bethell, Q.C.) and Wickens for the Crown.

Their Lordships took time for consideration.

Mar. 18, 1861. The following opinions were read.

LORD CAMPBELL, L.C.—The question which your Lordships are called upon to consider upon the present appeal is, "whether the marriage celebrated on June 7, 1850, in the Duchy of Holstein, in the kingdom of Denmark, between William Leigh Brook, a widower, and Emily Armitage, the sister of his deceased wife, they being British subjects, then domiciled in England, and contemplating England as the place of matrimonial residence, is to be considered valid in England—marriage between a widower and the sister of a deceased wife being permitted by the law of Denmark." [His LORDSHIP held that under the law then existing the marriage of a man with his deceased wife's sister would be void, and continued:] That is not denied on the part of the appellants. They rest their case entirely upon the fact that the marriage was celebrated in a foreign country where the marriage of a man with the sister of his deceased wife is permitted.

There can be no doubt of the general rule, that "a foreign marriage, valid according to the law of the country where it is celebrated, is good everywhere." But, my Lords, while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is

A celebrated—the essentials of the contract depend upon the *lex domicilii*—the law of the country in which the parties are domiciled at the time of marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicil, the marriage may be good everywhere. But
 B if the contract of marriage is such in essentials as to be contrary to the law of the country of domicil, and it is declared void by that law, it is to be regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated.

This qualification upon the rule that “a marriage valid where celebrated is good everywhere” is to be found in the writings of all eminent jurists who have discussed the subject. I will give one quotation from HUBERUS DE CONFLICTU
 C LEGUM, Bk. 1, tit. 3, s. 2:

“*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis, ejusque civium præjudicetur.*”

D Then he gives “marriage” as the illustration (*ibid.* s. 8):

“*Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eadem exceptione præjudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi: ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit.*”

E The same great jurist observes (*ibid.* s. 10):

“*Non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est quam in quo contrahentes matrimonium exercere voluerunt.*”

F STORY, J., in his valuable treatise on the CONFLICT OF LAWS, while he admits the rule that “a marriage valid where celebrated is good everywhere,”
 G says there are exceptions: those of marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country. He adds:

H “In respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest, and therefore no Christian country would recognise polygamy or incestuous marriages, but when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous.”

I The conclusion of this sentence was strongly relied upon by counsel for the appellants, who alleged that many in England approve marriages between a widower and the sister of his deceased wife, and that such marriages are permitted in Protestant states on the continent of Europe, and in most of the States of America.

Sitting here as a judge to declare and enforce the law of England as fixed by King, Lords and Commons—the supreme power of this realm—I do not feel myself at liberty to form any private opinion of my own on the subject, or to inquire into what may be the opinion of the majority of my fellow-citizens at

home, or to try to find out the opinion of all Christendom. I can as a judge only look to what was the solemnly pronounced opinion of the legislature when the laws were passed which I am called upon to interpret. What means am I to resort to for the purpose of ascertaining the opinions of foreign nations? Is my interpretation of these laws to vary with variation of opinion in foreign countries? Change of opinion on any great question, at home or abroad, may be a good reason for the legislature changing the law, but can be no reason for judges to vary their interpretation of the law. Indeed, as STORY allows marriages positively prohibited by the public law of a country, from motives of policy, to form an exception to the general rule as to the validity of marriage, he could hardly mean his qualification to apply to a country like England, in which the limits of marriages to be considered incestuous are exactly defined by public law. That the Parliament of England, in framing the prohibited degrees within which marriages were forbidden, believed and intimated their opinion that all such marriages were incestuous and contrary to God's word, I cannot doubt. All the degrees prohibited are brought into one category, and although marriages within those degrees may be more or less revolting, they are placed on the same footing, and before English tribunals, till the law is altered, they are to be treated alike.

The general principles of jurisprudence which I have expounded have uniformly been acted upon by English tribunals. Thus, in the great case of *Hill v. Good* (1), in the time of Charles II, VAUGHAN, C.J., and his brother judges of the Court of Common Pleas, held that

"When an Act of Parliament declares a marriage to be against God's law, it must be admitted in all courts and proceedings of this kingdom to be so."

In *Harford v. Morris* (2) the great judge who presided (SIR GEORGE HAY) clearly indicates his opinion that marriages celebrated abroad are only to be held valid in England if they are according to the law of the country where they are celebrated, and if they are not contrary to the law of England. He adds (2 Hag. Con. at p. 434):

"I do not say that foreign laws cannot be received in this court in cases where the courts of that country had a jurisdiction. But I deny the *lex loci* universally to be a foundation for the jurisdiction so as to impose an obligation on this court to determine by those foreign laws."

I will only give another example—*Warrender v. Warrender* (3) in which I had the honour to be counsel at your Lordships' Bar. Sir George Warrender born and domiciled in Scotland, married an Englishwoman in England, according to the rites and ceremonies of the Church of England; but, instead of changing his domicile, he meant that his matrimonial residence should be in Scotland, where he had large landed estates on which his wife's jointure was charged. Having lived a short time in Scotland, they separated. Sir George, continuing domiciled in Scotland, commenced a suit against her in the Court of Session in Scotland for a dissolution of the marriage on the ground of adultery alleged to have been committed by her on the continent of Europe. It was objected that this being a marriage celebrated in England, a country in which, by the then existing law, marriage was indissoluble, the Scottish court had no jurisdiction to dissolve the marriage, and *R. v. Lolley* (4) was relied upon, in which a domiciled Englishman, having been married in England, and while still domiciled in England having been divorced by decree of the Court of Session in Scotland, and having afterwards married a second wife in England, his first wife being still alive, he was convicted of bigamy in England, and held by all the judges to have been rightly convicted, because the sentence of the Scottish court dissolving his first marriage was a nullity. But your

A Lordships unanimously held that, as Sir George Warrender at the time of his marriage was a domiciled Scotsman and Scotland was to be the conjugal residence of the married couple, although the law of England, where the marriage was celebrated, regulated the ceremonials of entering into the contract, the essentials of the contract were to be regulated by the law of Scotland, in which the husband was domiciled, and that, although by the law of England
B marriage was indissoluble, yet, as by the law of Scotland the tie of marriage might be judicially dissolved for the adultery of the wife, the suit was properly instituted, and the Court of Session had authority to dissolve the marriage.

It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden
C by the law of the place of domicile as contrary to religion, morality, or any of its fundamental institutions. A marriage between a man and the sister of his deceased wife, being Danish subjects, domiciled in Denmark, may be good all over the world; and this may be so even if they were native-born English subjects, who had abandoned their English domicile, and were domiciled in Denmark.
D I am by no means prepared to say that the marriage in question ought to be, or would be, held valid in the Danish courts, proofs being given that the parties were British subjects, domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage
E celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.

The appellants argued that we could not hold this marriage to be invalid without being prepared to nullify the marriage of Danish subjects who contracted such a marriage in Denmark while domiciled in their native country, if they should come to reside in England. But on the principles which I have laid down, such marriages, if examined, would be held valid in all English courts, as they are according to the law of the country in which the parties were domiciled when the marriages were celebrated.

I may here mention another argument of the same sort brought forward
G by the appellants, that our courts have not jurisdiction to examine the validity of marriages celebrated abroad according to the law of the country of celebration, because the ecclesiastical courts, who had exclusive jurisdiction over marriage, must have treated them as valid. But I do not see anything to have prevented the ecclesiastical courts from examining and deciding this question. Suppose in a probate suit, the validity of a marriage had been denied, its
H validity must have been determined by the ecclesiastical court according to the established principles of jurisprudence, whether it was celebrated at home or abroad. Counsel further urged with great force, that both SIR CRESSWELL CRESSWELL and STUART, V.-C., had laid down that Lord Lyndhurst's Act [the Marriage Act, 1835, repealed by the Marriage Act, 1949] binds all English subjects, wherever they may be, and prevents the relation of husband and wife
I from subsisting between any subjects of the realm of England within the prohibited degrees. I am bound to say that, in my opinion, this is incorrect, and that Lord Lyndhurst's Act would not affect the law of marriage in any conquered colony in which a different law of marriage prevailed, whatever effect it might have in any other colony. I again repeat that it was not meant by Lord Lyndhurst's Act to introduce any new prohibition of marriage in any part of the world. For this reason I do not rely on the *Sussex Peerage Case* (5) as an authority in point, although much reliance has been placed upon it. My opinion in this case does not rest on the notion of any

personal incapacity to contract such a marriage being impressed by Lord Lyndhurst's Act on all Englishmen, and carried about with them all over the world, but on the ground of the marriage being prohibited in England as "contrary to God's law."

I will now examine the authorities relied upon by the counsel for the appellants. They bring forward nothing from the writings of jurists except the general rule that contracts are to be construed according to the *lex loci contractus*, and the saying of STONY with regard to a marriage being contrary to the precepts of the Christian religion, upon which I have already commented. There are various decisions which they bring forward as conclusive in their favour. They begin with *Compton v. Bearcroft* (6), and the class of cases in which it was held that Gretna Green marriages were valid in England, notwithstanding LORD HARDWICKE'S Clandestine Marriages Act, 1753 [repealed by Marriage Act, 1823]. In observing upon them, I do not lay any stress on the proviso in this Act, that it should not extend to marriages in Scotland or beyond the seas, this being only an intimation of what might otherwise have been inferred, that its direct operation should be confined to England, and that marriages in Scotland and beyond the seas should continue to be viewed according to the law of Scotland and countries beyond the seas, as if the Act had not passed. But I do lay very great stress on the consideration that Lord Hardwicke's Act only regulates banns and licences, and the formalities by which the ceremony of marriage shall be celebrated. It does not touch the essentials of the contract, or prohibit any marriage which was before lawful, or render any marriage lawful which was before prohibited. The formalities which it requires could only be observed in England, and the whole frame of it shows that it was only territorial. The nullifying clauses about banns and licences can only apply to marriages celebrated in England. In this class of cases the contested marriage could only be challenged for want of banns or licence in the prescribed form. These formalities being observed the marriages would all have been unimpeachable. But the marriage we are to decide upon has been declared by the legislature to be "contrary to God's law," and on that ground it is absolutely prohibited. Here I may properly introduce the words of COLERIDGE, J., in *R. v. Chadwick* (7) (11 Q.B. at p. 238):

"We are not on this occasion inquiring what God's law or what the Levitical law is. If the Parliament of that day legislated on a misinterpretation of God's law, we are bound to act upon the statute which they have passed."

The appellants' counsel next produced a new authority, the very learned and lucid judgment of DR. RADCLIFFE, in *Steele v. Braddell* (8). The Irish statute, 9 Geo. 2, c. 11, enacts,

"that all marriages and matrimonial contracts, when either of the parties is under the age of twenty-one, had without the consent of the father or guardian, shall be absolutely null and void to all intents and purposes; and that it shall be lawful for the father or guardian to commence a suit in the proper ecclesiastical court in order to disannul the marriage."

A young gentleman, a native of Ireland, and domiciled there, went, while a minor, into Scotland, and there married a Scottish young lady without the consent of his father or guardian. A suit was brought by his guardian in an ecclesiastical court in Ireland in which DR. RADCLIFFE presided, to disannul the marriage, on the ground that this statute created a personal incapacity in minors, subjects of Ireland, to contract marriage in whatever country, without the consent of a father or guardian. But the learned judge said:

"I cannot find that any Act of Parliament such as this has ever been extended to cases not properly within it, on the principle that parties endeavoured to evade it."

After an elaborate view of the authorities upon the subject, he decided that, both parties being of the age of consent, and the marriage being valid by the law of Scotland, it could not be impeached in the courts of the country in which the husband was domiciled—and he dismissed the suit. But this was a marriage between parties who, with the consent of parents and guardians, might have contracted a valid marriage according to the law of the country of the husband's domicile, and the mode of celebrating the marriage was to be according to the law of the country in which it was celebrated. But if the union between these parties had been prohibited by the law of Ireland as "contrary to the word of God," undoubtedly the marriage would have been dissolved. DR. RADCLIFFE expressly says:

"It cannot be disputed that every State has the right and the power to enact that every contract made by one or more of its subjects shall be judged of, and its validity decided, according to its own enactments, and not according to the laws of the country wherein it was formed."

Another case was brought forward, decided by SIR CRESSWELL CRESSWELL: *Simonin v. Mallac* (9). This was a petition by Valerie Simonin for a declaration of nullity of marriage. The petitioner alleged that a pretended ceremony of marriage was had between her and Léon Malloce, of Paris, in the parish Church of St. Martin-in-the-Fields; that about two days afterwards the parties returned to Paris, but did not cohabit, and the marriage was never consummated; that the pretended marriage was in contradiction to and in evasion of the Code Napoléon; that the parties were natives of and domiciled in France; and that subsequently to their return to France the Civil Tribunal of the Department of the Seine had, at the suit of Léon Mallac, declared the said pretended marriage to be null and void. Léon Mallac was served at Naples with a citation and a copy of the petition, but did not appear. Proof was given of the material allegations of the petition, and that the parties, coming to London to avoid the French law which required the consent of parents or guardians to their union, were married by licence in the parish church of St. Martin-in-the-Fields. SIR CRESSWELL CRESSWELL, after the case had been learnedly argued on both sides, discharged the petition. But was there anything here inconsistent with the opinion which the same learned judge delivered as assessor to STUART, V.-C., in the present case. Nothing whatever. For the objection to the validity of the marriage in England was merely that the forms prescribed by the Code Napoléon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled, forbidding a conjugal union between them, and, the proper forms of celebration being observed, this marriage by the law of France would have been unimpeachable. The case, therefore, comes into the same category as *Compton v. Bearcroft* (6) and *Steele v. Braddell* (8), decided by DR. RADCLIFFE. None of these cases can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled.

Some American decisions cited on behalf of the appellants remain to be noticed. In *Greenwood v. Curtis* (10) the general doctrine was acted upon, that a contract valid in a foreign State may be enforced in a State in which it would not be valid, but with this important qualification, "unless the enforcing of it should hold out a bad example to the citizens of the State in

which it is to be enforced." The legislature of England, whether wisely or not, considers the marriage of a man with the sister of his deceased wife "contrary to God's law," and of bad example. *Medway v. Needham* (11), according to the marginal note, decides nothing which the counsel for the appellants need controvert:

"A marriage which is good by the laws of the country where it is entered into is valid in any other country; and although it should appear that the parties went into another State to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will nevertheless be valid in the country in which the parties live; but this principle will not extend to legalise incestuous marriages so contracted."

This judgment was given in the year 1819. As in England, so in America, some very important social questions have arisen on cases respecting the settlement of the poor. Whether the inhabitants of the district of Medway, or the inhabitants of the district of Needham, were bound to maintain a pauper depended upon the validity of a marriage between a mulatto and a white woman. They were residing in the province of Massachusetts at the time of the supposed marriage, which was prior to the year 1770. As the laws of the province at that time prohibited all such marriages, they went into the neighbouring province of Rhode Island, and were there married according to the laws of that province. They then returned to Massachusetts. PARKER, C.J., held that the marriage was there to be considered valid, and so far the case is an authority for the appellants. But I cannot think that that is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of HUBERUS and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and in the country of domicile were different, and he took the distinction between cases where the absolute prohibition of the marriage is forbidden on mere motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier, and entering another State in which this marriage is not prohibited, to celebrate a marriage forbidden by their own State, and, immediately returning to their own State, to insist on their marriage being recognised as lawful. Indeed, PARKER, C.J., expressly allowed that his doctrine would not extend to cases in which the prohibition was grounded on religious considerations, saying:

"If without any restriction, then it might be that incestuous marriages might be contracted between citizens of a State where they were held unlawful and void, in countries where they were not prohibited."

The only remaining case is *Sutton v. Warren* (12). The decision in this case was pronounced in 1845. I am sorry to say that it rather detracts from the high respect with which I have been in the habit of regarding American decisions resting upon general jurisprudence. The question was whether a marriage celebrated in England on Nov. 24, 1834, between Samuel Sutton and Ann Hills, was to be held to be a valid marriage in the State of Massachusetts. The parties stood near to each other in relation of aunt and nephew, Ann Hills being own sister of the mother of Samuel Sutton. They were both natives of England, and domiciled in England at the time of their marriage. About a year after their marriage they went to America, and resided as man and wife in the State of Massachusetts. By the law of that State a marriage

A between an aunt and her nephew was prohibited, and was declared null and void. Nevertheless, the Supreme Court of Massachusetts held that this was to be considered a valid marriage in Massachusetts. I am bound to say that the decision proceeded on a total misapprehension of the law of England. HUBBARD, J., who delivered the judgment of the court, considered that such a marriage was not contrary to the law of England. There can be no doubt that, although B contracted before the passing of the Marriage Act, 1835, it was contrary to the law of England, and might have been set aside as incestuous, and that Act gave no protection whatsoever to a marriage within the prohibited degrees of consanguinity, so that if Samuel Sutton and Ann Hills were now to C might be proceeded against for incest. If this case is to be considered well decided and an authority to be followed, a marriage contrary to the law of the State in which it was celebrated, and in which the parties were domiciled is to be held valid in another State into which they emigrate, although by the law of this State, as well as of the State of celebration and domicile such a marriage is prohibited, and declared to be null and void. This decision, my Lords, may D alarm us at the consequences which might follow from adopting foreign notions on such subjects rather than adhering to the principles which have guided us and our fathers ever since the Reformation.

I have now, as carefully as I could, considered and touched upon the arguments and authorities brought forward on behalf of the appellants, and I must say that they seem to me quite insufficient to show that the decree appealed E against is erroneous. The law upon this subject may be changed by the legislature, but I am bound to declare that, in my opinion, by the existing law in England this marriage is invalid. It is, therefore, my duty to advise your Lordships to dismiss the appeal.

LORD CRANWORTH.—The important question to be decided in this case F is whether the marriage contracted in 1850 between W. L. Brook, a widower, and Emily Armitage, the sister of his deceased wife, at Altona, where such marriages are lawful, was a valid marriage in England, both parties to it being at the time it was contracted native-born subjects of her Majesty domiciled in England. The Court of Chancery decided that it was invalid, as having been prohibited by s. 2 of the Marriage Act, 1835. The argument of the Attorney- G General was that this enactment is of a nature so general and extensive that it must be construed as affecting all her Majesty's subjects wheresoever born or domiciled, so that it would operate throughout all our colonies and on all who owe allegiance to the British Crown, wheresoever they may be. I cannot concur in that construction of the statute. No doubt the Imperial legislature can, and occasionally does, legislate so as to affect our colonies; H but ordinarily our Acts of Parliament speak only to the inhabitants of Great Britain and Ireland, and I see nothing to lead to the inference that the enactment in question was meant to have a wider import. Indeed, the exception of Scotland in the next section seems to me, independently of other considerations, conclusive on the subject. Excluding, then, this more extensive operation of the enactment, it seems plain that the prospective effect of the Act is to make all I marriages within the prohibited degrees absolutely void ab initio, dispensing with the necessity of a sentence in the ecclesiastical court declaring them void. The persons whose marriages by s. 2 are declared to be void are the same persons, and only the same persons, whose marriages before the passing of that Act might, during the lives of both parties, have been declared void by the ecclesiastical court. The question, therefore, is whether before the passing of that statute the ecclesiastical court could have declared the marriage now in dispute void. It certainly could, and must have done so, if it had been celebrated in England, and all that your Lordships have to say is, whether

the circumstances that it was celebrated in a foreign country where such unions are lawful, could have altered the conclusion at which the court ought to have arrived. A

In the first place, there is no doubt that the mere fact of a marriage having been celebrated in a foreign country did not exclude the jurisdiction of the ecclesiastical court while the jurisdiction as to marriages was exercised by them. It was of ordinary occurrence that the court should entertain suits as to the validity of marriages contracted out of its jurisdiction. So that the question for decision is narrowed to the single point, whether, in deciding on the validity of this marriage, if it had come into discussion before the year 1835, and during the lives of both the parties, the ecclesiastical court would have been guided by the law of this country only, or that of the country where the marriage was contracted. The case was most elaborately argued at your Lordships' Bar, and we were referred to very numerous authorities bearing on the subject. The conclusion at which I have arrived is the same at which my noble and learned friend on the Woolsack has come to, namely, that though in the case of marriages celebrated abroad the *lex loci contractus* must quoad solemnitates determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it, being subjects of her Majesty domiciled in this country, might lawfully make. There can be no doubt as to the power of every country to make laws regulating the marriages of its own subjects—to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. If the marriages of all its subjects were contracted within its own boundaries, no such difficulty as that which has arisen in the present case could exist. But that is not the case. The intercourse of the people of all Christian countries among one another is so constant, and the number of the subjects of one country living in or passing through another is so great, that the marriage of the subject of one country within the territories of another must be matter of frequent occurrence. So, again, if the laws of all countries were the same as to who might marry, and what should constitute marriage, there would be no difficulty. But that is not the case, and hence it becomes necessary for every country to determine by what rule it will be guided in deciding on the validity of a marriage entered into beyond the area over which the authority of its own laws extends. The rule in this country, and I believe generally in all countries, is that the marriage, if good in the country where it was contracted, is good everywhere, subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong. D E F G

The real question, therefore, is, whether the law of this country, by which the marriage now under consideration would certainly have been void if celebrated in England, extends to English subjects casually being in Denmark. I think it does. Of the power of the legislature to determine what shall be the legal consequences of the acts of its own subjects done abroad, there can be no doubt, and whether the operation of any particular enactments is intended to be confined to acts done within the limits of this country, or to be of universal application, must be matter of construction, looking to the language used, and the nature and objects of the law. It must be admitted that the statutes on this subject are in a confused state. But it must be taken as clear law, that though the two statutes of Hen. 8, i.e., 25 Hen. 8, c. 22, and the 28 Hen. 8, c. 7 (being the only statutes which, in terms, prohibit marriage with a deceased wife's sister as being contrary to God's law) are repealed, yet by two subsequent Acts of the same reign, viz. 28 Hen. 8, c. 16 [Ecclesiastical Licences Act, 1536], and 32 Hen. 8, c. 38 [Marriage Act, 1540, repealed by Marriage Act, 1949], which had for their object to make good certain H I

marriages, the prohibition is in substance revived or kept alive. For in both of them there is an exception of marriages prohibited by God's law, and in the Act of 1536 the language of the exception is, "which marriages be not prohibited by God's law, limited and declared in the Act made in this present reign." That is the repealed Act of the 28 Hen. 8, c. 7; so that it is to that Act, though repealed, that we are to look in order to see what marriages the legislature has prohibited as being contrary to God's law. It was perhaps unnecessary to advert to this after the decision of the Court of Queen's Bench in *R. v. Chadwick* (7), but it is fit that the ground on which we proceed should be made perfectly clear.

Assuming then, as we must, that such marriages are not only prohibited by our law, but prohibited because they are contrary to the law of God, are we to understand the law as prohibiting them wheresoever celebrated, or only if they are celebrated in England? I cannot hesitate in the answer I must give to such an inquiry. The law, considering the ground on which it makes the prohibition, must have intended to give to it the widest possible operation. If such unions are declared by our law to be contrary to the laws of God, then persons having entered into them and coming into this country would, in the eye of our law, be living in a state of incestuous intercourse. It is impossible to believe that the law could have intended this. It was contended by the Attorney-General that such a marriage even between two Danes celebrated in Denmark must be contrary to the law of God, and, therefore, if the parties to it were to come to this country, we must consider them as living in incestuous intercourse, and if any question were to arise here as to the succession to their property, we must hold the issue of the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to the law of God. It is our law which makes the marriage void, and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction. The authorities showing that the general rule which gives validity to marriages contracted according to the laws of the place where they are contracted is subject to the qualification I have mentioned, namely, that such marriages are not contrary to the laws of the land to which the parties contracting them belong, have been referred to, not only by my noble and learned friend, but in the able opinion of SIR CRESSWELL CRESSWELL, delivered in the court below, as also in the judgment of the vice-chancellor. I abstain, therefore, from going into them in detail. To do so would only be to repeat what is already fully before your Lordships.

I cannot, however, refrain from expressing my dissent from that part of SIR CRESSWELL CRESSWELL's able opinion, in which he repudiates a part of what is said by STORY, J., as to marriages which are to be held void on the ground of incest. That very learned writer, after stating in s. 113, that marriages, valid where they are contracted, are in general to be held valid everywhere, proceeds thus:

"The most prominent, if not the only known exceptions to the rule, are marriages involving polygamy or incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves under special circumstance to the laws of their own countries. As to the first exception, Christianity is understood to prohibit polygamy and incest, and therefore no Christian country would recognise polygamy or incestuous marriages; but when we speak of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous."

With this latter portion of the doctrine of STORY, J., SIR CRESSWELL CRESSWELL does not agree. But I believe that this passage, when correctly interpreted, is strictly consonant to the law of nations. STORY there is not speaking of marriages prohibited as incestuous by the municipal law of the country. If so prohibited, they would be void under his second class of exceptional cases. No inquiry would be open as to the general opinion of Christendom. But suppose the case of a Christian country in which there are no laws prohibiting marriages within any specified degrees of consanguinity or affinity, or declaring or defining what is incest; still even there incestuous marriages would be held void, as polygamy would be held void, being forbidden by the Christian religion. But then to ascertain what marriages are within that rule as incestuous—a rule not depending on municipal laws, but extending generally to all Christian countries—recourse must be had to what is deemed incestuous by the general consent of Christendom. It could never be held that the subjects of such a country were guilty of incest in contracting a marriage allowed and approved of by a large portion of Christendom, merely because in the contemplation of other Christian countries it would be considered to be against God's laws. I have thought it right to enter into this explanation, because it is important that a writer so highly and justly respected as STORY, J., should not be misunderstood, as, with all deference, I think he has been in the passage under consideration.

Having thus expressed my opinion, I do not feel that I should usefully occupy your Lordships' time by going again over the cases which have been so carefully examined by my noble and learned friend. I agree with him that the cases decided as to Gretna Green marriages do not assist the appellants. LORD HARDWICKE's Clandestine Marriages Act, 1753, directs that marriages shall only be celebrated after publication of banns or by licence; and in case of marriage, by licence, if either party is under age, s. 11 makes the marriage void unless there has been the requisite consent of parent or guardian. That section evidently cannot be extended to marriages celebrated out of England. The necessity for banns or licence clearly shows that the operation of the statute was to be confined to this country, and on that ground such marriages as those I have alluded to have always been deemed valid. It was on the same ground that the Irish case *Steele v. Braddell* (8) was decided. DR. RADCLIFFE held that the Irish statute prohibiting the marriage of a minor without certain consents was, from the nature of its provisions, and attending to all its enactments, to be deemed to be confined to marriages celebrated in Ireland, not that the nature of the provisions might not have been such as to show that its operation was intended to be universal—indeed, he expressly stated the contrary. It has, therefore, no bearing on the present case, where the ground of the prohibition shows that it must have been meant to be of the widest possible extent. I also concur entirely with my noble and learned friend that the American decision of *Medway v. Needham* (11) cannot be followed or treated as sound law. The State or province of Massachusetts positively prohibited by its laws as contrary to public policy the marriage of a mulatto with a white woman; and on one of the grounds of distinction pointed out by STORY, J., such a marriage certainly ought to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful. I shall not further detain your Lordships. I think that this marriage is one clearly prohibited by the statutes of Hen. 8, wheresoever celebrated, and, therefore, that the Marriage Act, 1835, makes it absolutely void. I, therefore, concur in thinking that the appeal should be dismissed.

LORD ST. LEONARDS.—The question before the House is one of great importance, but not of much difficulty. The learned counsel for the appellants insisted that a marriage was but a civil contract—it must, by inter-

national law, depend upon the law of the country where it is contracted, and that the question of domicile was excluded; that marriages in Scotland were allowed, notwithstanding the Clandestine Marriages Act, 1753; and that but for the Marriage Act, 1835, this marriage could not be impeached. It was admitted that this country would not recognise a contract in a foreign country, which was contrary to religion or morality or was criminal, but it was argued that the allowance of such marriages as that under consideration by other States showed that they were not contrary to religion or morality or criminal; and that the Act of 1835 virtually repealed any former law of this country impeaching the validity of such marriages as contrary to the law of God, for, if deemed to be contrary to God's law, Parliament would not have given legal validity to those which had been solemnised.

It was forcibly urged that no Act of Parliament treats a marriage with a deceased wife's sister as incestuous. I consider this as purely an English question. It depends wholly on our own laws binding upon all the Queen's subjects. The parties were domiciled subjects here, and the question of the validity of the marriage will affect the right to real estate. *Warrender v. Warrender* (3) shows how the marriage contract may be affected by domicile. We cannot reject the consideration of the domicile of the parties in considering the question. I may at once relieve the case from any difficulty arising out of Scottish marriages, in fraud, as it is alleged, of our Marriage Act of 1835. When those marriages are solemnised according to the law of Scotland they are no fraud upon the Act, for it expressly, amongst other exceptions, provides that nothing contained in it shall extend to Scotland. LORD HARDWICKE observed, in *Butler v. Freeman* (13), that there was a door open in the statute as to marriages beyond seas and in Scotland. I may observe that the door was purposely left open; such marriages have no bearing upon the question before the House. The grounds upon which, in my opinion, the marriage in Denmark is void by our law depend upon our Acts of Parliament, and upon the rule that we do not admit any foreign law to be in force here where it is opposed to God's law according to our view of that law. The argument, as I have already observed, for the appellant was, that no law in this country branded marriages with a deceased wife's sister as incestuous.

Let us see how this stands. [HIS LORDSHIP dealt with this question, said that under the existing law the marriage now in question would have been void if it had been contracted in England, and continued:] This case, then, is reduced to the simple question: Is the marriage valid in this country because it was contracted in Denmark, where a marriage with a deceased wife's sister is valid? This depends upon two questions, either of which, if adverse to the appellants, would be fatal to the validity of the marriage, viz.: First, will our courts admit the validity of a marriage abroad by an English subject domiciled here with his deceased wife's sister, because the marriage is valid in the country where it was contracted; secondly, is such a marriage struck at by the Marriage Act, 1835?

I think that the marriage has no validity in this country on the first ground, for by our law such a marriage is forbidden as contrary, in our view, to God's law. The objection that Parliament gave validity to such marriages already had, in cases of affinity, is no reason why, when we have in future carefully made all such marriages absolutely void, we should admit their validity in favour of the law of a foreign country. The learned judge who assisted the vice-chancellor in the court below came to the conclusion, after an elaborate review of the authorities, that a marriage contracted in one country by the subjects of another country in which they are domiciled is not to be held valid if by contracting it the laws of their country are violated. This proposition is more extensive than the case before us requires us to act upon, but I do not dissent from it. I shall not, however, dwell upon this

point, because I think that upon the second point the marriage is clearly invalid.

The appellant relies upon the silence of the Act of 1835 in respect to marriages abroad. The Act is general, and contains a large measure of relief as well as a prohibition. It gives validity to all marriages celebrated before the passing of the Act by persons being within the prohibited degrees of affinity. This is unlimited, and we could hardly hold that such of those persons as had been married abroad were excluded from the benefit of the Act. Why should the relief be confined and not allowed as large a range as the words will admit? Clearly no intention appears to limit the operation of the words. The next section, which nullifies the contract, is equally unlimited. All marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity are declared to be null and void. We must give the same interpretation to the words in this section as to those in the former section. To whatever class the relief was extended, to the same class, in addition to those within the prohibited degrees of consanguinity, the prohibition must be applied. It is, of course, not denied that three or four additional words would have put the question at rest. But why, when the words are "all marriages," without making any exception, are we to introduce an exception in order to give validity to the very marriages which the legislature intended to render null and void? The marriage now under consideration shows how expedient it was that the law should prohibit it. It is not like the exception in the Marriage Act, 1823, of marriages in Scotland, which enabled parties, without any real evasion of the law, to marry there without the forms imposed by the Act. What was intended was expressed. Here, on the contrary, the enactment is general and unqualified, and as it was intended to create a personal inability, there is, of course, no exception. The answer to the argument that the very case is not provided for in so many words is that with the Marriage Act, 1823, before them the framers of the Act of 1835 would have introduced an exception to meet this case, if such had been the intention. But when we advert to the nature of the contract and the state of our law in relation to such a contract, which law was not altered by the new enactment, and bear in mind that the contrary law in the foreign country ought to receive no sanction here, opposed as it is to our law declaring such a contract to be contrary to God's law—we cannot fail to perceive, that this case falls directly within the enactment that all such marriages shall be null and void.

Authority is not wanting in favour of this construction. The Royal Marriages Act, 1772, has been held in this House to extend to marriages abroad. And yet how much weaker a case was that than the one before us. There was no infraction of God's law as declared by our law. The prohibition there rested only on political grounds. There were difficulties to surmount in extending the Act to marriages abroad which do not occur in this case. The Royal Marriages Act enacts that no descendant of George the Second (other than the issue of princesses who had married or might thereafter marry into foreign families) should be capable of contracting marriage without the previous consent of the King under the great seal, and declared in council (which consent to preserve the memory thereof, was to be set out in the licence and register of marriage and to be entered in the books of the Privy Council), and that every marriage or matrimonial contract of any such descendant without such consent first obtained, should be null and void. But the Act provides that in case any such descendant, being above the age of twenty-five, shall persist in his or her intention to contract a marriage disapproved of by the King, then, upon giving notice to the Privy Council, which is to be entered in the books thereof, he or she may, after the duration of twelve months, contract such marriage without the King's consent, and such marriage is made valid unless both Houses of Parliament shall, before the expiration of the twelve months, expressly

A declare their disapprobation of such intended marriage. Every person convicted of knowingly solemnising or assisting, or being present at the celebration of any such marriage, or of the making any matrimonial contract without such consent, is to incur the pains and penalties of the Statute of Premunire, which provision made the Act a highly penal one.

3 The invalidity of the Duke of Sussex's marriage at Rome without the King's consent was declared by this House with the assistance of six law lords and seven common law judges: *Sussex Peerage Case* (5). The unanimous opinion of the judges was delivered by TINDAL, C.J. He stated the only rule of construction of Acts of Parliament to be that they should be construed according to the intent of the Parliament which passed them. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. The Act created a personal inability in the duke to contract a marriage without consent. The prohibitory words were general, that every marriage or matrimonial contract of any such person should be null and void. As a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage in Rome is as clearly within the prohibitory words of the statute as the incapacity to contract in England. So again as to the second or annulling branch of the enactment, "that every marriage without such consent shall be null and void," the words employed are general, or more properly universal, and cannot be satisfied in their plain literal ordinary meaning unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated.

E The learned Chief Justice then addressed himself to s. 2 of the Act, and made an observation strongly applicable to my observations on the Marriage Act, 1835, in rendering valid, as I submit, former marriages wherever celebrated. He said, as no doubt could be entertained by any one but that a marriage taking place with the due observance of the requisites of s. 2 would be held equally valid whether contracted and celebrated at Rome or in England, so the judges thought it would be contrary to all established rules of construction, if the very same words in s. 1 were to receive a different sense from those in s. 2; if it should be held that a marriage in Rome contracted with reference to s. 2 is made valid, and at the same time a marriage at Rome is not prohibited under s. 1, surely (the Chief Justice added) if a marriage of a descendant of George the Second, contracted or celebrated in Scotland or Ireland, or on the continent, is to be held a marriage not prohibited by this Act, the statute itself may be considered as virtually and substantially a dead letter from the first day it was passed.

H I think your Lordships will agree with me, that the opinions of the learned judges in the *Sussex Peerage Case* (5) strictly apply to this case, and ought to rule it. I adopt every one of those opinions without reserve. It is true that the Acts are not framed (as they could not be) exactly alike; because the Royal Marriages Act did not intend to establish an absolute prohibition, unless in the last resort. But where that Act and the Act of 1835 have the same object, viz. the annulling and rendering void a marriage contracted contrary to these provisions, they are identical, and cannot admit of two constructions. I am clearly of opinion that this marriage was rendered void by the Act of 1835, and I concur with my noble and learned friends that the appeal should be dismissed.

I LORD WENSLEYDALE concurred.

CASTRIQUE v. IMRIE AND ANOTHER

[House of Lords (Lord Hatherley, L.C., Lord Chelmsford and Lord Colonsay),
June 28, 29, 1869, February 18, April 4, 1870]

[Reported L.R. 4 H.L. 414; 39 L.J.C.P. 350; 23 L.T. 48;
19 W.R. 1; 3 Mar. L.C. 454]

Conflict of Laws—Foreign judgment—Binding effect—Proceedings in rem relating to moveable property within foreign State—Erroneous decision as to English law.

Where the court of a foreign State, acting within the jurisdiction conferred on it by the sovereign authority of that State, has pronounced a judgment in proceedings in rem relating to moveable property which is within the lawful control of that State, that judgment is binding on the whole world. Even if evidence was offered to the foreign court of what was the English law applicable to the case and the court come to an erroneous, though honest, conclusion on the subject, their judgment could not be impeached in our courts.

Notes. Considered: *Messina v. Petrocchino* (1872), L.R. 4 P.C. 144; *The City of Mecca* (1879), 5 P.D. 28; *Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, London and China*, [1897] 1 Q.B. 55; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Yates v. Kyffin-Taylor and Wark*, [1899] W.N. 141; *In the Estate of Crippen*, [1911] P. 108; *The Tolten*, [1946] 2 All E.R. 372. Referred to: *Godard v. Gray* (1870), L.R. 6 Q.B. 139; *Ellis v. M'Henry* (1871), L.R. 6 C.P. 228; *Taylor v. Ford* (1873), 22 W.R. 47; *Meyer v. Ralli* (1876), 1 C.P.D. 358; *De Mora v. Concha* (1885), 29 Ch.D. 268; *Re Trufört, Trafford v. Blanc* (1887), 36 Ch.D. 600; *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia* (1891), 61 L.J.Ch. 145; *Alcock v. Smith*, [1892] 1 Ch. 238; *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455; *Francis, Times & Co. v. Carr* (1900), 82 L.T. 698; *Caine v. Paluce Steamship Co.*, [1907] 1 K.B. 670; *Ingenohe v. Wing On (Shanghai)* (1927), 44 R.P.C. 343; *The Goulandris*, [1927] All E.R. Rep. 592; *Salvesen (or von Lorang) v. Austrian Property Administrator*, [1927] All E.R. Rep. 78; *Hollington v. Hewthorn & Co.*, [1943] 2 All E.R. 35; *Merker v. Merker*, [1962] 3 All E.R. 928.

As to the conclusiveness of foreign judgments, see 7 HALSBURY'S LAWS (3rd Edn.) 149-153; and for cases see 11 DIGEST (Repl.) 519-527.

Cases referred to:

- (1) *Stringer v. English and Scottish Marine Insurance Co.* (1870), L.R. 5 Q.B. 599; 10 B. & S. 770; 39 L.J.Q.B. 214; 22 L.T. 802; 18 W.R. 1201; 3 Mar. L.C. 440, Ex. Ch.; 29 Digest (Repl.) 298, 2257.
- (2) *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L.J.Ex. 350; 2 L.T. 799; 6 Jur.N.S. 918; 8 W.R. 639; 157 E.R. 1371, Ex. Ch.; 11 Digest (Repl.) 524, 1372.
- (3) *Simpson v. Fogo* (1863), 1 Hem. & M. 195; 1 New Rep. 422; 32 L.J.Ch. 249; 8 L.T. 61; 9 Jur.N.S. 403; 11 W.R. 418; 1 Mar. L.C. 312; 71 E.R. 85; 11 Digest (Repl.) 380, 426.

Appeal from a decision of the Court of Exchequer Chamber in an action of trover brought by the appellant, as the registered mortgagee of the ship *Ann Martin*, against the respondents, for the conversion of that vessel.

In May, 1854, Benson, the master of the ship *Ann Martin*, drew a bill on one Claus, the owner, for necessaries supplied to the ship at Melbourne. This bill was not accepted, and was dishonoured at maturity. In November, 1854, the ship being then on a voyage, Claus executed a mortgage on the ship to Harrison, who assigned the mortgage to Emley, who on April 9, 1855, assigned

A it to the appellant. On May 10, 1855, Claus became bankrupt, and the bill, which had not been accepted, was dishonoured at maturity. The bill having been endorsed to Trotteur et Cie., French subjects, they, the ship being at Havre, brought an action on the bill against the master in the Court of Commerce at Havre. Judgment in this action went by consent against the master "by privilege upon the ship," and, that judgment having been confirmed by the Civil Tribunal of the district on Aug. 15, 1855, a sale of the ship was ordered by the court and the respondents bought her. In September, 1855, the appellant began a suit in the Civil Tribunal of Havre to replevy the ship, and evidence of the facts and of English law was taken. On Mar. 3, 1857, that court and a court of appeal at Rouen decided against the appellant. In May, 1857, the ship was sold under the order of Aug. 15, 1855, the respondents being the buyers. The appellant then brought the present action against the respondents.

The following judges were present at the hearing—BRAMWELL and CLEASBY, BB., BLACKBURN, KEATING, MELLOR, and BRETT, JJ.

D Matthews, Q.C., for the appellant.

Mellish, Q.C., and Hutton for the respondents.

The following question was then put to the judges: Whether the plaintiff was entitled to recover from the defendants the ship in question and her appurtenances?

E Feb. 18, 1870. The judges answered the question put to them in the negative.

F **BLACKBURN, J.**, in the course of the joint judgment of himself, BRAMWELL and CLEASBY, BB., and MELLOR and BRETT, JJ., said that in *Stringer v. English and Scottish Marine Insurance Co.* (1), it appeared that the American Prize Court, pendente lite, had ordered a valuable cargo, which was claimed as prize, to be sold, not only without any adjudication that it was a prize, but also although the decision of the court below had been against the captors and that decision was ultimately affirmed on appeal. It was clear that in all such cases courts sitting under the same authority must recognise the title of the purchaser as valid. In *STORY ON THE CONFLICT OF LAWS*, s. 592, it is said that the principle that the judgment is conclusive

G "is applied to all proceedings in rem as to moveable property within the jurisdiction of the court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, re-vendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings in rem in foreign courts of admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such courts have a rightful jurisdiction founded in the actual or constructive possession of the subject-matter."

I We may observe that the words as to an action being in rem or in personam, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from *STORY*. We think the inquiry is first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted

within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world. In *Cammell v. Sewell* (2), a more general principle was laid down, viz., that

“if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.”

This we think as a general rule is correct, though, no doubt, it may be open to exceptions and qualifications, and it may very well be said that the rule commonly expressed by English lawyers, that a judgment in rem is binding everywhere, is in truth but a branch of that more general principle. But we think that it is unnecessary in this case to resort to the more general principle or to inquire what qualifications, if any, ought to be attached to it as a general rule. . . . Various cases were cited as authorities that where a foreign court has mistaken or misapplied English law, the courts of this country will not regard the foreign judgment, but we think they do not bear out any such general position.

Their Lordships took time for consideration.

April 4, 1870. The following opinions were read.

LORD HATHERLEY, L.C.—The question which arises in the case before us is whether or not the judgment of the French court, and the consequent sale in pursuance of that judgment, must be treated as having changed the property in the ship. The ship was bought at the auction by a person who was a British subject and came and registered himself as the owner of the vessel in this country, and he is now represented by the respondents. The question is as to the property in the ship as between Castrique, the appellant, and the respondents. We have been assisted with the opinions of the learned judges in this case, and I entirely concur in the conclusions at which they have arrived.

It appears to me, in the first place, desirable to consider whether this judgment must be taken as a judgment by the French court in rem, or whether it is to be taken as a judgment purporting only to deal with the interest in the vessel, whatever that interest might be, of Benson, who was the debtor in the action on the bill, and as giving no further or other right than such interest as Benson had. As was stated by the learned judges, we are familiar in our law with that distinction. We are familiar with the course taken by the Court of Admiralty in proceedings against a ship, selling the ship and giving a title against all third persons who become purchasers under a decree of the court. We are familiar also with the course taken by our own courts of law in decreeing judgment of any property of a debtor taken by levy on his goods, in which case the interest of the debtor in the chattel is sold, and that interest alone, and no further or other right than that possessed by the debtor can be transferred to persons purchasing under that sale. In other words, they purchase simply the interest of the debtor in that chattel.

If we look at the course of proceedings to see what were the intent and purpose and duty of the French courts, and if we ask: Did they proceed in the course which they took in directing the sale of the vessel as against the vessel herself, we find that there has been a difference of opinion on that point between the Court of Common Pleas and the Exchequer Chamber. The Court of Common Pleas thought that it was not a proceeding against the vessel herself, but simply against such interest as the debtor had therein, while the Court of Exchequer Chamber came to the conclusion that it was a proceeding against the ship herself. I entirely concur in the remarks of the learned judges who have assisted us in this case that, unfortunately, the case being one of foreign law, which we must consider as a fact laid before us, what that law is has not been stated in the Special Case, with all the clearness that would have

been desirable. But what is there stated, it appears to me, is sufficient to indicate upon the whole the course taken by the French courts, and the grounds of their proceeding.

In the first place, it was a proceeding against Benson and the ship which originated the matter. That being so, I think it would be very difficult to say that a proceeding in rem was not one of the matters contemplated in the original judgment. The judgment of the Tribunal of Commerce was a judgment against Benson. He had desired not to be made personally liable, as the expression here is, in respect of this judgment, and it was given against him "by privilege upon the ship." The ship was then directed to be sold. A good deal of argument turned upon that expression "by privilege upon the ship." Counsel for the appellant put the case to us thus: What was meant was no more than this, that, when the ship should be sold, the captain, by virtue of the French law, would be a privileged creditor, and would be entitled to be paid out of the first proceeds of the sale, but that it did not necessarily follow from this circumstance that the sale was ordered to be made as against all persons having an interest in the ship; and that the court might be considered to have treated the whole matter thus: Benson would have a certain amount of interest in the ship by virtue of such privilege as he might have, and the court merely meant to sell all such amount of interest as Benson had, and, therefore, to dispose only of those rights that he possessed in priority to others, and the amount due to him as captain in respect of any claim he had upon the ship in that capacity—in other words, to sell exactly what was due to Benson as captain, and not to sell the ship *per se* for any purpose whatever. But, as was well observed by the learned judges, in the first place, this privilege could only arise after the sale of the ship had taken place to give him a priority over other creditors interested in disposing of the vessel. Further than that, regard being had to the original proceeding, being against Benson and the ship, Benson himself being excluded from any personal liability, and the judgment against him being by privilege upon the ship, it does appear to me that the word "privilege," as used here, is much more in the sense in which it is used by LORD TENTENDEN in his work upon shipping of a charge upon the vessel which the person is entitled to realise by sale than in the sense of saying simply that among all the several persons who may have claims when the ship comes to be sold Benson is to stand in a favoured position. In other words, the French court intended to adjudge the sale of the vessel in order to satisfy this privilege.

I think the case becomes somewhat clearer when it is carried to the Civil Tribunal, which was called upon to affirm the judgment of the Tribunal of Commerce, and give efficacy to the dealing with the ship. What course did the Civil Tribunal take? It summoned all who were supposed to be owners of the ship. The judges of that court only knew of Claus and Claus's assignee; they did not know any of the mortgagees, whose titles did not appear upon the ship's papers. At all events, they considered, if anything was said about them, that they could pay no attention to persons of whom they could have no knowledge, except through the medium of the ship's papers. For what purpose did they call Claus and his assignee? For the purpose of making them liable upon the bill, not because Claus had accepted it, but only because, being interested in the thing they were about to sell, they thought it right that Claus and his assignee should be present. Therefore, upon the whole proceeding, taking first the proceeding against Benson and the ship; next, the detainer of the ship by the Tribunal of Commerce for the purpose of the sale being affirmed by the superior court; and then the fact of the superior court, when it arrives at the question of sale or no sale, taking care to summon those whom alone it could recognise as owners; I think there can be no doubt that the judgment of the court was intended to be a judgment in rem, and, therefore, the court intended to do, that which by the French law it did, viz., transfer the ownership of the vessel.

That being so, the only remaining point is this. It is said that the French judges decided against our English law; that the effect of our law was laid before them, and that they disregarded it and determined the case contrary to what the law of this country would be. It is said that the law of the flag should have governed the decision of the French courts with reference to this vessel, and, therefore, those courts having come to an erroneous conclusion, the judgment that they erroneously gave and acted upon would not here confer a title upon those who in France, undoubtedly, did acquire it. Without expressing any opinion (for I purposely wish to avoid doing so) with reference to a decision of my own, which has been cited, in *Simpson v. Fogo* (3), as to what might be done in the case of a court wilfully determining that it will not, according to the usual comity, recognise the law of other nations when clearly and plainly put before it, and without saying anything as to what would justify the courts in our own country in hesitating to give effect to a foreign judgment if obtained by fraud or misrepresentation, it is enough for me to say upon the present occasion that in this case the whole of the facts appear to have been inquired into the French courts judicially, honestly, and with the intention to arrive at the right conclusion; and, having heard the facts as stated before them, they came to a conclusion which justified them in France in deciding as they did. That decision confirmed the title by sale to the person who became the purchaser at the sale. According to the law of France that title could not be thereafter disputed or disturbed, the court at Rouen being the highest court having jurisdiction in the matter.

That being so, there being neither a case of refusal to attend or listen to anything that might be said to them with reference to our law, nor to adopt that as the ground of their conclusion; there being no case, so far as I know, of any fraudulent misrepresentation or concealment with reference to any facts in the case; and the decision having been come to and pronounced, not in the absence of the parties, but in Castrique's own suit, where he had every opportunity of bringing forward his own case, the decision cannot be complained of as one contrary to justice through its being pronounced in the absence, from want of citation, of any of the parties interested. I, therefore, think we are bound to give effect to the conclusion arrived at by the French court, and to the title derived through the medium of that conclusion, and that the Court of Exchequer Chamber was right in the decision to which it came. Therefore, I have to submit to your Lordships that the decision of the Court of Exchequer Chamber should be affirmed.

LORD CHELMSFORD.—In order to entitle the appellant to recover the ship in question, it was necessary for him to show that the judgment in the French court might be questioned, and to prove it to be one that our courts will not recognise. It is admitted that if the judgment of the court at Havre was a judgment in rem, the appellant cannot recover in this action, unless he can impeach the judgment on the ground of fraud, or as being contrary to natural justice. We cannot look out of the Special Case for an explanation of the nature of the judgment. In the description of the original proceeding, the Case states that while the ship was in the port of Havre, Trotteux et Cie., commenced and prosecuted a suit against William Benson, the master of the ship, in the court of the Tribunal of Commerce at Havre, and "against the said ship." It was argued for the appellant that, from the other facts stated in the Case, the words "against the said ship" may be understood as meaning that, the ship being available for payment of a bill given by the master for necessities supplied during a voyage, the suit was against the master personally, and only indirectly and by consequence against the ship.

Assuming this to be so, it is stated in the Case that according to the law of France, a sale of a ship could take place only after the judgment of the Court

of Commerce was confirmed, and the sale of the ship ordered by a judgment of the Civil Tribunal of the district in which the Court of Commerce was situated. The Case states a judgment in the Court of Commerce, and the seizure of the ship and her appurtenances in pursuance of that judgment, and that "proceedings were afterwards instituted in the Civil Tribunal of Havre (being the Civil Tribunal of the district in which the Court of Commerce is situated), and, in default of appearance of the parties summoned, a judgment by default was given and duly recorded in the Civil Tribunal of Havre, by which the seizure of the ship and its appurtenances was confirmed." It was ordered that the ship and appurtenances should be sold by public auction to the highest bidder at the sittings for sales of the Civil Tribunal. This order for the sale of the ship, whatever may be thought of the original proceeding, appears to me a judgment in rem. Without, however, looking to this ultimate order, I think that the original proceeding being for the purpose of enforcing a maritime lien, which, by the law of all foreign codes founded on the civil law, exists for money advanced for repairs and necessities on a voyage, was a proceeding in rem.

Then it is said that the law to be applied to this case was the English law, and that by that law there is no charge or lien on the ship for necessities supplied to a master during a voyage, and the courts at Havre acted erroneously and in ignorance of the law they were administering. But no proof was offered to the French courts whether by the law in existence at Melbourne, where the bill was drawn by the master of the ship, there was, or was not, a lien on the ship for necessities, and they might well assume, in the absence of evidence, that the general maritime law of lien prevailed and attached upon the master's contract. Assuming that there was a mistake of the law, still this error will not render the French judgment void in this country. Even if evidence had been offered to the French courts of the English law applicable to the case, and they had honestly come to an erroneous conclusion upon the subject, their judgment could not be impeached in our courts. To sum up my opinion, in the words of BLACKBURN, J., and the other learned judges who concurred with him, I think "the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world." For the reasons thus shortly expressed I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD COLONSAY.—I entirely concur in the judgment which has been proposed to be pronounced in this case. It appears to me that we cannot enter into an inquiry whether the French courts proceeded correctly, either as to their own course of procedure or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of English law. Nor can we inquire whether they were right in their views of the English law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship. I think the respondents are entitled to judgment, and that the judgment of the court below ought to be affirmed.

Appeal dismissed.

Re PHENÉ'S TRUSTS

[COURT OF APPEAL IN CHANCERY (Giffard, L.J.), December 18, 21, 22, 1869,
January 14, 1870]

[Reported 5 Ch. App. 139; 39 L.J.Ch. 316; 22 L.T. 111;
18 W.R. 308]

Death—Presumption—Person not heard of for seven years—Date of death—Need of proof by evidence.

The law presumes a person who has not been heard of for seven years to be dead, but in the absence of special circumstances draws no presumption from that fact as to the particular time at which he died. A person seeking to establish the date of such a person's death must do so by evidence proving that date. Therefore, those who found a right upon a person having survived a particular date must establish that fact affirmatively by evidence.

Administration of Estates—Legacy—Need to prove that legatee survived testator.

That a legatee's survivorship of the testator is requisite to clothe him with that character is a tacit condition annexed by law to every ordinary immediate gift by will, and it follows that the representatives of a person alleged to be a legatee must prove, as against the other members of the class who prove their survivorship, that he survived the testator.

Notes. In cases where, after Dec. 31, 1925, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths are, for all purposes affecting the title to property, to be presumed to have occurred in order of seniority, the younger being deemed to have survived the elder: Law of Property Act, 1925, s. 184. Before 1926 the time of death was a matter of proof.

Followed: *Re Lewis's Trusts* (1871), 6 Ch. App. 356. Applied: *Hickman v. Upsall* (1875), L.R. 20 Eq. 136. Considered: *Re Corbishley's Trusts* (1880), 49 L.J.Ch. 266; *Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch.D. 586; *Wills v. Palmer* (1904), 53 W.R. 169. Applied: *Re Aldersey, Gibson v. Hall*, [1904-7] All E.R. Rep. 644. Explained: *Lal Chand Marwari v. Mahaut Ramrup Gir* (1925), 42 T.L.R. 159. Considered: *MacDarmid v. A.-G.*, [1950] 1 All E.R. 497. Explained: *Chard v. Chard (otherwise Northcott)*, [1955] 3 All E.R. 721. Referred to: *Chipchase v. Chipchase*, [1939] 3 All E.R. 895; *Hickman v. Peacey*, [1945] 2 All E.R. 215.

As to presumptions of life and death, see HALSBURY'S LAWS (3rd Edn.), vol. 15, pp. 344-347, and vol. 16, 192-194. For cases see 22 DIGEST (Repl.) 157 et seq., 23 DIGEST (Repl.) 80 et seq. For the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

- (1) *Lamb v. Orton* (1859), 29 L.J.Ch. 286; 1 L.T. 290; 6 Jur.N.S. 61; 8 W.R. 111; 22 Digest (Repl.) 158, 1437.
- (2) *Dunn v. Snowden* (1862), 2 Drew. & Sm. 201; 32 L.J.Ch. 104; 7 L.T. 558; 11 W.R. 160; 62 E.R. 598; 22 Digest (Repl.) 160, 1453.
- (3) *Thomas v. Thomas* (1864), 2 Drew. & Sm. 298; 11 L.T. 471; 13 W.R. 225; 62 E.R. 635; 22 Digest (Repl.) 162, 1466.
- (4) *Re Benham's Trust* (1867), L.R. 4 Eq. 416; 36 L.J.Ch. 502; 15 W.R. 741; reversed, 5 Ch. App. 141, n.; 37 L.J.Ch. 265; 16 W.R. 180, L.J.; 22 Digest (Repl.) 162, 1467.
- (5) *Dowley v. Winfield* (1844), 14 Sim. 277; 8 Jur. 972; 60 E.R. 365; 22 Digest (Repl.) 165, 1510.
- (6) *Mason v. Mason* (1816), 1 Mer. 308; 35 E.R. 688; 44 Digest 222, 469.

- (7) *Underwood v. Wing* (1854), 4 De G.M. & G. 633; 24 L.J.Ch. 293; affirmed sub nom. *Wing v. Angrave* (1860), 8 H.L.Cas. 183; 30 L.J.Ch. 65; 11 E.R. 397, H.L.; 22 Digest (Repl.) 167, 1526.
- (8) *Re Green's Settlement* (1865), L.R. 1 Eq. 288; 35 L.J.Ch. 252; 13 L.T. 541; 12 Jur.N.S. 70; 14 W.R. 192; 22 Digest (Repl.) 163, 1479.
- (9) *Lakin v. Lakin* (1865), 34 Beav. 443; 12 L.T. 517; 11 Jur.N.S. 522; 13 W.R. 704; 55 E.R. 707; 22 Digest (Repl.) 165, 1498.
- (10) *Re Beasley's Trusts* (1869), L.R. 7 Eq. 498; 38 L.J.Ch. 159; 22 Digest (Repl.) 165, 1501.
- (11) *Re Henderson's Trusts* (1868), cited L.R. 7 Eq. at p. 500; 38 L.J.Ch. at p. 159; 22 Digest (Repl.) 165, 1500.
- (12) *Nepean d. Knight v. Doe* (1837), 2 M. & W. 894; Murp. & H. 291; 7 L.J.Ex. 335; 150 E.R. 1021, Ex. Ch.; previous proceedings, sub nom. *Doe d. Knight v. Nepean* (1833), 5 B. & Ad. 86; 2 Nev. & M.K.B. 219; 2 L.J.K.B. 150; 22 Digest (Repl.) 159, 1448.
- (13) *R. v. Inhabitants of Harborne* (1935), 2 Ad. & El. 540; 1 Har. & W. 36; 4 Nev. & M.K.B. 341; 2 Nev. & M.M.C. 517; 4 L.J.M.C. 49; 111 E.R. 209; 22 Digest (Repl.) 158, 1434.
- (14) *R. v. Lumley* (1869), L.R. 1 C.C.R. 196; 38 L.J.M.C. 86; 20 L.T. 454; 33 J.P. 597; 17 W.R. 685; 11 Cox, C.C. 274, C.C.R.; 15 Digest (Repl.) 885, 8537.
- (15) *R. v. Inhabitants of Twynning, Gloucestershire* (1819), 2 B. & Ald. 386; 106 E.R. 407; 14 Digest (Repl.) 493, 4766.

Appeal by beneficiaries of residue under a will from a decision of JAMES, V.-C., declaring, on a petition presented by the administrator of the estate of one Nicholas Phené Mill, who had not been heard of for upwards of seven years, that the said Nicholas Phené Mill must be taken to have survived the testator, his uncle, Francis Phené, and that a fund in court, which represented a share of residue given by the testator to Nicholas Phené Mill and had been paid in by the trustees of the will, must be paid out to his representative.

Bristowe, Q.C., and *Everitt* for beneficiaries other than N. P. Mill.

Amphlett, Q.C., and *Bagshawe* for the administrator of N. P. Mill.

Edwards and *Langworthy* for parties in the same interests as the beneficiaries.

C. J. Hill for the trustees who had paid in the fund.

Jan. 14, 1870. **GIFFARD, L.J.**, read the following judgment.—This is an appeal from so much of an order of JAMES, V.-C., as directs the residue of a fund, which is standing in court to “the account of the share intended for Nicholas Phené Mill,” to be paid to his administrator. The order was made upon the hypothesis that Nicholas Phené Mill survived Francis Phené, the testator. The learned vice-chancellor, in making the order stated that he did so in deference to the authority of three cases which have been decided by KINDERSLEY, V.-C., and a fourth by MALINS, V.-C., but at the same time he dissented from their opinions, and expressed a wish that the whole matter should be brought before the Court of Appeal. The testator died on Jan 5, 1861. According to one view of the evidence Nicholas Phené Mill was last heard of in August, 1858; according to another view, about seven months previously to the testator's death. That he survived the testator was treated by the vice-chancellor, but in deference only to the four cases referred to, as to be presumed. It will be desirable, therefore, to examine those cases, and such others as bear materially on the subject, before dealing with the evidence more particularly.

The cases decided by Kindersley, V.-C., were *Lambe v. Orton* (1); *Dunn v. Snowden* (2); and *Thomas v. Thomas* (3). They were all decided on the same general principles. The propositions enunciated were in substance these: First, that the law presumes a person who has not been heard of for seven years to be dead, but, in the absence of special circumstances, draws no presumption from

that fact as to the particular period at which he died; secondly, that a person alive at a certain period of time is, according to the ordinary presumption of law, to be presumed to be alive at the expiration of any reasonable period afterwards; thirdly, that the onus of proving death at any particular period within the seven years lies with the party alleging death at such particular period.

The case decided by MALINS, V.-C., was *Re Benham's Trusts* (4). He adopted and acted on the decisions of KINDERSLEY, V.-C., but went somewhat further, laying it down (L.R. 4 Eq. at p. 419),

"that if you cannot presume death at any particular period during the seven years, then at the end or expiration of the seven years you must presume for the first time that the person was dead, and you must also presume that within that time he was not alive."

Re Benham's Trusts (4) was appealed from, and ROLT, L.J., in November, 1867, discharged the vice-chancellor's order, directing further inquiries, and simply stating, according to the only report I am aware of (16 W.R. 180), "that there was no evidence for the court to act upon, and that it was a case not of presumption, but of proof."

In *Dowley v. Winfield* (5) the testator died in September, 1833; one of his two sons went abroad in September, 1830, and was heard of for the last time about twenty months previously to his father's death. The court ordered a share of the father's residue bequeathed to him to be transferred to his brother, as the sole next of kin of the father living at the father's death. Security to refund was taken. In *Mason v. Mason* (6) the father and son were shipwrecked together. The rules of the civil law and of the Code Napoléon were relied on. SIR WILLIAM GRANT said (1 Mer. at pp. 312, 313):

"There are many instances in which principles of law have been adopted from the civilians by our English courts of justice, but none that I know of in which they have adopted presumptions of fact from the rules of the civil law. . . . In the present case I do not see what presumption is to be raised; and since it is impossible you should demonstrate, I think that if it were sent for an issue, you must fail for want of proof."

An issue was directed whether the son was living at the death of the father; nothing appears to have come of it.

In *Underwood v. Wing* (7), which was also a case of commorientes, a testator bequeathed personal estate to J. W. in the event of his wife dying in his lifetime. [As to commorientes after 1925 see s. 184 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.), 798), which provides that, for all purposes affecting the title to property, such deaths shall be presumed to have occurred in order of seniority, and, accordingly, the younger shall be deemed to have survived the elder.] The testator and his wife were shipwrecked and drowned at sea. On the question being raised between the next of kin of the testator and J. W., who claimed under the will, it was held, first, that the onus of proof that the husband survived his wife was upon J. W. Secondly, that it was necessary to produce positive evidence in order to enable the court to pronounce in favour of the survivorship; and, thirdly, that no such evidence having been produced, the next of kin were entitled. *Underwood v. Wing* (7) was heard before LORD CRANWORTH, WIGHTMAN, J., and MARTIN, B. WIGHTMAN, J., in the course of delivering judgment, stated (4 De G.M. & G. at p. 657):

"If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide independent of age or sex, and if there be no evidence the case is the same as a great variety of other cases, more frequent formerly than at present, where no evidence exists, and of consequence no judgment can be formed."

He added (*ibid.* at p. 658):

"We think there is no conclusion of law on the subject; in point of fact we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which was the survivor."

In *Wing v. Angrave* (7), another branch of the same case, the House of Lords concurred in the view which had been taken by LORD CRANWORTH and the learned judges who sat with him.

In *Re Green's Settlement* (8), Mr. Green was murdered in the Indian mutiny on June 3, 1857, Mrs. Green on Nov. 16 following. Mr. and Mrs. Green's child escaped with its native nurse on the same June 3, but was never afterwards distinctly heard of. After the lapse of seven years and upwards, a petition was presented, and the present Lord Chancellor [LORD HATHERLEY], then PAGE-WOOD, V.-C., delivered the following judgment (L.R. 1 Eq. at pp. 289, 290):

"I think the rule which the court should follow in this case is analogous to that laid down in *Underwood v. Wing* (7). The whole question is, on whom is the onus of proof thrown? The lady, on the devolution of whose estate the question arises, is shown to have died on Nov. 16, her husband is shown to have died before her; a number of persons claim as her relatives, and prove their kindred within a certain degree, and, so far as now appears, there is no one nearer in kindred. On the other hand the representative of another person claims the property also, and shows that the person through whom he claims was nearer of kin than the petitioner, and would have been entitled if he had survived his mother. But a person claiming under such a title must go further, and must show, not only that the person through whom he claims would have been entitled if he had survived, but that he actually was entitled, or, in other words, that he did survive. I am of opinion also that in this case there was some evidence to go to a jury, that the child died in the mother's lifetime, but I do not rest my decision on this evidence. I prefer to rely on the grounds which I have before stated."

There are three other cases in equity, viz., *Lakin v. Lakin* (9); *Re Beasley's Trusts* (10); and *Re Henderson's Trusts* (11), referred to in that case. In all of these the period of the death was inferred as a matter of fact from the circumstances proved, not in any sense presumed. This appears to be the state of the authorities in the equity courts.

The leading case, however, is one at law, viz., *Nepean d. Knight v. Doe* (12). In that case the lessor of the plaintiff claimed as grantee in reversion of a copyhold estate on the death of Matthew Knight. Matthew Knight went to America; the last account that was heard of him was by a letter written by him from Charleston, and received in England in May, 1807. Ejectment was brought within twenty-five years from the date he was last heard of, and within twenty from the date of the right accruing, if he was to be taken to have died at the end of the seven years from 1807. The Court of King's Bench was of opinion that the lessor of the plaintiff, who gave no other evidence of Matthew Knight's death than his absence, failed in establishing that his death took place within twenty years before the ejectment brought. With reference to the argument of inconvenience LORD DENMAN said (5 B. & Ad. at p. 96):

"If, for the sake of preventing inconvenience, we were arbitrarily to lay down a rule that seven years' absence abroad, the party not having been heard of, was *prima facie* evidence of his death at the end of the seven years, such a rule would in the very great majority of cases, nay, in almost every case, cause the fact to be found against the truth, and as the rule would be applicable to all cases in which the time of death became material, it would in many be productive of much inconvenience and injustice."

The Exchequer Chamber adopted the doctrine of the Court of King's Bench in these terms, viz. (2 M. & W. at p. 914):

"We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof."

It is obvious from these passages that there is an inconsistency between that which the Court of King's Bench and Court of Exchequer Chamber laid down and what I have quoted from the judgment of MALINS, V.-C., as going beyond what was laid down by KINDERSLEY, V.-C. KINDERSLEY, V.-C., however, seems to have founded his opinion on certain portions of these two judgments; there are, therefore, other parts of them which it will be desirable to quote and examine. Thus in the Court of King's Bench it is stated (5 B. & Ad. at p. 94):

"There is no doubt that the lessor of the plaintiff must recover by the strength of his own title, and in order to do so must prove that he had a right to enter on the lands sought to be recovered within twenty years before the ejectment brought; and consequently, as the presumption is that a person once alive continues so until the contrary is shown, the lessor of the plaintiff was bound to prove, first, the death of Matthew Knight, and, secondly, that it took place within twenty years before ejectment brought."

In the judgment of the Exchequer Chamber the following are the material passages bearing on this part of the subject (2 M. & W. at pp. 912, 913):

"The court is called on to review the decision of the Court of King's Bench in *Doe d. Knight v. Nepean* (12). The doctrine there laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; and that, if it be important to anyone to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. After fully considering the argument at the Bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of Jac. 1 relating to bigamy [presumably Bigamy Act, 1603, repealed by the Offences Against the Person Act, 1828], and more particularly to the statute of 18 & 19 Car. 2, relating to this very matter [Cestui que Vie Act, 1666, repealed by Statute Law Revision Acts, 1863, 1888, 1948], the words of which distinctly point at the presumption of the fact of death, but not of the time; it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by *R. v. Inhabitants of Harborne* (13). It is true the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death by proving the absence of Matthew Knight, and his not having been heard of for seven years; whence arises at the end of those seven years another presumption of law, namely, that he is not then alive, but the onus is also cast on the lessor of the plaintiff by showing that he has commenced his action within twenty years after his right of entry accrued, that is after the actual death of Matthew Knight. Now when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary,

A if he was alive, that he should not be heard of. In other words it is
presumed that his not being heard of has been occasioned by his death,
which presumption arises from the considerable time that has elapsed. If
you assume that he was alive on the last day but one of the seven years,
then there is nothing extraordinary in his not having been heard of on the
last day, and the previous extraordinary lapse of time, during which he was
B not heard of, has become immaterial by reason of the assumption that he
was living so lately. The presumption of the fact of death seems, therefore,
to lead to the conclusion that the death took place some considerable time
before the expiration of the seven years."

C KINDERSLEY, V.-C., appears to have acted on the passages in both these
judgments, which are to the effect that the onus of proving the death of Matthew
Knight lay on the plaintiff because the law presumes that a person shown to be
alive at a given time remains alive until the contrary be shown. Those passages
are not essential to the conclusions arrived at, or sound in point of reasoning.
The other parts of the same judgments go to prove that there is not, and ought
not to be, any such presumption of law; if there was such a presumption, it
D would be no ground for throwing the onus of proof on the plaintiffs where seven
years had elapsed from the date of the last proof of existence; on the contrary,
it would carry the period of death, as suggested and laid down by MALINS, V.-C.,
to the end of the seven years; but both the decisions are that it did not, and
because it did not the plaintiff failed, and did not recover the property he sought.

E In *R. v. Iumley* (14), it was held, consistently with another judgment delivered
by LORD DENMAN in *R. v. Inhabitants of Harborne* (13), that there was no
presumption of law in favour of the continuance of a life up to a particular
period; but that it was a question for the jury as a matter of fact. The case was
heard before KELLY, C.B., BYLES, LUSH, and BRETT, JJ., and CLEASBY, B., and
LUSH, J., delivered the judgment of the court in these terms (L.R. 1 C.C.R. at
pp. 198, 199):

F "We are of opinion that the direction to the jury in this case, viz., 'that,
there being no circumstances leading to any reasonable inference that he had
died, Victor must be presumed to have been living at the date of the second
marriage,' was erroneous. In an indictment for bigamy it is incumbent on
the prosecution to prove to the satisfaction of the jury that the husband or
G wife, as the case may be, was alive at the date of the second marriage. That
is surely a question of fact. The existence of the party at an antecedent
period may, or may not, afford a reasonable inference that he was living at the
subsequent date. If, for example, it were proved that he was in good health
on the day preceding the second marriage, the inference would be strong,
almost irresistible, that he was living on the latter day, and the jury would,
H in all probability, find that he was so. If, on the other hand, it were proved
that he was then in a dying condition, and nothing further was proved, they
would probably decline to draw such an inference. Thus the question is
entirely for the jury; the law makes no presumption either way. The cases
cited of *R. v. Inhabitants of Twynning, Gloucestershire* (15), *R. v. Inhabitants*
of Harborne (13), and *Nepean d. Knight v. Doe* (12), appear to us to establish
I this proposition. Where the only evidence is that the party was living at
a period which is more than seven years prior to the second marriage, there
is no question for the jury. The provision in the Offences Against the Person
Act, 1861, s. 57 [that a person cannot be convicted of bigamy if his or his
wife or husband shall have been continually absent for seven years and not
have been known to be living within that time] then comes into operation, and
exonerates the prisoner from criminal liability, though the first husband or
wife be proved to have been living at the time when the second marriage was
contracted. The legislature, by this provision, sanctions a presumption that

a person who has not been heard of for seven years is dead, but the provision affords no ground for the converse proposition, viz., that when a party has been seen or heard of within seven years, a presumption arises that he is still living. That, as we have said, is always a question of fact."

True it is that *R. v. Lumley* (14) was a criminal case, and that the seven years had not elapsed from the date of the first husband having been last heard of; but though a jury might be more ready to draw an inference in a civil than in a criminal proceeding, it cannot be that the rules of evidence in each case should be so far different as that there should be a positive legal presumption in the one proceeding, and no legal presumption in the other. A prosecutor and a person seeking to recover property each have to prove their case, and in each instance the object is to arrive at, and act on, the real truth.

LORD DENMAN, who delivered both judgments in *Nepean v. Doe* (12), thus expressed himself in *R. v. Inhabitants of Harborne* (13) (2 Ad. & El. at pp. 544, 545):

"I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe d. Knight v. Nepean* (12) the question arose much as in *R. v. Inhabitants of Twynning, Gloucestershire* (15). The claimant was not barred if the party were presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff, because, if there was a legal presumption there was nothing to be submitted to the jury. But this court held that no legal presumption existed, and set the verdict aside. That is quite consistent with the view which we take in the present case, and *R. v. Inhabitants of Twynning, Gloucestershire* (15) is explained in the same way. I am aware that in the latter case BAYLEY, J., founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it?

Other learned judges concurred in this opinion.

The notion of a legal presumption in favour of life originated, I believe, with the civil law, and we have SIR WILLIAM GRANT'S opinion in *Mason v. Mason* (6) as to adopting presumptions of fact from that law. It is a general well-founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in *Nepean d. Knight v. Doe* (12), and to assert, as an exception to the rule, that the onus of proving death at any particular period, either within the seven years or otherwise, should be with the party alleging death at such particular period, and not with the person to whose title that fact is essential, is not consistent with the judgment of the present Lord Chancellor [LORD HATHERLEY, L.C.] when PAGE-WOOD, V.-C., in *Re Green's Settlement* (8), or with the dictum of ROLT, L.J., when he said, in *Re Benham's Trusts* (4), that the question was one not of presumption, but of proof, or with the real substance of the actual decisions, or the sound parts of the reasoning in *Nepean d. Knight v. Doe* (12), or with the judgments in *R. v. Inhabitants of Harborne* (13), and *R. v. Lumley* (14), or with the principles to be deduced from the judgment in *Underwood v. Wing* (7). The true proposition is that those who found a right upon a person having survived a particular period, must establish that fact affirmatively by evidence. The evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail. The present case happens to be

A one of an alleged number of a class of legatees. That a legatee's survivorship of the testator is requisite to clothe him with that character is a tacit condition annexed by law to every ordinary immediate gift by will, and it follows that the representatives of a person alleged to be a legatee must prove, as against the other members of the class who prove their survivorship, that he survived the testator; otherwise he was not a legatee at all. For these reasons, and upon
 B a review of the authorities and the judgments on which they rest, I am of opinion that there is no presumption of law as to the particular period at which Nicholas Phené Mill died—that it is a matter of fact to be proved by evidence, and that the onus of proof rests on his representative.

This brings me to an examination of the evidence. There are three affidavits—the earliest in point of date is that of Nicholas Phené Mill's mother. She states
 C that she is the widow of William Mill the elder, that she left England many years ago to reside abroad, that Nicholas Phené Mill was born at Ostend in the year 1829, that on Aug. 19, 1853, he left home, and went to reside in America, that he wrote letters to her and her family from America, that she received from him a letter addressed from on board the United States frigate *Roanoke*, dated
 D Aug. 15, 1858; that neither she, nor, as she believes, any member of the family has heard from him since, and that she believes him to be dead. She speaks of inquiries that have been made for him. The next affidavit is that of the petitioner in the court below. He is a brother of Nicholas Phené Mill. He speaks of his brothers and sisters, and says that the last that has been, or can be, ascertained or heard about Nicholas Phené Mill is that, being a sergeant of marines in the United States naval service and unmarried, he deserted from
 E the *Roanoke* United States frigate on June 16, 1860. He further says that he was himself in America from August, 1853 till April, 1862; speaks of many fruitless inquiries and advertisements, and adds that his information as to Nicholas Phené Mill's desertion was derived from an official letter written in answer to one from his solicitors to the government authorities in America. The last affidavit is that of the clerk to the petitioner's solicitors. He speaks of
 F letters of administration being granted to the petitioner, and proves the correspondence with the government officials in America. There were two letters from the petitioner's solicitors; each was answered. The answer to the second was the most explicit, and the only one necessary to refer to—it is endorsed on the letter to which it is an answer, and is in these terms:

G "Navy Department, Bureau Equipment and Recruiting, Washington, Dec. 11, 1867.

Nicholas Mill was a sergeant in the Marine Corps, and deserted June 16, 1860, while on leave from New York to join the Philadelphia Station. He has not been heard of from since that date.

M. SMITH, Chief of Bureau."

H This was in answer to the letter that Nicholas Phené Mill wrote to his mother on Aug. 15, 1858, from on board the United States frigate, *Roanoke*, Boston Navy Yard, Massachusetts, stating he expected to be long absent, but would write on return from his voyage. If this correspondence is excluded there is no other evidence than that Nicholas Phené Mill was last heard of in 1858. There would,
 I therefore, be no sufficient evidence of his having survived the testator, nor does the admission of the correspondence supply the necessary proofs; for, though I assume that the Nicholas Mill was the Nicholas Phené Mill who wrote from the *Roanoke*, I cannot infer from the statement of his desertion on June 16, 1860, that he was alive when the testator died in January, 1861. I should not do so if it was a simple statement of desertion and no more; but the statement is not simply that he deserted, but that he deserted June 16, 1860, while on leave from New York, to join the Philadelphia Station, and has not been heard of "from since that date"; the reasonable conclusion from which is that he never reappeared

after he went on leave, that his leave was up on or before June 16, 1860, and that, accordingly, his name was on the books as a deserter. If I am to draw a conclusion at all, I should infer that a person in the position of a sergeant having nothing against his character would not desert, and that he had died while on leave, and so was not heard of by the authorities. It is enough, however, for me to state that, in my opinion, the burden of proof is on the representative of Nicholas Phené Mill, and that Nicholas Phené Mill's representative has not proved affirmatively that Nicholas Phené Mill survived the testator, a proof which I consider essential to his title. The order of the vice-chancellor must be discharged, and this appeal allowed.

MARCH v. MARCH AND PALUMBO

[COURT OF DIVORCE AND MATRIMONIAL CAUSES (Wilde, J.O., Mellor, J., and Pigott, B.), April 24, 1867]

[Reported L.R. 1 P. & D. 440; 36 L.J.P. & M. 64; 16 L.T. 366;
15 W.R. 799]

Variation of Settlement—Power of court—Power to make order for benefit of both husband and child of respondent—Discretion of court when allotting amounts.

When exercising their power to make an order for the application of settled property under s. 5 of the Matrimonial Causes Act, 1859 [now s. 25 of the Matrimonial Causes Act, 1950], the court may make an order for the benefit of both a child of the marriage and the parties, or either one of them, as they think fit, and the power is not exhausted by the making of an order in respect of any one of them.

On the dissolution of a marriage on the grounds of the wife's adultery an order was made under s. 5 of the Act of 1859 directing the trustees of a marriage settlement to pay to the husband an annual sum of £200 for the maintenance and education of the child of the parties and a further sum of £440 for his own use. The husband had made no contribution to the marriage settlement.

Held: (i) the order would be varied to make the allowance for the maintenance of the child not payable to the husband absolutely, but only so long as he should have the custody of the child; (ii) the court had exercised its discretion properly with regard to the amount allotted to the husband; and (iii) the court had the power to make an order with regard to both the husband and the child of the marriage at the same time.

Observations on the matters to be considered when determining the amounts to be allotted to the children and the parties when making an order for the variation of a settlement.

Notes. The Matrimonial Causes Act, 1859, s. 5, was repealed by the Supreme Court of Judicature Consolidation Act, 1925. For the power of the court to make orders as to the application of settled property, see now the Matrimonial Causes Act, 1950, s. 25, which is in virtually identical terms to s. 5 of the 1859 Act.

Considered: *Schofield v. Schofield and Cowper* (1891), 64 L.T. 838. Approved: *Savary v. Savary* (1898), 79 L.T. 607. Applied: *Beauchamp v. Beauchamp and Watt* (1904), 20 T.L.R. 273; *Constantinidi v. Constantinidi*, [1905] P. 253. Considered: *La Terriere v. La Terriere and Grey* (1920), 124 L.T. 575. Referred to: *Blandford v. Blandford* (1892), 67 L.T. 392; *Midwinter v. Midwinter*, [1893] P. 93; *Lorriman v. Lorriman and Clair*, [1908] P. 282; *Tallack v. Tallack and Broekema*,

A [1927] All E.R. Rep. 676; *Matheson v. Matheson and Hartley*, [1935] P. 171; *Egerton v. Egerton*, [1949] 2 All E.R. 238; *Snelling v. Snelling*, [1952] 2 All E.R. 196; *Compton (Marquis of Northampton) v. Compton (Marchioness of Northampton)*, [1960] 2 All E.R. 70; *Moy v. Moy*, [1961] 2 All E.R. 204.

As to variation of settlements, see 12 HALSBURY'S LAWS (3rd Edn.) 451 et seq.; and for cases see 27 DIGEST (Repl.) 641 et seq. For s. 25 of the Matrimonial Causes Act, B 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

Case referred to :

(1) *Thomas v. Thomas* (1860), 2 Sw. & Tr. 89.

C **Cross-Appeals** from an order of the judge ordinary made under s. 5 of the Matrimonial Causes Act, 1859, directing the trustees of the marriage settlement of the parties to pay to the petitioner, the husband, an annual sum of £200 for the maintenance and education of the only child of the parties and a further annual sum of £440 for the petitioner's own use.

D The marriage settlement was contributed to solely from sources on the respondent's side, the petitioner brought no money into the settlement. The total joint income of the parties was £1,718 made up as follows: (a) £909 annual produce of the respondent's settled property; (b) £549 annual produce of sums directed to be settled by the will of the respondent's mother on trusts similar to those contained in the marriage settlement; and (c) £260 yearly salary of the petitioner.

E The marriage of the parties was dissolved at the suit of the petitioner on the grounds of the adultery of the respondent. The judge ordinary made the order referred to above with reference to the application of the settled property. Both parties appealed.

F On the part of the respondent it was submitted (i) that the court had no power to order the respondent to pay to the petitioner an allowance for the education and maintenance of the child of the said marriage after the said child had attained the age of sixteen; (ii) that too large a proportion of the income of the respondent was allotted to the petitioner during their joint lives; (iii) that in dealing with the property in settlement the court ought not to take into consideration the property directed to be settled by the will of the respondent's mother. It was further submitted that the order in respect of the allowance for the maintenance of the child of the marriage should be varied G by making such allowance payable to the petitioner "or to such other person as the court may from time to time direct." On behalf of the petitioner it was submitted that a larger proportion of the settled property should be allotted to him.

Sir R. P. Collier, Q.C. (*Searle* with him) for the respondent.

Hannen for the petitioner.

H *G. Woods* for the trustees intimated that they were ready to submit to any order of the court.

I **WILDE, J.O.**—The court is agreed upon the judgment that ought to be given on the present occasion. First, with regard to the form of the order, it is submitted that it should be so varied as to make the allowance for the maintenance of the child not payable absolutely to the petitioner, but to make it payable to him so long as he has the custody of the child, or, if at any time the custody of the child should be transferred to anybody else, then to such person. So far as that is concerned, if the parties had applied to me when the registrar drew up the order, I would certainly have made the alteration, not because I should consider that such alteration was necessary, or that the court had not the power to make a subsequent order on the subject, but with the view of freeing the matter from all difficulty. The amendment is

one which the court think ought to be made, and we propose to make it, indicating at the same time that it is not a subject of appeal, but one which should have been dealt with at the time I have mentioned. A

The next question is whether under s. 5 of the Matrimonial Causes Act, 1859, the court has power to make orders both for the benefit of the children and of their respective parents. With respect to that, I am clearly of opinion that the language of the Act is large enough to give that jurisdiction; and looking to the language of the previous Acts, the Matrimonial Causes Act, 1857, ss. 32, 35, 45, and the Matrimonial Causes Act, 1858 [both repealed]; which are Acts in *pari materia*, and Acts which ought to be read with this Act and not as antagonistic with it, I can only come to the conclusion that the intention of the legislature was not to tie down the hands of the court by saying that, if it thought right to make an order for the benefit of the children, it should have no power to make an order for the benefit of the parents, but that the intention was to give the power of making an order for the benefit of one or both as may seem fit. So far as my opinion goes I see no difficulty in that part of the case; because the court ought not, in dealing with a statute of this sort, to be so critical as to refuse to give full effect to the language that the legislature has employed, but should consider it in its natural sense and in its widest form. There then remains the question of amount. This really is a pure matter of discretion. It is a matter of discretion depending on general circumstances; it is a matter upon which no two minds would ever without concert arrive at the same sum, and I see no reason to alter the opinion I formed. B C D E

MELLOR, J.—I am clearly of the same opinion. I desire to add nothing on the first point, but with reference to the second, I cannot but think that it would be too narrow a construction of the statute if we were to hold that the power of the court was exhausted by the making of one order either for the benefit of the children or for the benefit of the parents. I do not think that it can bear any such construction. The obvious intention of the legislature was to make provision for both classes of persons, and the use of the word "or" is quite consistent with that view. Had the context compelled me to decide upon the mere word "or," under certain circumstances I might be compelled to regard it as conferring only an alternative power; but both the context and the use of the word "or" in the two sections of the former Acts justify the interpretation put by the judge ordinary on the section. I think clearly that under the section the court has power to make orders both in the case of children and parents, and with reference to that *Thomas v. Thomas* (1) was cited. I was at first startled by that case, but when you come to consider the principle upon which that case was decided, I think that the court, upon the whole came to a right construction of the section. F G H

With reference to the main question, the discretion of the judge ordinary in the sum he has allotted to the petitioner, I confess I do not see any ground on which I can hold that that discretion was not properly exercised. The principle seems to be, that if the union of two parties is dissolved by the fault of one, the party who is innocent shall not be placed pecuniarily in a worse position than if the marriage had continued. I cannot better express my views on this head than by quoting the words of the judge ordinary, in which I quite agree. He says: I

"If this union has been broken, and the common home abandoned by the criminality of one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage vow, be wholly deprived of the means, to the scale of which he may have learnt to accommodate his mode of life; nor,

A viewing the matter on the other side, does it seem just or equitable that funds which were intended at the time of the marriage for the use of both should be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of a second marriage."

B I think that is a sound exposition of the view which ought to be taken in the construction of this statute, and I also thoroughly agree in and adopt the observations of the judge ordinary as to the interests of society pointing in the same direction.

C "It would be of evil example if this court were to decide that the entire fortune of a wealthy married woman were to be reckoned as part of the prospects of an adulterer; or the resources of a second home for a guilty woman."

Concurring in those views, I think that the judge ordinary was perfectly right in the order which he has made.

D One other point only remains, namely, that the order should be retrospective, or that it should be carried back to the final decree of dissolution. I have some doubts whether we have the power to do that, but it is not necessary to express an opinion upon the point. I am perfectly satisfied that we ought not to do it under the circumstances of the case, because it might affect the position of parties who may have already acted under a different impression, and even if they had notice, it appears to me that the notice was not sufficient to prevent them from discharging the duty which was devolved upon them as trustees. I do not think, even if we had the power, that we should vary the order in that respect. I think that both appeals ought to be dismissed with costs.

F **PIGOTT, B.**—I am of the same opinion. I shall say nothing as to the order for the custody and maintenance of the child, merely observing that it is not a matter of appeal to the full court, but one which might have been settled at chambers. An important question was raised upon the construction of s. 5 of the Matrimonial Causes Act, 1859. Upon that I adopt the views expressed by the judge ordinary and MELLOR, J. Indeed, I think it is clear that, if we were to adopt the argument of counsel for the respondent, we should be sacrificing the sense and spirit of the enactment to the mere letter. G It seems to me that the legislature contemplated that the court should provide for the benefit of the parents and for the benefit of the children in certain cases, and as the legislature intended that both parents and children should be taken care of by the court, what an absurdity it would be, if, when the court saw that both required its interposition in the same case, it should be obliged H to hold its hand and say that it could only deal with one or the other; that, although it might act for each in a separate case, yet that it could not act for both in the same case. I do not mean to say that *Thomas v. Thomas* (1) is not correctly decided. I think it is; but here the argument of counsel for the respondent would lead to this, that if the court dealt with the fund in the interest of the parent, the child would not be entitled to call for a like I exercise of the power of the court in its behalf. It seems to me that that would be an absurdity. I do not think, in holding otherwise, that we are doing violence to the meaning of the Act; on the contrary, I think that we are only carrying out its manifest spirit and meaning. With regard to the last point, the proportion of income allotted to the petitioner, I am quite sure that no three minds could arrive at the same figure, but I cannot say that the discretion of the judge ordinary has been wrongly exercised. On the contrary, I think he has laid down a valuable principle for the guidance of the court.

SUNDERLAND OVERSEERS v. SUNDERLAND UNION GUARDIANS

[COURT OF COMMON PLEAS (Erle, C.J., Byles and Montague Smith, JJ.), April 28, May 10, 1865]

[Reported 18 C.B.N.S. 531; 34 L.J.M.C. 121; 13 L.T. 239;
11 Jur.N.S. 688; 13 W.R. 943; 144 E.R. 551]

Rates—Licensed premises—Rateable value—Brewery—"Tied" public-house—Effect of "tying" covenant on values.

By agreements between brewers, as landlords, and the tenants of public houses occupied by the brewers as owners or tenants it was provided that the tenants must buy from the brewers all liquor which they sold in the public houses. The brewers thus secured to themselves a certain trade and were able to charge the tenants higher prices for liquors than they could charge an occupier of a "free" public house. On the other hand, the "tied" tenants paid to the brewers less rent than they would have paid if they had been "free."

Held: (by ERLE, C.J., and MONTAGUE SMITH, J., BYLES, J., dissenting): the advantages and disadvantages resulting to the parties from the terms of the agreements did not form any ground for either raising or diminishing the gross or rateable values of the breweries, on the one hand, or the public houses, on the other.

Notes. Considered: *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-Le-Street Assessment Committee*, [1937] 2 All E.R. 298. Referred to: *Ipswich Dock Comrs. v. St. Peter, Ipswich, Overseers* (1866), 7 B. & S. 310; *R. v. Battle Union* (1866), L.R. 2 Q.B. 8; *R. v. London and North Western Rail. Co.* (1874), L.R. 9 Q.B. 134; *West Middlesex Waterworks Co. v. Coleman, Coleman v. West Middlesex Waterworks Co.* (1885), 14 Q.B.D. 529; *Bradford-on-Avon Assessment Committee v. White*, [1898] 2 Q.B. 630; *Poplar Metropolitan Borough Assessment Committee v. Roberts*, [1922] All E.R. Rep 191.

As to valuation for rating, see 32 HALSBURY'S LAWS (3rd Edn.) 60 et seq.; and for cases see 38 DIGEST (Repl.) 609 et seq.

Cases referred to:

- (1) *Allison v. Monkwearmouth Shore Overseers* (1854), 4 E. & B. 13; 23 L.J.M.C. 177; 18 Jur. 1075; 119 E.R. 6; sub nom. *R. v. Allison*, 2 C.L.R. 1544; 23 L.T.O.S. 232; 18 J.P. 438; 2 W.R. 592; 38 Digest (Repl.) 673, 1236.
- (2) *R. v. Thurlstone (Inhabitants)* (1859), 1 E. & E. 502; 28 L.J.M.C. 106; 32 L.T.O.S. 275; 23 J.P. 565; 5 Jur.N.S. 820; 7 W.R. 192; 120 E.R. 997; 38 Digest (Repl.) 679, 1280.
- (3) *Theed v. Starkey* (1724), 8 Mod. Rep. 314; 88 E.R. 225; 31 Digest (Repl.) 325, 4599.
- (4) *Staley v. Castleton Overseers* (1864), 5 B. & S. 505; 4 New Rep. 361; 33 L.J.M.C. 178; 28 J.P. 710; 10 Jur.N.S. 1147; 12 W.R. 911; 122 E.R. 920; sub nom. *R. v. Castleton Overseers*, 10 L.T. 606; 38 Digest (Repl.) 619, 876.

Also referred to in argument:

R. v. Bradford (1815), 4 M. & S. 317; 105 E.R. 852; 38 Digest (Repl.) 672, 1224.

Case Stated under the Quarter Sessions Act, 1849, s. 11.

The parish of Sunderland-near-the-Sea was one of the parishes included in the Sunderland Poor Law Union, the board of guardians of which union had, in accordance with the Union Assessment Committee Act, 1862, appointed an assessment committee for the purposes of the Act. The overseers of the parish, in pursuance of the Act, made a list of all the rateable hereditaments in the parish, which list was duly deposited for inspection, published, and afterwards transmitted to the committee as required by the Act. The committee, after

A receiving the valuation list, made alterations in the value of certain hereditaments, and then caused the list to be deposited for inspection, as required by the Act, and appointed a day for hearing any objections thereto. The overseers of the poor of the parish of Sunderland gave notice of objection, and appeared before the committee and stated their objections to the alterations; but the committee adhered to their original views, and approved and confirmed the list. The overseers having reason to think that the parish was aggrieved by the decision of the committee, and having duly obtained the consent of the vestry, gave the notice of appeal. Before the appeal came before quarter sessions the guardians gave notice to respite, which was done, and an arrangement was entered into that the questions of law should be settled by a Special Case for the opinion of the Court of Common Pleas.

C One ground of appeal was

"that the rateable hereditaments comprised in the valuation list were valued at sums beyond the rateable value thereof."

This ground of appeal had reference to the valuation of certain breweries in the parish, and the facts were as follows. In the parish there were five breweries, three of which were occupied by the owners, and the remaining two by lessees. The occupiers of those five breweries were possessed of, as owners or as lessees, or entitled to a great number of public-houses known as "tied houses," some of which were situate in the parish of Sunderland-near-the-Sea, and some in other different parishes. All these public-houses were let to tenants at smaller rents than they would have been let at if they had been free public-houses, the tenants being bound to purchase from the brewers all malt and other liquors which they sold in their public-houses, the brewers thus securing to themselves a certain large trade, and being enabled to charge higher prices for their liquors than they would charge the occupier of a free public-house. In valuing these breweries and public-houses for the purpose of making the valuation list, the overseers applied the same principles to the breweries and public-houses as to the other rateable hereditaments in the parish, pursuant to the Parochial Assessment Act, 1836 [repealed by Local Government Act, 1948], and in the case of the breweries without any regard or reference to the advantages derived by the occupiers from the contracts with the occupiers of the "tied public-houses," and in the case of the "tied public-houses," without any regard or reference to the "smaller" rents paid by the occupiers to the brewers, and as if such occupiers were at liberty to purchase the liquors in the open market.

The assessment committee having ascertained that the overseers, in arriving at the "gross estimated rental," and the rateable value of the breweries, had not taken into consideration the advantages which the occupiers of such breweries derived from the contracts with their tenants, the publicans, and having obtained the number of such "tied public-houses" attached to each brewery, increased the "gross estimated rental" and "rateable value" of those breweries by such an increased sum as they considered the breweries might reasonably be expected to let for with the advantages attending the contract with the "tied public-houses." The committee made no reduction in the valuation list in respect of the value of the several tied public-houses. The overseers, in objecting to the increase made in the value of the breweries, insisted that if the valuation of the breweries was to be increased by reason of the advantages derived by the tied public-houses, the occupiers of the tied public-houses should be valued only in respect of the smaller rents actually paid by them and at the reduced value of the premises resulting from their obligations to purchase their malt liquors of their landlords, and not at the full annual value of the premises without reference to such obligation. The committee, however, being of opinion that they were bound by *Allison v. Monkwearmouth Shore Overseers* (1), and the cases therein referred to, refused to alter their decision.

The overseers appealed, the questions of law arising for the opinion of the court being (i) whether, under the circumstances stated in the Case, the breweries in question should be rated on any additional sum beyond their annual rateable value as breweries for the advantages derived from the custom of those tied public-houses, the occupiers of which were compelled to purchase their liquors at such breweries; and, if so, whether the public-houses connected with the breweries, but situate in other parishes, should be taken into account in calculating the gross estimated rental and rateable value, as well as those within the parish where the brewery is situate? (ii) If the breweries were, in the opinion of the court, liable to be assessed in respect of the advantages derived from the tied public-houses, whether the tied public-houses were liable to be assessed at a reduced "gross estimated rental" and "rateable value" in consideration of being so tied to such breweries?

Lush, Q.C. (Prideaux and Heath with him) for the overseers.

Liddell, Q.C. (Tomlinson with him) for the guardians.

Cur. adv. vult.

May 10, 1865. The following judgments were read.

ERLE, C.J.—Questions relating to the rateable value, first, of the breweries, and, secondly, of the tied public-houses, are now to be disposed of. The case relates to five breweries, and a number of public-houses tied to each brewery, some being in the same parish with the brewery to which they are tied, and some in a different parish. It seems that all the breweries are rated on some principle known to the assessment committee. Without referring to the title-deeds and leases for the purpose of this judgment, I will take the case as if it related to one brewery in one parish, and one public-house tied thereto, by a contract for beer, in another parish. Then the facts relevant to the question are that the occupier of the public-house holds it under a lease from the occupier of the brewery; that in the lease he contracts to take beer from his landlord's brewery; and that the rent to be paid for the public-house is adjusted by reference to this contract. Thus this causes a loss to the tenant in respect of the beer he buys—that is, he pays more for it than he would have to pay if he traded free from such contract. It also causes a gain to the landlords' brewery from the same cause. The Case does not state that the gain to the brewery is greater or less, or equal to the loss of the public-house; but, as nothing is stated to the contrary, I assume it to be equal. Thus, the rent in money to be paid and received respectively is less than it would be if the house were free by the amount of such respective loss and gain; but the value that passes between the landlord-brewer, selling beer on the one side, and the tenant-publican, buying beer on the other side, is the same as it would be if the house were free. The overseers making out the valuation lists for these parishes, and setting down the rateable value of this brewery and of this public-house, among others, have obeyed literally the commands of the Union Assessment Committee Act, 1862, and the Parochial Assessment Act, 1836 [both repealed by Local Government Act, 1948]—that is, they have estimated the gross rent which each of those tenements would be worth to a free occupier, and in making that estimate they have excluded from their attention, as they were bound to do, any reference to special profits of trade by reason of special contracts in leases or otherwise. The assessment committee, in revising these valuation lists, have made an alteration by increasing the estimate of the gross rent which the brewery could command. They do not state on what principle they have made this increase, or on what evidence they have acted; but they have raised the rateable value from £254 to £355 in the example set out in the case, being nearly the rate of increase which was approved of in *Allison v. Monkwearmouth Shore Overseers* (1). It is further stated that, although they have followed that case in raising the rateable value of the brewery, they

I have not lowered the rateable value of the public-house by the amount of the loss caused by the tie, probably because the judgment in *Allison's* case (1) does not refer thereto.

We are thus called upon to decide between the overseers and the assessment committee; and, in my opinion, the overseers are right. In support of that opinion I would premise some observations before examining the application of *Allison v. Monkwearmouth Shore Overseers* (1), on which the assessment committee rely. I would premise that the Union Assessment Committee Act, 1862, now under consideration, has a purpose ulterior to the Parochial Assessment Act, 1836, which alone was under consideration in *Allison v. Monkwearmouth Shore Overseers* (1). The purpose of the Parochial Assessment Act is to provide for equality in the rating of each of the rateable subjects in one parish. The purpose of the Union Assessment Committee Act is to provide for equality in the rating of each aggregate of rateable value in each of the parishes of the union. This latter purpose is to be effected by applying, with correct uniformity, throughout every parish of the union, the principles for estimating value as required by the Parochial Assessment Act. The valuation lists are made a permanent standard of value whereby to assess all the rateable subjects within the union, both to the Parochial and to the Union Assessment Acts, until an alteration shall have been made; and, although a mode of alteration is provided, yet, considering the expense and difficulty of a survey of the rateable property in a union, an alteration will not be easily made.

It is, therefore, commanded by those statutes, as I understand them, that the estimate of the rental should be confined to corporeal hereditaments, and should be founded on the more permanent elements of value found therein, excluding the effect of temporary contracts and other such contracts. I would further premise that, as the Case is stated, there is no ground for assuming that the aggregate value of the two tenements does not continue the same whether they are held separately or jointly, there being no statement of any increase of value by reason of any combination. Then, if the brewery gains by the tie what the public-house loses thereby, and no more, the aggregate amount of the rateable value of the two tenements ought to be the same, whether they are rated together or separately and whether they are held under the same or different landlords.

Under these circumstances the notion that the rateable value of the brewery could be increased by the gain from the tie, without lowering the rateable value of the public-house to the same extent by reason of the loss from the tie, was so untenable that the counsel for the guardians did not offer to maintain it. By that admission the question to be answered is narrowed to the point whether the whole rateable value of the public-house shall be set down in the list for the parish where it is situate, or partly therein and partly in the parish where the brewery is situate to which it is tied. That question may be raised in respect of four changes of the relation between the respective occupiers of the brewery, and of the public-house. First, I would take the case when the owner of both is the occupier of both, the brewer carrying on the public-house by a servant. There is no lease and no tie, and each rateable subject would be rated in the parish where situated upon the ordinary principle, and the contingent possibility of a tie, in case there should be a lease of each, would be immaterial. The value thus ascertained is the true rateable value for the list. Secondly, I would take the case where the owner of both tenements occupies the brewhouse, worth say £200 per annum, and lets the public-house to a publican, say at £20 per annum, without any contract relating to beer, the house would be free, and the rateable value would be the same as in the last case, unaffected by a tie. Thirdly, I would take the case where the owner of both tenements occupies the brewery and lets the public-house with the tie, that is, with the contract for taking beer, the money-rent being lowered, say to £10, and the beer overcharged, say to the same amount. In this case also it seems to me that the rateable value

of each remains the same, and would be rated in the parish where situate. Fourthly, I take the case where the owner of both tenements makes a lease of each, first letting the public-house, assumed to be worth £20, for £10, monied rent, with a contract for taking beer which is worth £10, given to the brewer, and then letting the brewery with the benefit of that contract, the brewery by itself being worth £200 per annum, the benefit of the tie being worth £10 per annum. Thus the rent for the brewery with the contract is £210 per annum.

Under these circumstances, also, it seems to me that each tenement should be rated in the place where it is situate, at the rent which it would command if let by itself without the tie; and that a decision that the rateable value in the fourth case is different from that of the former cases, would in effect hold that the rateable value depends on the actual occupation, not on the estimated rental, which is contrary to the Assessment Acts, as I understand them. Moreover, if the rateable value is altered by the tie, the overseers making the rate ought to know whether it exists. Its existence depends on the title-deeds and leases of the brewer and publican. If the overseers are to rate for the tie, it seems to follow that they ought to inspect and understand those documents of title, and this consequence seems to me absurd. The assessment committee do not refer to any such source of knowledge: perhaps they have increased the rate on every brewery to a large amount, assuming that the tie exists, and they expect the brewer to produce his deeds to relieve himself if that assumption be wrong. But such a principle of rating cannot be sanctioned by any court at Westminster.

I now proceed to *Allison v. Monkwearmouth Shore Overseers* (1). The facts of that case seem to me to be materially different from those here stated, and the statute here to be construed is different from the statute then in question, and, therefore, it is not necessary to decide whether an opinion given by a court by way of advice, from which there is no appeal, is as binding on co-ordinate courts as a judgment would be where the same question is sent up to a second court for its opinion. I should think not. It seems to me that each court is in such case original, and bound to give its own judgment, just as on a motion for a writ of habeas corpus each tribunal must give its own decision without being swayed by other tribunals. But, as already observed, it may be that we are not called on here to say that any former case should be overruled. In *Allison v. Monkwearmouth Shore Overseers* (1) the title-deeds and leases were produced by the brewer, and the facts relevant to the rating of the brewery for the supposed profit from the tie were taken therefrom. Those facts were that Sir Marmaduke Williamson was owner of a brewery, of which the rateable value by itself was £350, and thirty-three public-houses, of which the rateable value is not given. The public-houses he had let with the contract to take beer at monied rents amounting in the aggregate to £150. He then leased to Allison for seventeen years the brewery, with the goodwill of these public-houses, as it is called, subject to the payment of the rents theretofore received by Williamson, that is, yielding in respect of the brewery and fixtures £350, and in respect of the public-houses £150. This sum of £150 thus described is found to have been in substance the rents of the public-houses collected by Allison for Williamson during the existing leases. When the tenancies changed, Allison let to the new tenants, and continued to receive during the term the same monied rent from those public-houses amounting to about the sum of £140 per annum, which he paid to Williamson under the above-mentioned covenant. The lease of the goodwill of the public-houses is thus shown to have been, in effect, a lease of the public-houses. The court held that Allison was liable to be rated for this sum of £150, being the amount of rent so received. The case also finds that all the tenants were assessed for their public-houses, but the value is not stated.

These being the facts, the judgment affirming the rate on the brewer for the amount of rent collected by him and paid over to the superior landlord, has the singular effect of holding that a rent-collector may be rateable for the amount

of rents which he collects where the given relation of brewer and publican is found to exist. Although, as a general rule, the province of the court here is confined to deciding on rateability, and does not extend to deciding on amount, yet the court, in thus holding the brewer liable to be rated for the rents collected, refused to give permission to go into the question of the cost of the production of the supposed rateable value of £150, and assumed that the covenant to pay that sum as rent of the brewhouse was inclusive of rateable value, although the deed showed it was rent collected. The case also found that Mr. Allison rented other public-houses, not of a brewery landlord, which he sub-let to publicans with the contract for beer. The notion of rating him for the rent he received from those publicans seems not to have been attempted: but, if he was liable for those he rented of Williamson, it is difficult to say why he was not liable for those rented of others. If the attempt had been made to rate him for every public-house under contract with him to take beer, it would have been the rating of a profit of trade, and yet the profit from beer to Williamson's public-houses was the same profit of trade as that from other public-houses.

Furthermore there is sound distinction between that case and the present, on the ground that the assessment lists relate to the whole union, and all the tenements are at once to be assessed. Under the former Acts, before the Union Assessment Act, there was a defect in deciding appeals on rates, because only one tenement was the subject of the judgment at a time, and in apportioning the rateable value of two or more portions of the same rateable subject in two or more parishes, the injustice of doubly rating the same rateable subject might be inflicted in the apportioning process, unless all the portions were disposed of at once. Accordingly, in *Allison's* case (1), although it appeared that the tenants of the public-houses were rated as well as the tenant of the brewery, yet the court had no power of inquiring, and did not inquire, whether the public-houses were rated at their full value, and whether the rating Allison for the rents which they paid to him was not in reality a double rating of the rent of these public-houses; that is, once on the tenant, and again on Allison. Here the overseers have rated all the public-houses, as well as the brewery, according to the principle of the Assessment Acts, and according to those principles the publican would have to pay a rate both on the lower money payment and higher beer charges which he pays to the brewer, his landlord, under the contract.

There is no suggestion that any further value is created by this relation of landlord and tenant. If the suggestion was made, it certainly could not be ascertained without taking an account of the profits of the beer trade, involving an account of all losses by insolvency, and otherwise, and so it would be made apparent that it was an attempt to rate a profit of trade. If the doctrine is established that the supposed profit from a publican-tenant taking beer by contract is rateable upon the brewer, the question would arise why the same profit arising by reason of a publican-debtor contracting to take beer from the brewer-creditor should not be also assessed. The tie is created as well by a loan secured by bill of sale as by a covenant in a lease; that is, unless the publican can pay off the loan he may be broken up, as it is called, at any time, and yet the attempt to make such a profit of trade rateable has not been made. It is also clear that a brewer differs not in respect of this liability from a butcher, a baker, or the like. If the brewer-landlord is to be rated as Allison was, other tradesmen landlords influencing custom by letting retail tenements, with contracts for custom, ought to be raised, but such an item of rateable value has never been recognised.

For these reasons *Allison v. Monkwearmouth Shore Overseers* (1) seems to me distinguishable from the present case. In the judgment delivered by us in that case I endeavoured to distinguish the right of the occupier of a soke-mill, derived from immemorial custom, to the servitude of all within the soke, and the right of the occupier of a canteen placed in a populous locality from a right derived under such a contract as that in *Allison's* case (1). I refer to the reasons there

given, which appear to me to have more force when applied to an assessment A list fixing the rateable value of each rateable subject in the union, on the principles above explained, and I will not increase the length of this judgment by repeating what I am reported there to have said. I will only add, as to the soke-mill, that the prescriptive right of the miller of that mill to the multure from the inhabitants of the soke is a reality affecting the fee-simple of the whole locality, and the immediate profit fixed by the custom subject to no risk of trade, if the miller may take his toll in kind, whereas the right of the landlord to sue on the contract for taking beer is a personalty affecting only the persons of the contracting parties, and the profit therefrom varies in proportion to the skill of the contracting parties, and is subject to all the risks of trade from insolvency, dishonesty, and the like. If this be correct, the profit to the mill from the prescription is rateable, and the profit to the brewer from the contract for beer is not. Upon this review C I come to the conclusion that the judgment should be for the appellants.

BYLES, J.—In this case no question arises as to the aggregate rateable value of the whole brewing concern, including in that expression both the brewery, properly so called, and the restricted public-houses. The question is: How should that rateable value be distributed between the brewery itself and those D restricted houses? It has been decided by the Court of Queen's Bench, in *Allison v. Monkwearmouth Shore Overseers* (1), by which conclusion I think we are bound, that the monopoly which a brewery enjoys over its tributary public-houses enhances the rateable value of the brewery. It is a necessary consequence that it diminishes the rateable value of the public-houses. It doubly affects, or E may affect, their annual value to the occupiers, who not only pay more for their beer, but being shut out from the benefit of buying in the open market, may be obliged to purchase an inferior article and to suffer a diminution of the extent of their trade as well as of their rate of profit. These public-houses do in consequence actually let at a lower rent than they would otherwise command. It is objected that a mere personal contract cannot diminish the rateable value F of land or houses.

But the Parochial Assessments Act, 1836, establishes as the criterion of rateable value the rent (subject to the deductions there enumerated) which a tenant not for a long term of years, but from year to year, would give. The statute does not make the actual rent reserved the criterion of rateable value, but the true theoretical rent, that is to say, the sum at which, making the statutable deductions and having regard to all the surrounding circumstances, the tenement ought to command. Again, the statute, by adopting a supposed tenancy from year to year, seems to exclude a valuation of distant future advantages or disadvantages of the property demised, and to regard its actual condition at the time of the rate, or in the immediate future. If the natural or ordinary advantages of a tenement are permanently taken away from it, and annexed to another tenement, H that should seem to be a diminution of the value of the first tenement, and an augmentation of the value of the second. It seems to me that it makes no difference whether the severance arises from modern contract, or from prescription, which presupposes an ancient contract.

In the present case the ordinary advantages of the tenement are, by a permanent contract between landlord and tenant, taken away from the tenant's tenement, I and annexed to the landlord's tenements. If it be said that the surrender of these ordinary advantages by the tenant to the landlord is in effect rent paid by the tenant to the landlord, I should respectfully answer that it is straining the word "rent," as used in the statute, to give it this extensive signification. Moreover, there are cases, much nearer to a reservation of rent service to the landlord than the case now under consideration, in which cases, nevertheless, the reservation of valuable privileges to the landlord, on the one hand, or the enjoyment of them by the tenant, on the other, have been held respectively to

diminish or augment the rateable value of the tenant's occupation. Thus it has been decided, that if the landlord allows to the tenant the right of shooting, the tenant will be rated as more; but if the landlord reserves it to himself the tenant will be rated at less: *R. v. Thurlstone (Inhabitants)* (2). Some ornamental squares in the metropolis must, by mere private contracts for a long term of years, be used as squares, and no one would live there subject to those contracts. Their rateable value, though in itself very great for many purposes, is destroyed by contract, and by contract it is transferred to the adjoining property, for it is included and rated in the increased value which the ornamental square confers on the mansions that surround it. A house in Cheapside, let as a shop, for which it is adapted by situation and construction, would command a large rent, but if it be subjected by the ground landlord to a stipulation that it shall be used as a dwelling-house only, and not as a shop, its rateable value in the occupation of a tenant is reduced by the effect of the contract.

It is no objection that a portion of the value of the land may thus escape the rate altogether, for the statute of Elizabeth imposes the rate, not on the land, but on the person of the occupying tenant in respect of his ability, as tested by the annual value of the land he occupies, for, originally, an inhabitant and occupier was rated for personal property as well as real property, and it has been repeatedly held that the poor-rate is no charge upon the land: *Theed v. Starkey* (3). Nor is there much danger of abuse, for in ordinary cases that method of letting which will produce most rent will be preferred by the landlord. It is true that pecuniary charges on the land created by contract, as ground rent-charges, annuities, interest of mortgage, and the like, are not to be deducted from the rateable value of a tenement, but that it is because the legal criterion of rateable value is, by the provision of the statute, the rent which a tenant from year to year would give for the land in its actual condition, subject to certain deductions, among which are tithes, rates, taxes, insurance, repairs, etc., but among which deductions pecuniary charges created by contract are not to be found. But in truth the statute of 1836, though not in form declaratory, made very little alteration in the principles of rating before accepted by courts of law. For these reasons, differing, with respect and reluctance, from the judgment of the Lord Chief Justice, I think the magistrates were right in their decision.

MONTAGUE SMITH, J.—I agree with my Lord that the judgment on the first and second questions of this Special Case should be for the Overseers. These questions in substance are whether the rateable value of a brewery, to be inserted in a valuation list under the Union Assessment Committee Act, 1862, is to be increased beyond the ordinary rateable value of the like property, and the rateable value of certain public-houses is to be reduced, because the owner of both has made a contract with his tenants of the public-houses that they shall buy all their beer of him as brewer, at a price beyond the fair market price of the beer. It is contended by the counsel for the guardians that the rateable value of the brewery should be increased, and, as a consequence (which he admits), that the rateable value of the public-houses should be reduced by reason of these contracts, and this although the properties may happen to be in different parishes.

It appears to me that this contention is not well founded, and that the contracts between the brewer and the publicans do not form a basis for either raising or diminishing the gross or net rateable value, as defined by the statutes, for the purpose of the valuation list under the recent Act. In estimating the rateable value, or the "rent at which these properties might reasonably be expected to let from year to year," the value of the tenements as they stand and are fitted up, the use to which they may be applied, their local position, and other like circumstances are to be considered. In the case of a brewery the capacity of the building and premises for carrying on trade, and also the fact that a trade corresponding to its capacity would *prima facie* be carried on in it, would be

proper elements to include in the estimate, subject, however, in the case of the latter element, to modification if it were shown, as in the case of the idle cotton-mill, *Staley v. Castleton Overseers* (4), that the trade was not in fact carried on. But these contracts, if considered, would introduce personal and collateral matters into the estimate, not directly bearing on the occupation of the property and the uses to which it is applied. The contracts here are really modes by which the owner of the two properties chooses for the time not to alter the nature or uses of the occupation of the properties, but to apportion and regulate his own rents and profits. Assume that the owner and occupier of the brewery derives increased profit as a brewer from the contract, there is, on the other hand, a corresponding loss to him as owner of the public-houses; and if this profit so purchased is held to add to the rateable value of the brewery, it would follow that that value must be reduced below the ordinary rateable value of the like property in case the brewer chooses to foster his public-houses at the expense of his trade as brewer by contracts to sell beer to his tenants at a loss.

It seems to me that such grounds of raising and depressing rateable value are not warranted by the statutes. The difficulty of importing such contracts into the estimate of rateable value is still more apparent when we are called on to reduce the rateable value of the public-houses below that of other like houses. I am unable to find a sound principle for such a reduction. The public-houses are occupied, their capacity for trade exists, and a trade is actually carried on in them. These things afford the ordinary elements for estimating rateable value, but neither the particular rent a tenant pays, nor the particular profits or losses of his individual trade depending on provident or improvident contracts in relation thereto, can, I apprehend, be imported. It may be assumed here that the profits of the publican's trade are cut down by the contract, with the consequence, as found in the Case, that the publican pays less rent; but rateable value is not altered by the actual rent being more or less than the rent the premises would reasonably command from a yearly tenant. Rent is no more than presumptive evidence of value, and this being so, I think the rateable value of the public-house remains unaffected, although the actual rent may be below what, without the contract in question, the house would let for. If it were to be held otherwise, and the contract of the publican happened to be so onerous in its terms that no new tenant would give more than a nominal rent for the public-house burdened with a like contract, it would follow from the argument of the guardians that the houses must be rated at a nominal value only. But in truth, in the case of these public-houses, the publicans are really paying a part of their rent in the extra price they are charged for the beer, and clearly the shape in which they pay cannot alter the rateable value of the house. The facts of *Allison v. Monkwearmouth Shore Overseers* (1) differ in some respects from the present case, and the question of reducing the rateable value of the public-houses was not in that case before the court for decision. Here we have to decide that question, and to decide it upon the provisions of the recent statute. Notwithstanding the respect which I feel for the opinion of the two learned judges who formed the majority of the court, their decision, which could not be appealed from, ought not, I think, to be conclusive in this case. On the first and second questions of this Special Case, I think the overseers are entitled to judgment.

Order accordingly.

POLE AND ANOTHER v. LEASK

[HOUSE OF LORDS (Lord Westbury, L.C., Lord Cranworth and Lord Kingsdown),
May 15, 16, 19, 20, 22, 23, 26, 27, 30, June 2, 1862, April 17, 1863]

[Reported 33 L.J.Ch. 155; 8 L.T. 645; 9 Jur.N.S. 829]

Agent—Agency—Proof—Burden on person alleging agency and liability of principal—Constructive agency—Person placed in position of agent—Principal estopped from denying agency.

No one can become the agent of another person except by the will of the other person which may be manifested in writing, or orally, or by placing the person said to be an agent in a situation in which, according to ordinary rules of law or the ordinary usages of mankind, that person is understood to represent and act for the person who has so placed him, but in every case it is only by the will of the principal that an agency can be created. Where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed.

The burden of proof is on a person dealing with anyone as agent through whom he seeks to charge another as principal. He must show that the agency did exist and that the agent had the authority he assumed to exercise or that the principal is estopped from denying it. Anyone dealing with a person assuming to act as agent for another can always save himself from loss or difficulty by applying to the alleged principal to learn whether the agency does exist and to what extent. The alleged principal has no similar mode of protecting his interests; he may be ignorant of the fact that anyone is assuming to act for him or that persons are proposing to deal with another under the notion that that other is his agent.

A party who seeks to establish a constructive agency or to extend by implication an agency admitted or proved to exist for some purposes to others ought to be held to strict proof: per LORD CRANWORTH.

Partnership—Agency—Partners agents of each other in matters of partnership.

Per LORD WESTBURY, L.C.: Partnership is a fact from which it follows in law that the partners are the accredited agents of each other in the matters of the partnership.

Notes. Considered: *Clayton-Greene v. De Courville* (1920), 36 T.L.R. 790.

As to the creation and evidence of agency, see 1 HALSBURY'S LAWS (3rd Edn.) 152-160; and for cases see 1 DIGEST (Repl.) 310-317, 327-344.

Appeal from a decree of SIR JOHN ROMILLY, M.R., in an action in which the appellants claimed from the respondent sums alleged by them to be due from him in respect of certain commercial transactions and a cross-action for similar sums by the respondent.

The appellants were merchants, carrying on business in partnership under the firm of P. and C. Van Notten & Co., at Nos. 2 and 3, Lime Street Square, in the city of London. The businesses carried on at Nos. 2 and 3 were kept distinct, and all the statements in the case related exclusively to the transactions of the house No. 3, Lime Street Square, unless otherwise mentioned. The respondent was a sworn broker in the city of London, and was known as and was introduced to the appellants and employed by them as a dried fruit broker. The principal question in these suits was whether the appellants were chargeable with certain large contracts entered into in their

names, but alleged to be without their knowledge, privity, or authority, by the respondent as broker, acting, as he alleged, by the order or under the direction of William Burnett Anderson, as the alleged general agent, or professed agent, of the appellants. Another question was whether the appellants were chargeable with large sums of money alleged to be paid or advanced, without their knowledge, privity, or authority, by the respondent to Anderson, as the respondent alleged, as such agent, and on their account, which sums of money were never received, directly or indirectly, by them, but were applied to Anderson's own use. The appellants were alleged to be entirely ignorant of all these transactions until after Anderson's apprehension for forgery, on Dec. 20, 1853. The Master of the Rolls decided that the appellants were chargeable, on the ground that Anderson was their general agent authorised by them to buy and sell any goods within the province of the respondent, as a fruit and colonial broker, which he thought fit to embark in on their account; to receive deliveries of unsold goods belonging to the appellants; to receive and pay moneys; and to receive and settle accounts, and receive balances on their behalf. From this decision the appellants appealed.

Sir Roundell Palmer, Q.C., Sir Hugh Cairns, Q.C., G. Simpson and D. A. D. Freeman for the appellants.

Selwyn, Q.C., Mellish, Q.C., and Ferrers for the respondents.

Their Lordships took time for consideration.

April 17, 1863. The following opinions were read.

LORD WESTBURY, L.C.—The appellants are merchants, and the respondent is a broker carrying on businesses in the city of London. During the interval of time between August, 1852 and Dec. 20, 1853, the respondent, as he alleges, was employed by the appellants as their broker in making large and numerous purchases of goods, consisting principally of imports from the Levant—currants, dried fruits and tartaric acid. These transactions, which were continuous during the time I have mentioned, amounting almost to a separate business, were conducted in the name of the appellants entirely by Mr. William Burnett Anderson. On Dec. 17, 1853, Anderson was committed to prison on a charge of perjury, of which he was afterwards convicted, and he was subsequently declared a bankrupt. It was proved that he had in his hands considerable sums of money which he had received from the respondent Leask in respect of some transactions, and had not, as the appellants allege, accounted for as between himself and the appellants; and the principal question in the cause depends on the inquiry whether Anderson had authority to receive these moneys from Leask, which again depends on the question what was the relation between Anderson and the appellants. If Anderson was in law the partner of the appellants in respect of the transactions in which the respondent acted as broker, then, undoubtedly, he had full authority to receive from the respondent either money or goods which belonged to the partnership. If he was not a partner, he might still have a general authority, and if there be no direct evidence of his having expressly received from the appellants a general authority, the existence of a sufficient authority, either general or limited, may still be inferred as a fact from the acts and conduct of the appellants; or (which is the same thing in law) the acts of the appellants may be shown to be such as to accredit Anderson and estop the appellants from insisting that Anderson had no authority.

In ascertaining the answer to these questions, it is not immaterial to consider the connection subsisting between the appellants and Anderson before the transaction with the respondent. Anderson was at first a clerk to a custom-house agent, but for some time before the month of August, 1852, he appears

to have been on terms of commercial intimacy with the appellants. He had gained their confidence, and it may be said their friendship, to such an extent that they had assisted him in various mercantile speculations, and enabled him to enter into business on his own account. We begin our inquiry, therefore, with the fact that Anderson was a person well known to and largely trusted by the appellants. The next step is the account which the appellants give, in their answer, of the origin of their employment of the respondent. They say that "having assisted Anderson in his endeavour to establish himself in business, he (Anderson) not being a man of capital, expressed himself as under great obligation, and as a return for their kindness he represented to them the large gains which he had ascertained might be realised by entering into speculations in the purchase and sale of currants; and he offered, if they would engage in the speculations, to undertake the duty of superintending the purchases and sales that might be made." The appellants further say, that "they resolved to adopt Anderson's advice and to accept his offer; and that, in order to induce him to exert himself, and by way of compensation for his services, they offered to give him half the profits in the event of a satisfactory result"; words which must mean in the event of the business proving profitable. The respondent Leask, who was introduced to the appellants by Anderson, was thereupon directed by the appellants to make purchases of currants under the superintendence of Anderson.

Taking this to have been the agreement, I am of opinion that the result in law was to create a partnership between the appellants and Anderson in all the transactions which follow this agreement. It is true that the appellants say in their answer that Anderson declined the proposed remuneration, and did not accept the offer. But I am unable to give credit to this statement, for the fact that a partnership existed between the appellants and Anderson in all the purchases and sales that were made by the respondent Leask, under the direction of Anderson, is clearly proved, not only by the entries made by the appellants in their own books of account (entries which have the greater weight and significance from the fact that the appellants have attempted, since the commencement of this suit, to alter and mutilate them), but also from the conclusive circumstances that since the bankruptcy of Anderson the appellants have paid over to the assignees of Anderson the sum of £1,004 Os. 4d., as being the portion of Anderson's share of the profits resulting from the purchases and sales made by Leask, and recognised by the appellants, which remained due to Anderson at the time of his bankruptcy.

It is possible that the appellants might not have fully understood the actual legal relation in which they stood to Anderson in respect of these transactions, and the consequences in law of that relation, though it is difficult to reconcile any such conclusion with the entries made in their books, of the import of which they must have been well aware, and of the legal effect of which entries the erasures and alterations which they have since made prove them to be perfectly conscious. Persons who are guilty of such acts are entitled to little respect or credit in a court of justice, and I, therefore, give no more belief to their denial of a partnership than I do to their statement on oath that the alterations and erasures in their books of account (plainly designed for the purposes of this suit) were made without their authority. To the evidence of Anderson no weight should be given, save so far as it is corroborated; but it is not unfit to observe that he confirms the existence of a partnership, for his statement is that the appellants agreed to enter into joint account transactions with him in currants. It may be objected that the respondent, by his bill, treats Anderson as the agent and not as the partner of the appellants. But this is correct enough, for partnership is a fact from which it follows in law that the partners are the accredited agents of each other in the matters of the partnership, and the allegation, that Anderson was the agent of,

and had authority to represent the appellants in their dealings with the respondent, may be well proved by the fact of the partnership between the appellants and Anderson, although that fact, being material in this case only as evidence of the alleged agency, is not itself stated in the respondent's bill. That the assignees of Anderson are not parties to the bill of the respondent is immaterial, unless the respondent had sought to have the benefit of a proof against the estate of Anderson, which is not the case. The partnership of the appellants and Anderson was put an end to by the bankruptcy of Anderson; and the respondent Leask having contracted with the appellants alone without any knowledge of the partnership, has a right to sue the appellants in equity, as he might at law, and to use the partnership as proof only of the authority of Anderson. The respondent's suit, being a cross-suit, need not be constituted differently in respect of parties from the original suit of the appellants to which the assignees are not parties, and the objection, therefore, if well founded (which, in my opinion, it is not), could not have been taken by the appellants.

If I were not warranted by the facts which I have mentioned, and by many other facts in the evidence which I forbear to state, in concluding that a partnership existed in law between the appellants and Anderson in the subject of their transactions with the respondent, and that the respondent has a right to use the legal conclusion of partnership as proof of the general agency and authority of Anderson, I shall not hesitate to consider the evidence in the cause as proof of a general agency and authority in Anderson in all the transactions between Anderson and the respondent in which Anderson assumed to act on behalf of the appellants. The most conclusive proof of Anderson's general authority (in itself antecedently probable) is that which is furnished by the manner of carrying on the business, and by the conduct of the appellants. The transactions with the respondent through Anderson are divided by the appellants into two distinct portions—one being purchases and sales by the respondent anterior to Nov. 13, 1852 (these the appellants adopt, and admit that they were made with their full authority); the other, purchases and sales made by the respondent under the direction of Anderson after Nov. 13, 1852. These the appellants repudiate, and deny that Anderson had any authority from them to direct any such acts to be done by the respondent. Up to Nov. 13, 1852, and during a continuous course of dealing for some months previously, they admit that Anderson had authority, and that they, the appellants, are bound; but after Nov. 13, 1852, during a course of dealings perfectly similar, they deny that Anderson had any authority, and insist that they are not bound.

It is not alleged by the appellants that they gave the respondent any notice of the determination of the authority of Anderson, and there is no trace of any dispute or disagreement between the appellants and Anderson, about Nov. 13, 1852, which could lead to the discontinuance of this business. If, as they say, it terminated on Nov. 13 by their giving no longer any authority to Anderson to direct Leask to make purchases on their behalf, it might be expected that the transactions would be wound-up and the accounts closed in the books of the appellants, but of that there is no sign. In fact, there is no account whatever in the books of the appellants between them and the respondent, even in respect of the transactions in which they now admit that the respondent was their agent; and I know of no fact which could more than this convince any person conversant with mercantile usage of the truth of the statement that the appellants trusted Anderson entirely, and left it to him to employ and direct the respondent, and to keep the accounts on behalf of himself and the appellants of all the transactions with the respondent as such agent. But the appellants seek to draw a line between the transactions which they admit to have been authorised, and those which they allege to have been unauthorised, in the following manner. They allege by their bill that, at the

beginning of, and throughout the transactions before Nov. 13, 1852, they always required that Anderson should put his initials to all the contracts which the respondent should enter into on their behalf, and that, although the respondent alleges that he was only to send the contracts to Anderson, yet he well knows that he was only to get the contracts marked by Anderson, and was then to send such contracts to the appellants.

Upon this statement it has been insisted by the appellants in argument that it was actually agreed between the appellants and the respondent that the respondent should procure every contract to be first initialled by Anderson, and should afterwards transmit the same, so signed, to the appellants. The appellants assert in argument that every contract prior to Nov. 13, 1852, was so dealt with by Leask, but that no contract since that date was sent to them by the respondent after it had been initialled by Anderson. But, on an accurate examination of the appellants' statements on this important particular, it will be found that they do not warrant the representation of them made during the argument. There is great confusion and inconsistency in the separate statements of the two appellants as to the person by whom the alleged arrangement was made; and there is not, in fact, any definite statement on oath by either of the appellants that any such arrangement was made by them with the respondent Leask expressly, all that is sworn to being the following statement by the appellant Lambert Pole: "I told Leask we should purchase under the superintendence of Anderson, which implied the arrangement I have been mentioning, which was a kind of check upon Mr. Leask." But it is quite clear that the telling Leask that the appellants would purchase under the superintendence of Anderson implied nothing as to the duty of getting the contracts signed by Anderson and then sending them to the appellants, but it might imply the contrary, namely, that Leask was to resort to Anderson for all necessary orders and directions. In answer to the passage which I have cited above from the bill of the appellants, the respondent Leask denies that he ever engaged to get the contracts marked by Anderson with his initials, and afterwards to send such contracts, to the appellants.

The assertion, therefore, is not supported by the oath of the appellants, and is distinctly denied by the oath of the respondent. There is nothing, therefore, to support this assertion, which is the corner-stone of the appellants' case. In fact, what the appellants allege in this respect is shown by the evidence to be at variance with the custom of brokers, and that it would have been found to have been impossible in practice. It is very likely that as between Anderson and the appellants it was agreed that the contracts when received from the respondent Leask by Anderson should be initialled by Anderson, and afterwards transmitted by him to the appellants. As the appellants relied wholly on Anderson's judgment, they would naturally desire to secure his personal attention to the terms of the contract, and to receive from him a voucher that he had approved, and was, therefore, responsible for, the prudence of the contracts. But that Leask ever engaged to perform a double duty of first transmitting each contract to Anderson to be countersigned, and then delivering it so signed to the appellants, is not only unsupported by evidence, but is a thing which, consistently with the usage and custom of brokers, the respondent Leask could not have performed.

If, then, the distinction attempted to be drawn by the appellants between the transactions before and after Nov. 13, 1852, be rejected as not proved, and as being inconsistent with admitted facts, it follows that all the transactions with Leask were, from the beginning of his employment, conducted in one and the same way; and that, as the dealings were continuous and without interruption, Leask had the same warrant for believing that the last orders he received from Anderson were given with the authority of the appellants as he had for believing that the first were so authorised. It is clear that there never

was but one interview between the appellants and Leask, namely, in August, 1852. What passed at the interview, according to the appellants, may be expressed in a few words, namely, the appellants told him that they would purchase fruit under the superintendence of Anderson. What the appellants meant by the word "superintendence," and what the respondent understood it to mean, is best shown by the actual mode of conducting the business, which was uniform, and which, as the appellants admit, was, until Nov. 13, 1852, with their approbation and authority. All the orders and directions to the respondent came from Anderson; to him all the bought and sold notes and contracts were regularly sent by Leask; every document necessary for the principal or owner to receive was sent by Leask to Anderson; the moneys which Leask required for the necessary payments in course of the business were supplied to him by Anderson; all the moneys which Leask received and had to account for to his principal were accounted for and paid over by him to Anderson, to whom the accounts current were also rendered, and no communication passed between Leask and the appellants. In short, all the duties of a principal were performed by Anderson with the knowledge and according to the intention of the appellants, as they themselves admit, up to Nov. 13, 1852. If this fact be added to the statement made by the appellants to Leask at the original interview, that the appellants would purchase under the superintendence of Anderson, the result, in my judgment, is, that Leask had a right to infer that Anderson had full authority, and was a general agent of the appellants. Under such circumstances, if the appellants did, as they say, put an end to these transactions on Nov. 13, 1852, it was their duty to have given notice of that fact to the respondent. They had fully accredited Anderson to the respondent, who had a right to consider him as their agent until he was informed of the termination of his authority. The series of transactions was unbroken, and it would have been impossible for the respondent to have ascertained when the authority of Anderson was determined.

But, in truth, the only material issue between the appellants and respondent is much narrower than the general question which I have been considering. The appellants contend that Leask is indebted to them in a considerable sum of money, while the respondent alleges that a large sum is due to him from the appellants, and the question depends on the inquiry whether Leask was warranted in paying over large sums of money to Anderson, which had been received by Leask on the sale of goods bought by him for the appellants before Nov. 13, 1852. Of course, if Anderson was the partner or the general agent of the appellants in the subject of the transaction with Leask, he had authority to receive the sums in question. But, independently of these broader grounds, there is enough to show that Anderson had, at all events, authority to receive and give a discharge for the moneys that were payable by Leask to the appellants. First, the transactions which the appellants acknowledge, viz., the purchases before Nov. 13, 1852, were many in number, and to a large amount; and the sales which were made of these goods were still more numerous and to a greater amount on the whole. During these transactions large sums had sometimes to be advanced and paid by Leask, and larger sums were received by him for the appellants, and yet from the beginning to the end no sum of money was ever paid by the appellants to Leask, nor was any sum of money paid by Leask direct to the appellants; all receipts and payments went, with the assent of the appellants, through the hands of Anderson. Can anything be stronger to prove what was the real intention of the appellants than the fact that from the commencement of the transaction Anderson was, with their assent, invariably the hand to pay to Leask the moneys he required, and to receive from him and pay over to the appellants the moneys that might be due to them? The authority of Anderson must be inferred from this uniform course of action. The conclusive fact, however, is that the

appellants never opened an account in their books with Leask in respect of these transactions, and that many of the sums with which they now seek to charge the respondent do appear in their books to the debit of an account which is found there, entitled "Anderson and others (the word "others" meaning, as is admitted, the appellants) in account with Van Notten & Co."; thus admitting that the sums so entered (being part of the moneys in dispute) had been duly received by "Anderson and others," and ought to be accounted for by them in their account with the appellants. The Master of the Rolls regarded these accounts, taken alone, as conclusive against the appellants, and I entirely concur in that opinion. They are sufficient proof for the respondent in any one of the three inquiries which I have been pursuing, namely: First, whether Anderson was a partner with the appellants; or, secondly, laying partnership aside, whether Anderson had a general and full authority to act for the appellants in their dealings with Leask; or, thirdly, in a narrower view, whether Anderson had authority to receive the moneys which were from time to time payable by Leask to the appellants.

After much consideration of the case, I think that every one of these questions must be answered in the affirmative; but, as the fact of the partnership between the appellants and Anderson is clearly proved by the appellants' own accounts and confirmed by their discreditable attempts to erase and alter the entries, and is also admitted by their accounting for the moiety of the profits to the assignees of Anderson, I place my judgment chiefly on that basis. I have no hesitation in giving my opinion that the decree ought to be affirmed, and the appeal dismissed with costs.

LORD CRANWORTH.—Before I examine in detail the facts of this case, I desire to advert very shortly to one or two general propositions connected with the law of agency, which I think were sometimes lost sight of in the argument of this case at your Lordships' Bar. First, then, as to the constitution by the principal of another to act as his agent. No one can become the agent of another person except by the will of that other person. His will may be manifested in writing, or orally, or simply by placing the person said to be an agent in a situation in which, according to ordinary rules of law, or, perhaps, it would be more correct to say according to the ordinary usages of mankind, that person is understood to represent and act for the person who has so placed him, but in every case it is only by the will of the employer that an agency can be created. This proposition, however, is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed. It is, however, necessary to bear in mind the difference between this agency by estoppel, if I may so designate it, and a real agency, however constituted. Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with any one as an agent through whom he seeks to charge another as principal. He must show that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it. Unless this principle is strictly acted on, great injustice may be the consequence; for any one dealing with a person assuming to act as agent for another can always save himself from loss or difficulty by applying to the alleged principal to learn whether the agency does exist and to what extent. The alleged principal has no similar mode of protecting his interests; he may be ignorant of the fact that any one is assuming to act for him or that persons are proposing to deal with another under the notion that that other is his agent. It is, therefore, important to recollect constantly where the burden of proof lies.

It was argued that in a case where a firm acting through an agent employs a broker to buy and sell in the market for them, and that practice has continued through many transactions, then the broker, dealing with the agent, has a right to assume the agency to continue until something has been done to revoke it. I do not concur in that as a correct exposition of the law. So far from it, I do not think that the previous dealings could without more be admitted even as *prima facie* evidence of agency in subsequent transactions. If a merchant constitutes any one his general agent for buying and selling in the market, either through a particular broker or otherwise, then, until revoked, the agency will continue, and the principal will be bound by his acts; and further, the fact that such general agency once existed would be admissible as *prima facie* evidence of its continuance. The burden would be on the principal to show that it had been determined. But unless there is proof either that the agency is a general continuing agency to endure until revoked, or that the agent fills some character from which such a general agency may be presumed, the fact that there had been separate agency in any number of previous cases affords no evidence of agency on any subsequent transaction, however closely it may resemble all which have gone before. If a person has on fifty separate occasions authorised a stranger to act for him as his agent in respect to any particular transactions, and the agent has so acted, then if, on a fifty-first occasion, the agent should, without authority, assume to act in a similar manner, the person dealing with him might not unreasonably suppose that he who had been authorised in fifty transactions was also authorised in the fifty-first; but if he should act on that belief, it would be because he would think it safe to trust to the representation of the alleged agent. If he is defrauded, his loss is occasioned by his confidence in the agent, not by any act or omission of the principal. If, after a certain number of purchases, the principal intends to discontinue his dealings, to purchase no more, all he has got to do is to hold his hand—to remain quiet, not to give the authority which on every former occasion he had separately given. It is no part of his duty to give notice to those with whom the person authorised by him in each particular transaction has acted that he does not intend to purchase any more.

[After reviewing the evidence at length his Lordship came to the conclusion that there was no partnership between Anderson and the appellants, and continued:] In cases of this sort, where it is sought to make out a constructive agency or to extend by implication an agency admitted or proved to exist for some purposes to others my judicial leaning is in favour of the party sought to be charged. The party who seeks to establish such a case ought to be held to strict proof. Unless this principle is rigidly acted on, great injustice may be done. The prudent course for any one dealing with a person acting as the agent of another is to require from the principal a distinct statement as to how far the agency extends. The person dealing with the agent has always in his own power the means of protecting himself, which cannot be said of the party sought to be charged as principal. If ever there was a case in which a strict application of this doctrine was necessary, it is, I think, that now under consideration. Mr. Leask, according to his own account of the origin of his acting for Van Notten & Co., must have taken solely from Anderson himself the explanation of the extent of his powers. He says he was introduced by Anderson to the Messrs. Pole; but he does not allege that he asked them, or that they explained to him, what were Anderson's powers. Yet, in the state of things, he acted on the assumption that Anderson had unlimited authority to buy and sell for Van Notten & Co. whatever goods at whatever price he might approve, to settle with him the accounts of all the transactions, to receive from him the net produce of all the sales; and not only that, but from time to time to receive, in substance to borrow on account of Van Notten & Co., large sums which made Leask, for eight or nine months, a

creditor of Van Notten & Co. to the extent generally of £3,000 or £4,000, and once of above £9,000. [His LORDSHIP referred to the evidence]. The sole matter of importance which I can discover out of the ordinary course is that they did not call on Leask for his accounts. But I think it would be most unsafe and unjust to found—and this on the few and unimportant irregularities which have been pointed out as existing in these large transactions, extended over a period of sixteen months—the conclusion either that Van Notten & Co. knew, or that by their conduct they led Leask to believe they knew, that Anderson was assuming, in the manner in which he did assume, to represent them.

I cannot, as a jurymen, say I am satisfied that Leask has made out the proposition he was bound to establish, and the result is that, in my opinion, Leask's bill ought to have been dismissed, and a common decree for an account ought to have been made in the original cause. I cannot sit down without making this observation. I believe, in general, it is not very useful, in this court of ultimate appeal, for any member of your Lordships' House who has heard the case, and who knows, as I happen to know in this case, that the view which he takes of the case is not that taken by the majority of your Lordships, to trouble your Lordships at length with any explanation of his own opinion. But the reason why I have thought I ought to do so in this case is this, that it is impossible, as it appears to me, to sustain the decree of the Master of the Rolls without affixing a very great stigma upon the character of the appellants. That they were free from blame I do not profess to believe, yet I do believe that the blame is of a very much more limited character than that which would necessarily attach to them if the case were such that I could feel satisfied in affirming the decree. Therefore, I thought it was due to these gentlemen, not merely to state my dissent, but to go at length into the reasons upon which I have founded my opinion. Although, all the time I have been addressing your Lordships, I have felt that it might probably be a very wearisome occupation of your time, I have felt that I was only discharging my duty, though a very unpleasant one to me.

LORD KINGSDOWN read an opinion in which he dealt with the facts, and said that on the whole he agreed with the Lord Chancellor that the decree ought to be affirmed.

Appeal dismissed.

ROBBINS v. JONES

[COURT OF COMMON BENCH (Erle, C.J., Willes, Byles and Keating, JJ.), May 6, 8, November 16, 1863]

[Reported 15 C.B.N.S. 221; 3 New Rep. 85; 33 L.J.C.P. 1;
9 L.T. 523; 10 Jur.N.S. 239; 12 W.R. 248; 143 E.R. 768]

Highway—Obstruction—Obstruction on highway at time of dedication—Injury to user of highway—Liability of dedicator.

If a way is dedicated by the owner of the soil as a public highway at a time when it has a dangerous obstruction on it, such as would have been a nuisance if placed on an ancient way, e.g., a flight of steps or a projecting cellar-flap, no action can be maintained against the dedicator for injury caused thereby, whether by day when it can be seen or by night when it is invisible. The public adopting a highway must take it in statu quo, and no obligation is imposed on the dedicator to remove projections or fill up holes which may be dangerous to passers by.

Landlord and Tenant—Liability of landlord—House let in dangerous condition—Liability dependent on terms of lease.

Per ERLE, C.J.: A landlord who lets a house in a dangerous condition is not liable to the tenant's customers or guests for accidents happening during the term, for there is no law against letting a tumble-down house, and the tenant's remedy is on his contract, if any.

Notes. Considered: *Gautret v. Egerton* (1867), L.R. 2 C.P. 371. Distinguished: *Silverton v. Marriott* (1888), 59 L.T. 61. Applied: *Lane v. Cox*, [1895-9] All E.R. Rep. 337. Approved: *Cavalier v. Pope*, [1906] A.C. 428. Applied: *Horridge v. Makison* (1915), 84 L.J.K.B. 1294. Followed: *Bromley v. Mercer*, [1922] 2 K.B. 126. Considered: *Shirvell v. Hackwood Estates Co.*, [1938] 2 All E.R. 1; *Taylor v. Liverpool Corpn.*, [1939] 3 All E.R. 329; *Travers v. Gloucester Corpn.*, [1946] 2 All E.R. 506. Referred to: *Hamilton v. St. George, Hanover Square* (1873), L.R. 9 Q.B. 42; *Ryall v. Kidwell*, [1914] 3 K.B. 135; *Dobson v. Horsley*, [1915] 1 K.B. 634; *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; *Bottomley v. Bannister*, [1931] All E.R. Rep. 99; *Nicholson v. Southern Rail. Co. and Cheam U.D.C.*, [1935] All E.R. Rep. 168; *Otto v. Bolton and Norris*, [1936] 1 All E.R. 960.

As to the dedication of a highway subject to obstructions, see 19 HALSBURY'S LAWS (3rd Edn.) 58-60; and for cases see 26 DIGEST (Repl.) 510-513. As to warranty by landlord of fitness on letting premises, see 23 HALSBURY'S LAWS (3rd Edn.) 574-578; and for cases see 31 DIGEST (Repl.) 384-386.

Cases referred to:

- (1) *Barnes v. Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, 1100.
- (2) *Fisher v. Prowse*, *Cooper v. Walker* (1862), 2 B. & S. 770; 31 L.J.Q.B. 212; 6 L.T. 711; 26 J.P. 613; 8 Jur.N.S. 1208; 121 E.R. 1258; 26 Digest (Repl.) 277, 70.

Also referred to in argument:

- Salmon v. Bensley* (1825), Ry. & M. 189, N.P.; 36 Digest (Repl.) 326, 702.
R. v. Pedly (1834), 1 Ad. & El. 822; 3 Nev. & M.K.B. 627; 3 L.J.M.C. 119; 110 E.R. 1422; 36 Digest (Repl.) 318, 641.
Rich v. Basterfield (1847), 4 C.B. 783; 16 L.J.C.P. 273; 9 L.T.O.S. 77, 356; 11 Jur. 696; 136 E.R. 715; 36 Digest (Repl.) 318, 643.
Todd v. Flight (1860), 9 C.B.N.S. 377; 30 L.J.C.P. 21; 3 L.T. 325; 7 Jur.N.S. 291; 9 W.R. 145; 142 E.R. 148; 31 Digest (Repl.) 381, 5094.

- A** *Bishop v. Bedford Charity Trustees* (1859), 1 E. & E. 714; 29 L.J.Q.B. 53; 1 L.T. 214; 6 Jur.N.S. 220; 8 W.R. 115; 120 E.R. 1078, Ex. Ch.; 31 Digest (Repl.) 381, 5085.
- R. v. Watts* (1703), 1 Salk. 357; 91 E.R. 311; sub nom. *R. v. Watson*, 2 Ld. Raym. 856; 26 Digest (Repl.) 495, 1791.
- B** *Hounsell v. Smyth* (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 6 Jur.N.S. 897; 8 W.R. 277; 141 E.R. 1003; 36 Digest (Repl.) 65, 356.
- Corby v. Hill* (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 4 Jur.N.S. 512; 6 W.R. 575; 140 E.R. 1209; 36 Digest (Repl.) 67, 370.
- Bolch v. Smith* (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 8 Jur.N.S. 197; 10 W.R. 387; 158 E.R. 666; sub nom. *Bolett v. Smith*, 6 L.T. 158; 36 Digest (Repl.) 66, 358.
- C** *R. v. St. Benedict, Cambridge (Inhabitants)* (1821), 4 B. & Ad. 447; 106 E.R. 1001; 26 Digest (Repl.) 314, 309.
- Le Neve v. Mile End Old Town Vestry* (1858), 8 E. & B. 1054; 27 L.J.Q.B. 208; 31 L.T.O.S. 81; 22 J.P. 657; 4 Jur.N.S. 660; 6 W.R. 338; 120 E.R. 393; 26 Digest (Repl.) 512, 1889.
- Bayley v. Wolverhampton Waterworks Co.* (1860), 6 H. & N. 241; 30 L.J.Ex. 57; 25 J.P. 199; 158 E.R. 99; 26 Digest (Repl.) 532, 2079.
- D** *Lade v. Shepherd* (1735), 2 Stra. 1004; 93 E.R. 997; 26 Digest (Repl.) 339, 589.
- Cornwell v. Metropolitan Comrs. of Sewers* (1855), 10 Exch. 771; 24 L.T.O.S. 244; 19 J.P. 313; 3 C.L.R. 417; 156 E.R. 652; 7 Digest (Repl.) 289, 145.
- Roberts v. Hunt* (1850), 15 Q.B. 17; 4 New Mag. Cas. 87; 15 L.T.O.S. 66; 14 J.P. 226; 117 E.R. 364; 26 Digest (Repl.) 393, 1004.
- E** *Hardcastle v. South Yorkshire Railway and River Dun Co.* (1859), 4 H. & N. 67; 28 L.J.Ex. 139; 32 L.T.O.S. 297; 23 J.P. 183; 5 Jur.N.S. 150; 7 W.R. 326; 157 E.R. 761; 7 Digest (Repl.) 292, 164.
- Brock v. Copeland* (1784), 1 Esp. 203; 2 Digest (Repl.) 379, 547.
- Coupland v. Hardingham* (1813), 3 Camp. 398, N.P.; 26 Digest (Repl.) 510, 1877.
- Bateman v. Bluck* (1852), 18 Q.B. 870; 21 L.J.Q.B. 406; 17 J.P. 4; 17 Jur. 386; 118 E.R. 329; 26 Digest (Repl.) 274, 44.
- F**

Rule Nisi obtained by the defendant to enter a nonsuit in or for the new trial of an action under the Fatal Accidents Act, 1846, in which the jury had awarded the plaintiff £280 damages.

- G** *Coleridge, Q.C.*, and *J. Martin* showed cause against the rule.
- Lush, Q.C.*, supported the rule.

Cur. adv. vult.

Nov. 16, 1863. **ERLE, C.J.**, read the following judgment of the court.—This was an action brought by the administratrix of one Robbins to recover damages under the Fatal Accidents Act, 1846, for the intestate's death. That death took place in consequence of the giving way of a portion of the east side of the public way leading to the south end of Waterloo Bridge. The part which gave way consisted of flagging and grating over the area of one of the houses at the side of the road by the default, and it gave way, as it is alleged, of the defendant.

- H** Waterloo Bridge was constructed under Acts of Parliament passed in 1813, 1816 and 1818. It was necessarily constructed so that the roadway should be at a level much higher than the river banks, and in order to give access to the roadway of the bridge so constructed, the road leading to the south end of the bridge approaches it upon a high causeway springing at a considerable distance. For some distance from the bridge persons passing along the causeway are protected against the danger of falling over the side by a parapet wall, or continuation upwards of the retaining wall of the causeway. This wall is continued up to a row of houses (of which the defendant is the lessee), and then ceases. This
- I**

row of houses stands upon the original level of the ground and runs parallel A
to the causeway and road leading to the bridge, leaving a gulf or space of more
than seven feet wide between the houses and the retaining wall of the cause-
way. That space belongs to the owner of the houses, and the bottom of it is
used for areas. The houses are divided, or capable of being divided, into two
distinct dwellings, having separate outer doors. The outer door of the lower B
part of each building opens into a street or court upon the lower level. The
outer door of the upper part of each house opens upon the level of the cause-
way towards the road leading to the bridge, and the inhabitants of the upper
part of the house go in and out by that door, and get to and from the road by
walking upon the structure, part of which gave way under the deceased. That
structure consisted of flags resting at one end for about four inches in and upon C
the walls of the houses, and at the other end for about six inches upon the
retaining wall of the causeway so as to bridge over the areas. At intervals there
were gratings fixed by means of horns into the flags and forming with them
one continuous roadway. The gratings were not attached to the houses, but were
fixed in the centre of the flagging, and served the double purpose of being walked
upon and of letting through light. The part of this structure lying straight D
between the doors and the roadway was flagging, so that it was not necessary
to walk upon the gratings in order to get to the houses. There was a flagged
foot-pavement between the edge of the flagging and grating and the carriage-
way on the same level with the flagging and grating. Between it and the flagging
and grating there was a narrow strip of gravel. The end houses of the row had
no flagging and grating, and the space over their areas was inclosed.

The road on the causeway was a common highway to be repaired by the E
parish. In the course of time, before the Highway Act, 1835, the flagging and
grating had been dedicated to the public, and used by them as part of the highway
for foot-passengers, and it so continued up to the time of the accident. The
fee-simple of the houses was in Lord Salisbury. The defendant was tenant under
him for a term of years, created in 1830, and assigned to the defendant before F
and vested in him at the time of the accident. While he was in possession, the
flagging and grating either became, or at least were, out of repair and insufficient,
whether considered as a passage to the houses, or as part of a public way
having regard to the tendency of persons to collect in crowds in or near such
ways upon the occasion of a fire or the like. It did not appear that any
substructure was out of repair, but only that the flagging and gratings forming G
the surface were out of repair. It became necessary, in order effectually to sustain
the flagging and grating as a way to make an entirely new work, viz., to turn
an arch under them, and so to make them safe. The defendant had notice
of this from the parish in 1859, some time before the accident, while he was
in possession, but no repairs were done between that time and the time of the
accident. The defendant afterwards underlet to a person named Jeffs, who again H
underlet to a person who let the rooms out to lodgers. The rent fell into arrear,
and a distress was put in upon the lodgers, who having paid their own rent
barred out the bailiff. The bailiff re-took possession by force, and a crowd col-
lected and stood thick upon one of the gratings. The deceased was passing by
at the time, and being beckoned to by one of the lodgers, he tried to get through
the crowd to the door, and in doing so stepped on to the grating. Scarcely I
had he set foot upon it when the grating and the flagging resting upon the house
wall, and a portion of that resting upon the retaining wall of the causeway, gave
way, and the deceased fell, with about thirty others, down into the area and
so met his death. The fall of the flagging and grating was caused by its
insufficiency and by the extraordinary crowd pressing upon it at the time.

The cause was tried at the sittings after last Michaelmas Term. There was
conflicting evidence upon the question of repairs and sufficiency; but the above
must be taken to be the result of the evidence as established by the verdict.

A Under the direction of the judge a verdict was found for the plaintiff for £280 damages, subject to the opinion of the court as to the defendant's liability. No question was raised upon the pleadings, nor could any usefully have been raised, as the court has power to amend, and the question has been treated as arising upon the general issue. Probably it arises also upon the record. A rule was obtained to enter the verdict for the defendant which was argued in B last Easter Term, before WILLES, BYLES and KEATING, J.J., and myself, when we took time to consider our judgment.

It is for the plaintiff to make out that the defendant has been guilty of the breach of some duty which he owed to the deceased, and that thereby the accident was occasioned. Whether he has done so may be considered under the following heads: If the passage over the area be considered as a private C way to the houses, then the reversioner is not liable, but the occupier. A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term, for there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any. In this case there was none; not that that circumstance makes any difference in our opinion. If it be considered as a public way, then the D defendant is not answerable for the area as for a hole made at the side of the highway, because there was no hole made by the defendant. The gulf at the side of the causeway was the result of its being raised by the makers of it, not by the land at the side being excavated by the proprietors of it. The alleged hole was coeval with the highway, and a consequence of the making thereof. In *Barnes E v. Ward* (1) there was a hole made by the defendant, and it was made after the dedication of the road. As for the suggested liability to repair, upon the ground that the construction was beneficial to the proprietor of the houses, that benefit was only retained by, not conferred upon, him. It is familiar law that a bridge F made by a private individual for his own benefit at an ancient ford, if useful to the public, is to be repaired by them, and not by the builder. The liability to repair a highway has not been made to depend upon the quantum of benefit. If it were so, a man who drove a flourishing trade in the house ought to pay for the benefit of passers by, but not a musician or the inventor of the calculating machine. The flagging and grating were not, like a door, under the control of the occupier, but fixed. They were not worked, used, or worn out by the proprietor of the houses, otherwise than as one of the public uses a public high- G way on the side of which his house stands. The passage of light and air through the grating does not wear it out any more than the wind wears out the surface of the road. The more or less artificial character of the flagging and grating does not make it more or less a way to be repaired by the parish. Whether it be stone, iron, wood, or composition, as it is a public way, the public are to keep it in repair, and not the person who dedicated it.

H Hitherto the exceptions to the liability of the parish have been known. They are custom, prescription, tenure and inclosure while it lasts. Have we authority to add flagging and grating? The case is not the same as that of an open cellar flap, which may be considered as a trap in its nature and essence, unless it be kept shut. Besides that is worn out by use for the benefit of the occupier of the cellar to which it is the door. The present case is nearer to that of a I mine propped up, and a way dedicated upon the surface. In such a case will any one venture to suggest that the owner of the mine and surface, or either of them, must renew the props when they rot and the road threatens to sink into the mine. This does not fall within the law as to keeping buildings adjoining a highway in such a state by repair or otherwise as not to endanger passers-by. What was insufficient here was part of the highway itself. Such law may apply to the arches of a cellar under a footway, though this we conceive to be worthy of argument and open to distinctions as to the state of things at the time of the dedication and other circumstances. It cannot apply to the foot-

way itself. We may refer by way of illustration only to the case of one of the squares, where the footway at one side consists of large flags reaching from the outer wall of the area to the outer wall of the cellar. There the upper part of the flags forms the way, and the lower part of the same flags forms, as we are told, the ceiling of the cellar. Who is to maintain and repair the flagged way? We apprehend the public who walk upon it and wear it out, without which it might last an indefinite time. It is to be observed, that in cases of liability under this head the building need not be repaired, but only prevented from causing injury by its fall, which implies that there is a power to remove, and such power does not exist in this case.

It has been suggested, in addition to the grounds relied upon in argument, that the fact of the flagging and grating concealing danger was a special cause of liability. To this we answer, first, that the flagging and grating did not prevent the existence of the deep area from being known to everybody passing, and there was no fraud; secondly, that there would have been no danger if the parish had properly maintained and repaired the flagging and grating; thirdly, that the defendant did not erect, and, as it was a highway, could not have removed, the structure. Moreover, concealment is relative, and every danger is more or less concealed.

If a highway is dedicated with a dangerous obstruction on it, such as would have been a nuisance if placed upon an ancient way—for instance, a flight of steps or a projecting flap—no action can be maintained for injury caused thereby, whether by day when it can be seen, or by night, when it is invisible. In such a case, it was held by the Court of Queen's Bench in *Fisher v. Prowse* (2) that the public adopting a highway must take it in statu quo, and that no obligation is imposed upon the dedicator to remove projections or fill up holes which may be dangerous to passers by. In that leading case, which explained and overruled several out of which vague notions of liability have sprung up, BLACKBURN, J., delivering the judgment of the court, expounded with clearness and force the law applicable to this supposed ground of liability as follows (2 B. & S. at pp. 779, 780):

“But the question still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be, or whether, on the contrary, the dedication must not be taken to be made to the public and accepted by them, subject to the inconveniences or risk arising from the existing state of things. We think that the latter is the correct view of the law. It is of course not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions, and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere use. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him

A that the public right should have been thus acquired, it would be doubly so if the consequence was, that he was bound to fill up or fence off his canal."

In this statement of the law we heartily concur. This is in accordance with the general law as to gifts, which, in the absence of fraud, must be taken as they are, without redress against the donor in respect of vice, apparent or secret, and all expenses in respect of which for repairs or otherwise are to be borne by the donee. [But see 18 HALSBURY'S LAWS (3rd Edn.) 378.] This conclusion is also in accordance with the law as to grants of a right of way or other easement, whether for valuable consideration or not, to the effect that the grantee, and not the grantor, is to maintain and repair the subject of the easement, with a corresponding duty to do so, if by his neglect the grantor may suffer damage, and a corresponding right to enter upon the grantor's land, and to do all acts necessary for such maintenance and repair. The authorities to this effect in our own law, the civil law, and the Code Civil will be found in GALE ON EASEMENTS, edition by MR. WILLES, 424 et seq. It thus appears to us that to hold this action to be maintainable, while it would for the first time impose a heavy burden upon reversioners, would violate well established principles of law. The rule to enter a verdict for the defendant must, therefore, be made absolute.

Rule absolute.

R. v. ROWTON

F [COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Sir Alexander Cockburn, C.J., Erle, C.J., Pollock, C.B., Williams, J., Martin, B., Willes, J., Channell, B., Keating, Blackburn and Mellor, JJ., Pigott, B., and Shee, J.), January 21, 28, 1865]

[Reported Le. & Ca. 520; 5 New Rep. 428; 34 L.J.M.C. 57;
G 11 L.T. 745; 29 J.P. 149; 11 Jur.N.S. 325; 13 W.R. 436;
10 Cox, C.C. 25]

Criminal Law—Evidence—Character—Evidence of prisoner's good character—Right of prosecution to call rebutting evidence of bad character—Evidence to be confined to prisoner's general reputation.

H The defendant in a criminal trial is entitled to give evidence of his good character, and when such evidence has been given the prosecution is entitled to call rebutting evidence of bad character. In both cases the evidence must be confined to evidence of the general reputation of the defendant, and evidence of particular facts to establish his disposition or the tendency of his mind, to show his capability or incapability to commit the offence charged, is inadmissible.

I Per SIR ALEXANDER COCKBURN, C.J.: The negative experience of a witness to character is not to be excluded. When a witness says: "I have known the prisoner for a number of years and never heard anything against him," that is cogent evidence of a man's character.

Per ERLE, C.J., and WILLES, J.: A witness to character is entitled to give evidence founded on his personal experience of the prisoner's character.

A witness called to rebut evidence of general good character of the prisoner, who was charged with committing an indecent assault, said that he knew nothing of the opinion of the neighbourhood as to the prisoner's character,

because he was only a boy at school when he knew the prisoner; but his own opinion and that of his brothers who were also pupils of the prisoner was that his character was that of a man capable of the grossest indecency.

Held: the answer was inadmissible, as it was in the nature of a statement of a particular fact.

Notes. Whether evidence should be admitted after the defence has been closed to rebut matters raised for the first time by the defence is a matter for the discretion of the judge who should exercise it with caution: *R. v. Owen*, [1952] 1 All E.R. 1040; 116 J.P. 244.

Considered: *R. v. Gunewardene*, [1951] 2 All E.R. 290; *Jones v. D.P.P.*, [1962] 1 All E.R. 569. Referred to: *R. v. Dunkley*, [1926] All E.R. Rep. 187; *Stirland v. D.P.P.*, [1944] 2 All E.R. 13; *R. v. Sims*, [1946] 1 All E.R. 697; *R. v. Butterwasser*, [1947] 2 All E.R. 415.

As to evidence of character, see 10 HALSBURY'S LAWS (3rd Edn.) 445-448; and for cases see 14 DIGEST (Repl.) 408-415.

Cases referred to :

- (1) *R. v. Davison* (1809), 31 State Tr. 99; 14 Digest (Repl.) 409, 3991.
- (2) *R. v. Burt* (1851), 5 Cox, C.C. 284; 14 Digest (Repl.) 410, 4004.

Also referred to in argument :

R. v. Harris (1680), 7 State Tr. 930.

Clarke v. Periam (1742), 2 Atk. 333, 337; 9 Mod. Rep. 340; 20 E.R. 603; sub nom.

Clark v. Periam, *Periam v. Clark*, 1 Coop. temp. Cott. 541, L.C.; 14 Digest (Repl.) 270, 2381.

R. v. Hardy (1794), 24 State Tr. 199; 14 Digest (Repl.) 135, 987.

R. v. Rookwood (1696), 4 Harg. St. Tr. 649; 13 State Tr. 139; 1 East, P.C. 110, 113; Holt, K.B. 683; 90 E.R. 1277; 14 Digest (Repl.) 280, 2511.

R. v. Jones (1809), 2 Camp. 131; 31 State Tr. 251; 14 Digest (Repl.) 535, 5184.

Sharp v. Scoging (1817), Holt, N.P. 541, N.P.; 22 Digest (Repl.) 484, 5345.

Mawson v. Hartsink (1802), 4 Esp. 102, N.P.; 22 Digest (Repl.) 484, 5343.

A.-G. v. Hitchcock (1847), 1 Exch. 91; 2 New Pract. Cas. 321; 16 L.J.Ex. 259; 9 L.T.O.S. 270; 11 J.P. 904; 11 Jur. 478; 154 E.R. 38; 22 Digest (Repl.)

Penny v. Watts (1849), Mac. & G. 150; 2 De G. & Sm. 523; 1 H. & Tw. 266; 19 L.J.Ch. 212; 14 L.T.O.S. 82; 13 Jur. 459; 41 E.R. 1220, L.C.; 20 Digest (Repl.) 348, 768.

R. v. Murphy (1753), 19 State Tr. 693; 14 Digest (Repl.) 530, 5129.

Case Stated for the opinion of the Court for Crown Cases Reserved by the deputy assistant judge at Middlesex Sessions.

James Rowton was tried at the Middlesex Sessions, on Sept 30, 1864, on an indictment which charged him with having committed an indecent assault upon George Low, a lad about fourteen years of age. On the part of the defendant, several witnesses were called who had known him at different periods of his life, and they gave him an excellent character as a moral and well-conducted man. On the part of the prosecution it was proposed to contradict this testimony, and a witness was called for that purpose. This was objected to by the defendant's counsel, who contended that no such evidence was receivable, and cited *R. v. Burt* (2). The deputy assistant judge thought the evidence was admissible, and after the witness had stated that he knew the defendant, the following question was put to him: "What is the defendant's general character for decency and morality of conduct?" His reply was :

"I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality."

A It was objected that this was not legal evidence of bad moral character. The deputy assistant judge considered that it was some evidence, and left the weight and effect of it as an answer to the evidence of good character to be determined by the jury. The defendant was convicted, and was in prison awaiting the judgment of the Court for Crown Cases Reserved.

B The questions submitted for the decision of the court were (i) whether, when witnesses had given a defendant a good character, any evidence was admissible to contradict; (ii) whether the answer made by the witness in the present case was properly left to the jury.

Sleigh for the prisoner.

G. Tayler for the prosecution.

Cur. adv. vult.

C Jan. 28, 1865. The following judgments were read.

SIR ALEXANDER COCKBURN, C.J. [of the Court of Queen's Bench].—The question for the court in this case is whether an answer is admissible given by a witness called on the part of the prosecution to rebut the general evidence of good character given in favour of the defendant, and who was asked this question: "What is the defendant's general character for decency and morality of conduct?", to which question the answer was in these terms:

E "I know nothing of the neighbourhood's opinion because I was only a boy at school when I knew him, but my own opinion and the opinion of my brothers, who were also pupils of his, is that his character is that of a man capable of the grossest indecency and the most flagrant immorality."

The question for the court is whether that answer was properly received in evidence? I am of opinion that it was not properly received, and that the conviction cannot stand.

F Two questions have been discussed: the first, whether, when evidence has been given of general good character for the prisoner, evidence of general bad character may be adduced on the part of the prosecution to rebut it. As to that question, I am clearly of opinion that such evidence may be properly received. It is true that no such evidence has been adduced within the recollection of most of us, for evidence of the prisoner's general good character is seldom called

G when the prisoner's counsel is made aware, as he is generally by the counsel on the other side, that the prisoner's good character is impeached on the part of the prosecution. But when we are called on to answer the question whether such evidence is admissible, it is impossible to come to but one conclusion. The question of the general good character of the prisoner is not a collateral issue in the ordinary sense of the term; it is one of the elements in the case from

H which the jury are to find their verdict. If the prisoner thinks proper to raise the question of his general good character by giving evidence of it, nothing could be more injurious to the interests of justice than that it should not be allowed to the prosecutor to rebut it, because, if the true character of the prisoner were known to the jury, they would not be likely to be misled in giving their verdict.

I Assuming, then, that evidence to rebut the evidence of the prisoner's general good character was properly received, the other question is whether the answer of the witness given to a legitimate question was an answer which it was proper on the part of the presiding judge to leave for the consideration of the jury. In the first instance, it is necessary to consider what is the meaning of evidence of character. It is laid down in the text-books that the prisoner is entitled to give evidence as to his general good character. Does that mean evidence of the reputation he holds among those who know him, or of the disposition or tendency of his mind in relation to the character of the offence charged? I quite agree that what it is desirable to get at is the tendency of the prisoner's mind as to

his liability to commit the offence charged against him; but the only way allowed by law to get at that is by producing evidence as to the prisoner's general character. That is the sense in which the term is used by all the text-writers. MR. ROSCOE puts the admission of evidence of the prisoner's general good character on the ground that the fact of the prisoner being a person of unblemished reputation leads to the presumption that he is incapable of committing the offence charged, and, therefore, that it is evidence that he did not commit it. We are not now considering whether the law should be altered. It may be that it would be expedient to import into our law the practice of other countries and to inquire into the antecedents of prisoners, and to show therefrom that they are capable of committing the offences charged against them. But no one would contend that it is competent to enter into particular facts. The truth is, this part of our law is an anomaly. It is not allowable to go into the antecedent bad character of the prisoner, from which you might form a probability as to his guilt, from the desire to administer the criminal law as mercifully as possible. It is true that in practice sometimes, when a witness is called to prove the good character of the prisoner, he gives cogency to his evidence by a statement of circumstances which show that he had a good and abundant opportunity of acquiring information. In practice this is often carried beyond what is justifiable. The limit is, in my judgment, that evidence is admissible of general reputation of good character, and not of individual opinion. It is clear that if a witness to character is called who knows nothing of the general reputation of the prisoner, but speaks only as to his individual opinion, such evidence, if objected to, is not receivable; he is not allowed to give his individual opinion.

The next question is: Within what limits must the evidence rebutting general good character be confined? In my opinion, it must be evidence of the same kind and be kept within the same line; it must be evidence of the same general description. In the present case the witness at once disclaims all knowledge of the general reputation of the defendant, but says that, in his opinion, the prisoner's disposition is that of a man capable of the grossest indecency and immorality, for in that sense the word character was obviously used. I am strongly of opinion that that answer was not receivable. It is not, however, because an objectionable answer has been given to an unobjectionable question that a verdict can be impeached; and if the presiding judge had told the jury not to take it into their consideration, but to disregard it, I should not have been disposed to disturb the conviction; but here he told them to take it into their consideration, and the evidence became part of the case. Therefore, I think the conviction ought not to stand. I rest on the fact that it has been uniformly laid down by text-writers that evidence of general character must be general evidence in the sense of reputation, and that evidence of particular facts to establish the disposition or tendency of the mind of the accused, and to show his capability of committing the offence charged, is inadmissible, and, therefore, I am of opinion that this conviction must be set aside.

SIR WILLIAM ERLE, C.J. [of the Court of Common Pleas].—I largely concur with SIR ALEXANDER COCKBURN, C.J. The admissibility of evidence of good character for a prisoner stands on peculiar grounds. The questions for our opinion today are raised now for the first time for solemn adjudication. Our answer thereto ought to be regulated by attending to the important interests of truth. If a prisoner having a bad character chooses to raise the question of his character by calling evidence to it I am of opinion that the impression likely to be so created ought to be removed by evidence on the part of the prosecution. With reference to the first question, whether evidence is admissible on the part of the prosecution to rebut evidence of general good character on the part of the prisoner, I agree with SIR ALEXANDER COCKBURN, C.J., that it is admissible, and that this question ought to be answered in the affirmative. With reference

A to the second question, I do not agree with him. I agree that individual facts are to be excluded, and I do not stop to inquire whether an answer to a proper question as to character, which includes in it something like individual fact, is receivable, because the main question is of such very general importance that I wish to give my opinion on that.

B On the general question: What is the principle of admitting character in evidence in criminal cases?, I am of opinion that such evidence is admitted for the purpose of showing the disposition of the accused and raising a presumption from it that the accused did not commit the crime charged. Evidence of character can only be obtained from the opinion of other persons than the accused; that opinion must be formed from the personal experience of the witnesses, or from that of others who have formed an opinion of the character of the accused from their own personal experience. The point at issue now is whether the court is at liberty to receive evidence of the reputation of the prisoner, founded on the personal experience of the witnesses called to prove it. I am of opinion that both sources of evidence are admissible, both the general rumour prevalent in the neighbourhood where the accused resides, and, in my opinion, also the personal experience of those who have had abundant opportunity of forming an opinion of the character of the accused. In my experience I never heard a witness to character examined without inquiry as to his own personal experience, and so his evidence has been left to the jury. If a witness was called to speak to the character of the accused, who should say: "I have had the accused in my employ twenty years, but I never heard a human being speak of his reputation," upon the rule as laid down by the Lord Chief Justice, the presiding judge would be required to say that his evidence was not admissible.

E That is the point on which I differ from him, and, to my mind, such a witness is entitled to give in evidence his personal experience of the prisoner's character. What a witness may say he has heard others say of the prisoner's character is slight in comparison with such personal experience. But if general character alone is admissible, it is important to get at it by evidence. General rumour, which is derived from a number of special statements, if strictly examined, will come to be the opinion of a number of persons speaking from their personal experience. The best character is generally the least talked about; the man whose honesty has never been thought to be in question is not talked of, and, therefore, the value of general rumour is doubtful. I have attempted to give expression to the argument of counsel for the prosecution, and when I look at *R. v. Davison* (1), that argument was justified by the mode in which Lord ELLENBOROUGH and Mr. Holroyd acted. Eleven witnesses to the character of Davison were called, and five or six out of the eleven gave very considerable evidence of their own personal experience. Lord Moira, the first witness called, spoke generally from his own experience, but when he came to a special transaction, then Lord ELLENBOROUGH interfered. He was asked whether he thought Davison capable of committing a fraud. In answer to this question: "From your Lordship's general knowledge of his conduct, is he a person whom your Lordship would think capable of committing a fraud?" he said:

I "Certainly not. I never had the remotest ground for suspicion. If I had had the slightest ground, I never could have again solicited him to accept the office of Treasurer of the Ordnance under circumstances which never could have made it an object to him from any pecuniary consideration. Shall I state the particulars?"

Then Lord ELLENBOROUGH interposed:

"One is very unwilling to diminish the scope of these inquiries, but the general inquiry is as to the general character."

That is confirmatory of my opinion. It is true that in the present case the answer of the scholar that was given was bad, and would have fallen within my principle, that you cannot speak as to a particular fact. But on a great question like this, as to the admissibility of personal experience or character, I do not stop to analyse the particular answer of the witness more fully.

SIR ALEXANDER COCKBURN, C.J.—I should not have thought for a moment to reply upon the judgment of the Lord Chief Justice of the Common Pleas, but I am anxious that I should not be thought by anything I have said to convey the idea that the negative experience of a witness to character should be excluded. I quite agree that, when a witness says: "I have known the prisoner for a number of years and never heard anything against him," that is cogent evidence of a man's character, and I did not intend to lay down that it should be excluded.

MARTIN, B.—I concur with SIR ALEXANDER COCKBURN, C.J., that the answer of the witness related to particular facts known to himself and his brothers, and that the judge was wrong in leaving it for the consideration of the jury.

With respect to the first point, whether evidence can be called on the part of the prosecution to rebut evidence of general good character given for the prisoner, I should have acted upon the practice that has prevailed for a long time, and had it depended on me I should have taken time to consider my judgment. The doubt on my mind arises from this. The common law of England is made up of practice and precedents; what has been the practice for years is the law of the land; if the practice is bad the legislature interferes and sets it right. That is the history of the common law. In this case the indictment charged the prisoner with committing an indecent assault. If I were investigating the case for myself, my first inquiry would be: What was the prisoner's character in cases like this? and if I was informed that he was addicted to such practices I should be much influenced by that; but in a court of law that kind of evidence is not admissible. Nothing but evidence bearing on the issue is admissible. The law says that the evidence in support of the charge shall be confined to evidence bearing directly on the issue before the jury. But a practice has sprung up that the accused may give evidence of good character, and show that he was, therefore, unlikely to commit an offence of the kind charged against him. That is an anomaly in the law, and the first case in the books in which it appears to have been done occurred nearly 200 years ago. No case can be cited in which evidence to rebut such evidence of good character has been admitted. In the text-books it is stated that such evidence is admissible, but no instance in which it has been done is cited. I rely on the fact that no instance in which such evidence has been admitted is cited, and I think it is better to leave the practice so. I can conceive cases in which it is likely that too much weight may be given to evidence of bad character. However, all my learned brothers are of a different opinion, and no doubt in strict reason the evidence is admissible. For my own part I should have been disposed to act on the course of practice that has been pursued for so long a time.

WILLES, J.—With respect to the first question whether evidence was admissible on the part of the prosecution to answer the evidence of general good character given for the prisoner, I own I should have been glad if the court could have come to the conclusion that it should be rejected. But looking to the textbooks of ROSCOE, PHILLIPS and STARKIE, it is clear that such evidence must have been given for years, and the practice have prevailed. The fact that there is no reported case does not operate on my mind. I cannot help thinking that where the practice has been resorted to it has been considered unusual, and been found inconvenient.

A With respect to the second question, I agree with ERLE, C.J. Why is it that evidence of general good character is admissible on the part of a prisoner? I agree that it is a mistake to suppose that the prisoner can raise the question of character collaterally only. Evidence of general good character makes it less probable that the prisoner committed the offence charged. Evidence of bad character is not in the first instance admissible on the part of the prosecution; B otherwise, as stated by MARTIN, B., we should have the whole life of the prisoner ripped up in the course of the trial, and in the result the prisoner might be overwhelmed with prejudice instead of being convicted on affirmative evidence. The question of character is relevant to the issue. General evidence of good character does not mean mere evidence of the general opinion among a man's acquaintance, but general evidence of the character of the man. I agree C that particular acts must be excluded, because there is no notice to the prisoner that any inquiry is about to be made into the particular acts. What other persons know of the prisoner, and their judgment of him, is, I think, admissible, otherwise a person of a shy or retiring disposition, of whom only his intimates can speak, will suffer, whereas another man of a forward disposition, who may have earned a reputation without deserving it, will profit by the exclusion of the witness's D own judgment. For the character of a servant you go to the last master; for the character of a boy to his parents and teachers; for the credit of a man to the man of business with whom he has dealt; and why not in point of law for the character of a prisoner go to the man who knows him, and has had an opportunity of forming a judgment of it? It is said that we are to be guided by the long practice as to the admission of such evidence. The practice as I find it is E to call, not merely witnesses from the neighbourhood where the prisoner resides, but also the master at the time of the offence. In point of reason, I think the evidence of character on the part of the prosecution should be as co-extensive as that given for the prisoner. I cannot help owning that, if I had tried this case, I should have attempted to persuade the counsel for the prosecution not to persevere with the witness; but not succeeding in that I should have fallen F into the same mistake as the presiding judge.

The other learned judges concurred with SIR ALEXANDER COCKBURN, C.J.

Conviction quashed.

LIMPUS v. LONDON GENERAL OMNIBUS CO.

[COURT OF EXCHEQUER CHAMBER (Wightman, Williams, Crompton, Willes, Byles and Blackburn, JJ.), June 25, 1863]

[Reported 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147;
9 Jur.N.S. 333; 11 W.R. 149; 158 E.R. 993]

Master and Servant—Liability of master for act of servant—Tortious act—Act done in course of employment—Express instruction by master against conduct likely to result in tort.

An employer is responsible for the tortious act of his servant provided it is done by the servant in the course of his employment. The fact that the employer has expressly instructed the servant not to act in such a way as would be likely to lead to the commission of the tort in question is immaterial and does not absolve the employer from liability.

The defendants, proprietors of an omnibus plying between Piccadilly and Kensington, directed the driver, their servant, not to hinder or obstruct the passing of other omnibuses, but when the plaintiff's rival omnibus was about to pass the defendants' omnibus the defendants' driver purposely pulled across the road to prevent the other omnibus passing his. In so doing he injured one of the plaintiff's horses, for which the plaintiff brought this action against the defendants for the negligence of their servant. The learned judge at the trial directed the jury that, if the defendants' driver in driving across the road to obstruct the plaintiff's omnibus was acting in the course of his service and doing that which he thought best for the interest of his employers by interfering with the trade and business of the plaintiff, the defendants were responsible, and that instructions given to the driver not to obstruct another omnibus, or hinder or annoy the driver, were immaterial.

Held: the summing-up was correct, as the proper questions for the jury to determine were whether what was done was in the course of the employment and for the benefit of the master.

Notes. It has now been held that an employer is liable for a tort committed by his servant in the course of the employment whether the tort be committed for the employer's benefit or not: see *Lloyd v. Grace, Smith & Co.*, [1911-13] All E.R. Rep. 51.

Distinguished: *Tobin v. R.* (1864), 16 C.B.N.S. 310. Considered: *Grill v. General Iron Screw Collier Co.* (1866), 12 Jur.N.S. 727; *Poulton v. London and South Western Rail. Co.* (1867), L.R. 2 Q.B. 534; *Wigan Borough Case* (1869), 1 O'M. & H. 188. Considered: *Ward v. General Omnibus Co.* (1873), 42 L.J.C.P. 265. Considered: *Harding v. Barker* (1888), 53 J.P. 308. Distinguished: *Vickery v. Great Eastern Rail. Co.* (1898), 79 L.T. 121. Considered: *Whitechurch v. Cavanagh*, [1902] A.C. 117. Applied: *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600. Considered: *Boyle v. Smith* (1905), 94 L.T. 30. Distinguished: *Harris v. Fiat Motors* (1906), 22 T.L.R. 556. Considered: *Malcolm, Brunker & Co. v. Waterhouse* (1908), 24 T.L.R. 854. Explained: *Lloyd v. Grace, Smith & Co.*, [1911] 2 K.B. 489. Considered: *Rand v. Craig*, [1919] 1 Ch. 1; *Performing Right Society v. Mitchell and Booker (Palais de Dance)*, [1924] 1 K.B. 762; *Ilkiw v. Samuels*, [1963] 2 All E.R. 879. Referred to: *Splents v. Lefevre* (1864), 11 L.T. 114; *Williams v. Jones* (1865), 3 H. & C. 256; *Burns v. Poulson* (1873), L.R. 8 C.P. 563; *British Mutual Banking Co., Ltd. v. Charnwood Forest Rail. Co.*, [1886-90] All E.R. Rep. 280; *Flood v. Jackson*, [1895] 2 Q.B. 21; *Dyer v. Munday*, [1895-9] All E.R. Rep. 1022; *Ruben and Ladenburg v. Great Pingall Consolidated*, [1906] A.C. 439; *Janvier v. Sweeney* (1919), 35 T.L.R. 226; *Soanes v. London and South-Western Rail. Co.*, [1918-19] All E.R. Rep. 852; *Sun Life Assurance of Canada v. W. H. Smith & Son, Ltd.* (1934), 150 L.T. 211; *McKean*

A v. *Raynor Bros., Ltd.* (Nottingham), [1942] 2 All E.R. 650; *Conway v. George Wimpey & Co.*, [1951] 1 All E.R. 363; *Rands v. McNeil*, [1954] 3 All E.R. 593.

As to the liability of an employer for the tort of his servant, see 25 HALSBURY'S LAWS (3rd Edn.) 535-546; and for cases see 34 DIGEST (Repl.) 157 et seq.

Cases referred to:

- B** (1) *Croft v. Alison* (1821), 4 B. & Ald. 590; 106 E.R. 1052; 34 Digest (Repl.) 179, 1268.
- (2) *Lyons v. Martin* (1838), 8 Ad. & El. 512; 3 Nev. & P.K.B. 509; 1 Will. Woll. & H. 500; 7 L.J.Q.B. 214; 112 E.R. 932; 34 Digest (Repl.) 172, 1215.
- (3) *Brucker v. Fromont* (1796), 6 Term Rep. 659; 101 E.R. 758; 34 Digest (Repl.) 173, 1225.
- C** (4) *Turberville v. Stampe* (1697), Carth. 425; 1 Com. 32; Comb. 459; Holt, K.B. 9; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; Skin. 681; 91 E.R. 1072; 34 Digest (Repl.) 160, 1111.
- (5) *Huzzey v. Field* (1835), 2 Cr.M. & R. 432; 1 Gale, 165; 5 Tyr. 855; 4 L.J.Ex. 239; 150 E.R. 186; 34 Digest (Repl.) 160, 1116.

D **Appeal** from a decision of the Court of Exchequer on a bill of exceptions to a ruling of MARTIN, B., in an action for negligence.

The declaration stated that the plaintiff was possessed of an omnibus and horses drawing the same, and that the defendants, owners of another omnibus and horses, by their servant so carelessly drove their horses that they ran against the horses and omnibus of the plaintiff, and overturned and damaged the same. The defendants denied liability.

E The cause was tried at Westminster, before MARTIN, B., on Nov. 30, 1861, when it appeared from the evidence that the driver of the plaintiff's omnibus was about to pass the defendant's omnibus whereupon the driver of the defendants' omnibus pulled across the road, recklessly and purposely, to prevent the plaintiff's omnibus from passing, causing thereby considerable damage to the plaintiff's omnibus and horses. The defendants' driver was called as a witness, and said that he so pulled across to prevent the plaintiff's driver passing, and to serve him as he had previously served the defendants' driver. The defendants' driver had been furnished by the company with a card of regulations, by which drivers were directed that they

G "must not, on any account, race with, or obstruct, another omnibus, or hinder or annoy the driver or conductor thereof, whether such omnibus be one belonging to the company or otherwise."

MARTIN, B., directed the jury that where the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service, and that if they believed that the defendants' driver, being irritated with the plaintiff's driver, whether justly or **H** unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly and improperly, but in the course of his service and employment and in doing that which he believed to be for the interests of the defendants, then the defendants were responsible. The learned baron also said that the instructions given to the defendants' driver were immaterial if he did not pursue them, but that, if the true character of the act of the defendants' **I** servant was that it was an act of his own, done to effect a purpose of his own, the defendants' were not responsible. The defendants' counsel excepted to this ruling, and contended that the jury should be directed that for an act wilfully done by the defendants' servant against their orders, even though at the time of doing it he was in the course of driving for them, they were not responsible. The jury found for the plaintiff, damages £35.

Lush, Q.C. (*Digby Seymour, Q.C.*, and *Pearce* with him) for the plaintiff.

Mellish, Q.C. (*T. Atkinson* with him) for the defendants.

Cur. adv. vult.

June 25, 1863. **WIGHTMAN, J.**—It appears by the evidence in this case that the defendants were the proprietors of an omnibus plying between Piccadilly and Kensington, which at the time in question was driven by a coachman in their service; that while upon the road, in the course of his employment to drive the defendants' omnibus from Piccadilly to Kensington, he wilfully and on purpose, and contrary to the express orders of the defendants, endeavoured to hinder and obstruct the passage along the road of another omnibus belonging to the plaintiff, and for that purpose he, who was ahead of the plaintiff's omnibus eighty or ninety yards, slackened his pace until the plaintiff's omnibus came up at the time and was about to pass, and then he purposely pulled across the road in order to prevent and obstruct his progress, and in so doing he ran against one of the plaintiff's horses with his (the defendants') omnibus, thereby causing considerable damage. The reason assigned by the defendants' coachman for this wrongful proceeding was, that he pulled across the plaintiff's coachman to keep him from passing in order to serve him (the plaintiff's coachman) as he had served him (the defendants' coachman). It seemed clear upon the evidence that this was only a wilful and unjustifiable act on the part of the defendants' coachman, and not in the lawful prosecution of the master's business.

A master is undoubtedly responsible for any damage occasioned by the negligence or carelessness of his servant whilst employed upon his master's business. In the present case it was no part of his employment to obstruct or hinder the passing of other omnibuses or carriages; on the contrary, he was directed not to do so. This case appears to me to fall within the principle of the decision in *Croft v. Alison* (1). In that case the court said the distinction was this:

"If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and thereby produce an accident, the master is not liable; but if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment."

In *Lyons v. Martin* (2), **PATTESON, J.**, in his judgment, says (8 Ad. & El. at p. 515):

"*Brucker v. Fromont* (3) and other cases where the master has been held liable for the consequences of a lawful act done negligently by a servant, do not apply. Here the act was unlawful. A master is liable where a servant causes injury by doing a lawful and negligent act, but not where he wilfully does an illegal one."

There are other cases, some of which were cited upon the argument to the same effect.

In the present case, the defendants' coachman wilfully did an illegal act, contrary to his master's orders, and quite beyond the scope of his employment. In this view of the case, it appears to me that, if the evidence of the defendants' coachman was believed as well as that of the other witnesses in the case, the verdict ought to have been for the defendants. The question, however, before us is whether the direction of the learned judge to the jury as it appears upon the bill of exceptions was right in point of law upon the case as it appeared in evidence. I entertain the very highest and most sincere respect for the opinion of **MARTIN, B.**, but does appear to me that the mode in which the questions were put to the jury was such as might mislead them

A and induce them to find a verdict which I cannot but think was wrong. He appears to have told them

B "that if the act of the defendants' driver in driving up right across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interests of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible; that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment; and that the instructions given to the coachman not to obstruct another omnibus, or hinder or annoy the driver in his business, were immaterial."

C It certainly appears to me that the wilful and wrongful attempting to obstruct the progress of another omnibus contrary to the express directions of the defendants, though done by their coachman while employed in the service of the defendants, cannot be considered an act done by him in the course of his service. It was quite beside the course of his service which he was employed to do, and I cannot consider the express prohibition to the coachman to do what he did was immaterial in considering what was the course of his service in that respect. This was not a case of reckless or careless driving, but a wilfully and wrongfully attempting to obstruct the passage of another omnibus, and in so doing running against one of the horses. This cannot, I think, under the circumstances, be considered as an act done in the course of his service, even though the coachman might think it for his master's interest by such wrongful means to obstruct the business of the other omnibus. The defendants' coachman was not employed to obstruct or hinder the plaintiff's omnibus, nor was it in the course of his service, in the proper sense, to do so. Upon the evidence it was certainly his own wrongful and wilful act, for which I think, according to the distinction taken in the cases to which I have referred, the defendants are not responsible. The jury, upon the direction to which I have referred, might well have thought that if the act was done during the time that the defendants' coachman's employment was to drive their omnibus, and he thought it for their benefit to obstruct the other omnibus, the defendants would be liable. This, I think, was wrong, for the reasons I have given, and I am of opinion that there should be a venire de novo.

II **WILLIAMS, J.**—I am of opinion that the judgment should be affirmed. If a master employs a servant to drive and manage a carriage, the master is, in my opinion, answerable for any misconduct of the servant in driving or managing which can fairly be considered to have resulted from the performance of the functions entrusted to him, and especially if he was acting for his master's benefit, and not for any purpose of furthering his own interest, or for any motive of his own caprice or inclination. I think the summing-up of **MARTIN, B.**, was substantially in accordance with that doctrine, and, therefore, there is no foundation for this appeal.

I **CROMPTON, J.**—I must say my mind has fluctuated very much during the course of the discussion. I at first rather felt inclined to take the view which **WIGHTMAN, J.**, has expressed; but certainly my mind was in a considerable state of doubt between the two views presented by my learned brothers. I do not think it necessary to go into the discussion of one or the other. I think they have presented the two views exactly as they best can be presented, and my present impression is in favour of that of **WIGHTMAN, J.**, that this may be taken to be in the course of the "management and driving" of defendants' omnibus. I do not quite follow **WIGHTMAN J.**'s statement in one respect, a statement for

which he mentioned the authority of *PATTESON, J.*, as to its being necessarily a lawful act, because I think the later cases tend to show it need not be a lawful act; still my doubt is whether *WIGHTMAN, J.*'s view is not right whether it is in the scope of the authority of the driver; in other words, whether it is in the course of the management or driving. He says the driver was driving this omnibus, and for a proper object; but he was driving it in an improper way, and I think on the evidence it may be fairly taken that, without intending to touch the horses or drive against them, he did drive so near, for the purpose of crossing them, that that caused the accident. It is not necessary to say what would have been the case if he used the omnibus entirely to block up the passage. I am not sure that would be within the management.

I cannot say that the direction of *MARTIN, B.*, was necessarily wrong. If this had been a question of a rule for a new trial, I should have been very much inclined to agree with *WIGHTMAN, J.*, that it might have been presented in a way which might bring the exact question more clearly before us, as it is possible some expressions may have led the jury to a wrong conclusion. But I do not think that is the question. The question is whether there is any exception taken to show that his ruling was wrong in point of law? Throughout his summing-up the learned judge puts it to them whether it was in the course of the service, and for the master's purpose. That is really the criterion which I think *WILLIAMS, J.*, has rightly taken, whether it is in the course of his service, and whether it is for the master's purposes and not for his own particular purposes. He so left it to them, and I cannot say there is anything distinctly wrong in the ruling of *MARTIN, B.*, which is excepted to. Therefore, though with considerable doubt, I think we ought not to reverse the judgment of the court below founded on his ruling.

WILLES, J.—I am of opinion that the judgment ought to be affirmed. It appears to me that the direction given by *MARTIN, B.*, at the trial was in accordance with principle and sanctioned by authority. It is well known that there can be no effective remedy against a driver of an omnibus, and, therefore, it is necessary that, for what the driver does in the course of his master's service, the master should answer for it. There should be some person who is capable of paying damages, and to be sued by people who are injured by improper driving.

It appears clearly to me that this was, and it was treated by *MARTIN, B.*, as, a case of improper driving, and not a case in which the servant did anything altogether inconsistent with the discharge of his duty to his master and out of the course of his employment—a fact upon which, it appears to me, the case turns. This omnibus of the defendants was driven in before the omnibus of the plaintiff. We may say it is no part of the duty of a servant to obstruct another omnibus, and in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say, in my opinion, those instructions were perfectly immaterial. If they were disobeyed, the law casts upon the master the liability for the acts of his servants in the course of his employment, and the law is not so futile as to allow the master, by giving secret instructions to a servant, to set aside his liability. I hold it to be perfectly immaterial that the master directed the servant not to do the act which he did. As well might it be said that, if a master employing a servant told him that he should never break the law, he may thus absolve himself from all liability for any act of the servant, though that act was done in the course of the employment.

But there is another construction that may be put upon the act of an omnibus driver in cutting in before another omnibus, and it is that he intended to get before it. That clearly would be an act in the course of the employment. In the present case the defendants' driver was employed not only to drive the omnibus, which alone would be sufficient to uphold this summing-up, but he was

A employed to get as much money for his master as he could, and to do it in rivalry
with other omnibuses driving along the road. That does not show that the act
of driving before the other omnibus was inconsistent with the employment when
it is capable of being explained by the desire to get before the other omnibus in
the course of the traffic. I do not speak without authority when I treat that as
B the proper test, because I take the ordinary case of the master of a vessel, who,
it must be assumed, is not instructed to do that which is unlawful, and he
receives distinct instructions not to sell the cargo under any circumstances
whatever. If the master, in the course of his employment, does necessarily sell
a portion of the cargo under circumstances not altogether inconsistent with the
C master's employment, the owner is liable in damages to the person whose goods
have been so sold. I put that as a familiar case for the purpose of showing
what the true test is.

It appears to me, therefore, that this summing-up is in accordance with the
principle that the master should be liable for the acts done by the servant
in the course of his employment, and is also consistent with authority. I need
do no more than refer to the authority of LORD HOLT in *Turberville v. Stampe* (4),
D and that of LORD WENSLEYDALE in *Huzzey v. Field* (5). It is part of the history
of the law that the judgment apparently delivered by LORD ABINGER was a judg-
ment prepared by LORD WENSLEYDALE. There (2 Cr. M. & R. at p. 440) that
learned person lays down that the proper question for the jury to determine is
whether what was done was done in the course of the employment and for the
benefit of the master. These are the terms in which the learned judge laid
E down the law in the present case, and it appears to me that in so laying down
the law he was strictly accurate, as I feel bound to say, because it is in the
interest of every person who has to deal with other persons' servants, and is
liable to be injured by them, that he should not be left without remedy by the
law being loosely administered. I do not entertain a doubt that the direction
was perfectly correct.

F **BYLES, J.**—I also am of opinion that the direction of MARTIN, B., in this
case was correct. He uses the words "in the course of his employment," which,
as WILLES, J., has pointed out, are expressions justified by the decisions; and
his direction, as I understand it, amounts to this, that if a servant acted in the
prosecution of his master's business with the intention of benefitting the master
G and not to benefit or gratify himself, then the master is responsible, although it
were in one sense a wilful act on the part of the servant. It is said that this
was contrary to the master's instructions. That might be said in ninety-nine
cases out of one hundred where actions are brought against a master to recover
damages for the reckless driving of his servant. It is said that it is an illegal act.
H So in almost every case of an action against a master for the negligent driving
of a servant the illegal act is imputed to the servant. That this direction is right
seems to me to be proved for another consideration. If we were to hold that
this direction was wrong, the consequence would be that in almost every case the
driver would come forward and exaggerate his own negligence or misconduct,
he not being worth one farthing, and say: "I did it wilfully and unnecessarily,"
I and so the master would be absolved. Looking at what is a reasonable direction
in the common understanding of the law, as well as what has been held before,
I think this direction was perfectly correct.

BLACKBURN, J.—I also am of opinion that the direction excepted to is a
sufficient direction to have given the jury a proper guide in the particular case,
which is all that a learned judge in directing a jury is called upon to do. It
is agreed by all that a master is responsible for the improper act of his servant,
even if it be wilful, reckless, or improper, provided the act is the act of the
servant in the scope of his employment, and in executing the matter for which

he was engaged at the time. In the present case the learned baron, in directing the jury, tells them that perfectly accurately; but that alone would not have guided the jury, or assisted them in determining the case. It was, therefore, right that he should go on to give the jury a sufficient guide for the purpose of enabling them to understand what would be the principles which they were to apply in order to see whether the act was done in the course of the employment of the servant upon this particular occasion. It is that part of the summing-up that has been attacked. We must look to what the particular employment was in order to see what was the meaning that was said to be understood by the jury in reference to the particular act in the particular case before them. The defendants' servant was employed as the driver of an omnibus, and as such the scope of his employment was not merely to conduct the omnibus from one terminus to another, but to guide it and to stop it, and to use it in every way that would be right and proper, exercising his discretion for the picking up of traffic, and forwarding his master's interests in the trade. During the course of such a drive the driver of the omnibus drove in before another omnibus under circumstances from which the jury might have thought he did it not at all to further his master's interests, but to wreak a private spite against the driver of a rival omnibus—doing an act quite unconnected with his service and employment. The learned judge, having to tell the jury what was the test by which they would know whether it was in the service or no, uses language—which has been criticised in the course of the argument—in which he tells them, perfectly rightly, that if it was done in the scope of the servant's employment, in the course of the service, the defendants would be responsible, and he says that, if the jury believed that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, and in that state of mind acted carelessly, recklessly wantonly and improperly, but in the course of his service and his employment, and doing that which he believed to be for the interests of the defendants, then the defendants are responsible for his act. It is perfectly true—though not by any means universally true—that every act by a servant supposed to be done for the interest of the master is done in the course of his employment. A footman might think, and rightly, it was for the interest of his master that he should get on the box and drive the coach; no one would say that that was in the scope of the footman's employment, and that the master would be responsible for the wilful act of the footman in taking charge of the horses. But in a case such as this, where the driver is driving an omnibus and cutting in before a rival omnibus, I think the test given by the learned judge to the jury was a perfectly sufficient guide to enable them to see whether the act was done in the course of the employment. He then proceeds to say that, if that was so, it was utterly immaterial, if the servant's act was contrary to instructions given by the master. I believe we are all agreed that the direction was unimpeachable. The learned judge proceeds, at the end of his direction, to point out that, if the jury were of opinion that the truth was that the servant's act was his own act, not done in his desire to serve the interests of his employers, then the employers were not responsible. If the jury came to the conclusion that he did it, not to further his master's interest, not in the course of his employment as an omnibus driver, but from private spite, with an object to injure his enemy, the rival omnibus, that would be out of the course of his employment. I am of opinion that the summing-up was sufficiently accurate to guide the jury, and, consequently, there should be no venire de novo.

Appeal dismissed.

HADLEY AND OTHERS v. PERKS AND ANOTHER

[COURT OF QUEEN'S BENCH (Blackburn, Shee and Lush, JJ.), April 21, 25, 1866]

[Reported L.R. 1 Q.B. 444; 7 B. & S. 375; 35 L.J.M.C. 177;
14 L.T. 325; 30 J.P. 485; 12 Jur.N.S. 662; 14 W.R. 730]

Criminal Law—Metropolis—"Having or conveying" property suspected of being stolen—Property found in building—Metropolitan Police Act, 1839 (2 & 3 Vict., c. 47), s. 66—Metropolitan Police Courts Act, 1839 (2 & 3 Vict., c. 71), s. 24.

By the Metropolitan Police Act, 1839, s. 66, a constable may stop, search and detain any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained, and by the Metropolitan Police Courts Act, 1839, s. 24, any person who shall be brought before a metropolitan magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of the magistrate how he came by the same, shall be guilty of a misdemeanour. A number of flour sacks marked with the name of the respondents were found by a constable at the steam flour-mills of the appellants filled with offal, etc., which rendered them unfit for the miller afterwards. The appellants were summoned before the Lord Mayor under s. 24 of the Metropolitan Police Courts Act, 1839, and, not having given any satisfactory account of how they became possessed of them, were convicted.

Held: section 24 of the Metropolitan Police Courts Act, 1839, was supplementary to s. 66 of the Metropolitan Police Act, 1839, and only applied where the property was being carried or conveyed; accordingly, the convictions must be quashed.

Notes. Followed: *R. v. Whitley* (1867), 31 J.P. 565. Considered: *Willey v. Peace*, [1950] 2 All E.R. 724. Referred to: *Dumbell v. Roberts*, [1944] 1 All E.R. 326; *Christie v. Leachinsky*, [1947] 1 All E.R. 567.

As to special powers of a metropolitan stipendiary magistrate as to persons in possession of stolen goods, see 25 HALSBURY'S LAWS (3rd Edn.) 144, 145; and for cases see 33 DIGEST (Repl.) 181, 182. For the Metropolitan Police Act, 1839, s. 66, see 18 HALSBURY'S STATUTES (2nd Edn.) 38, and for the Metropolitan Police Courts Act, 1839, s. 24, see 5 HALSBURY'S STATUTES (2nd Edn.) 649.

Case Stated by the Lord Mayor of London under the Summary Jurisdiction Act, 1848.

On May 10, 1865, the respondents, who were millers at Shad Thames, preferred three informations against the appellants, jointly charging three offences, viz., that each of them on the three several days hereinafter mentioned, in Upper Thames Street, in the city of London, unlawfully had in their possession, and contrary to the statute, certain goods, to wit, the respective number of sacks following (that is to say): on April 11, 1865, twelve sacks, on April 18, 1865, nine sacks, and on April 24, 1865, fourteen sacks, respectively the property of the respondents, and which goods were then and there, and were still, reasonably suspected of being stolen and unlawfully obtained. The informations were laid under the Metropolitan Police Courts Act, 1839, s. 24, which enacts,

"Every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour . . ."

Several witnesses were examined to prove that, on the three days alleged, the number of sacks named, marked with the brand of the respondents (amongst a large number of sacks of other owners), were found by an officer (who was also a constable of a society known as the "Sack Protection Society" formed among the millers of the metropolis and the neighbouring counties, for the protection of the flour sacks of the members, and for the prosecution of persons having illegal possession of such sacks), at the steam flour-mills of the appellants in Upper Thames Street, at which one of the appellants was the foreman. The sacks were filled with offal, pollard and other things, a purpose which rendered them entirely useless to the miller afterwards. The appellants were present on the occasion referred to. One of the respondents proved that he and other millers never sold, exchanged or gave away their sacks, and identified the several sacks found at the appellants' as his property, stating that he did not know how they came out of his custody, but that they must have been sent to bakers, his customers, with flour, who ought to have returned them. In order to show the knowledge of the appellants of the custom of millers in relation to their sacks, it was proved that Messrs. Hadley had been for many years members of the Sack Protection Society. By s. 66 of the Metropolitan Police Act, 1839, it is enacted :

"... every such constable may also stop, search, and detain any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained . . ."

It was contended for the appellants, *inter alia*, that the class of persons against whom the Acts were directed was an erratic class, who were wandering about in possession of suspected property, with which they would escape if not arrested on the spot, and whom, therefore, it was necessary to bring before a magistrate to account for the possession; and that s. 24 of the Metropolitan Police Courts Act, 1839, did not apply to goods in possession of known residents deposited on their premises, for the Act in such cases gave the police of their own motion no power of search, but, on the contrary, s. 25 of the same Act directed in such cases the issue of a search-warrant. It was contended for the respondents (*inter alia*) that s. 24 of the Metropolitan Police Courts Act, 1839, created the offence alleged, separate and independent of any other and was not limited to cases in which the constable had exercised the powers given him by s. 66 of the Metropolitan Police Act, 1839. The Lord Mayor convicted the appellants of the offence on each of the three days charged, and adjudged certain penalties.

Giffard, Q.C. (*Poland* with him) for the respondents.

Serjeant Parry and *Waddy* for the appellants.

BLACKBURN, J.—We are all agreed that the conviction was wrong upon the ground which counsel for the appellants has put before us, *viz.*, that s. 24 of the Metropolitan Police Courts Act, 1839, under which only the appellants could be convicted, does not extend to such a case as the present. Section 24 is as follows :

"That every person who shall be brought before any of the said magistrates [in which, by subsequent enactments, a city magistrate is included] charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour, and shall be liable to a penalty of not more than £5; or, in the discretion of the magistrate, may be imprisoned with or without hard labour for any time not exceeding two calendar months."

A Thus a very extensive summary power of conviction is given under certain circumstances. We are to see what those circumstances are.

B Taken by themselves alone, the words "having in his possession" of course include the case of a person having in his possession, at any time, in any manner, or in any place. But here we have them in connection with the words "or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained." It is no offence at common law, nor is it, except under s. 66 of the Metropolitan Police Act, 1839, an offence against any statute, for persons to have in their possession things suspected of having been stolen. The offence at common law would be having a guilty knowledge that the things were actually stolen. We must see, therefore, what it is to which these words are intended to apply.

C In the Metropolitan Police Act, 1839 (which was passed in the same session, the two going through the legislature contemporaneously, one of them being meant to regulate the metropolitan police constables, and the other the police courts, s. 55 of the Metropolitan Police Courts Act, 1839, requiring that they shall be construed and read as one Act), we have this power given by s. 66 :

D "And every constable may also stop, search, and detain any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may reasonably be suspected of having or conveying in any manner anything stolen or unlawfully obtained; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, or that the same, or any part thereof, has been stolen or otherwise unlawfully obtained, is hereby authorized, and, if in his power, is required, to apprehend and detain, and as soon as may be to deliver such offender into the custody of a constable."

F Here there is a power of arrest given, which was not given by the common law. Under the common law if a felony were actually committed a person might be arrested without a warrant by any one, if he were reasonably suspected of having committed the felony; and a constable could go further : if he had reasonable ground for supposing that a felony had been committed, and reasonable ground for supposing that a certain person had committed the supposed felony, he might arrest him, though no felony had actually been committed; but neither a constable, nor any one else, could arrest a person merely on suspicion of his having illegally obtained goods. This is a misdemeanour, and a power of arrest is given with respect to it quite beyond the common law. That power is given by s. 66 of the Metropolitan Police Act, 1839, and we must look

H at that section, to see what the power given to the constable is.

I Where any person is reasonably suspected of having or conveying anything stolen or unlawfully obtained, the constable is authorized to arrest him in transitu in the street; and one can see at once that very good reasons could be given for this summary power to do what could not be done elsewhere. It might be expedient to give the power to arrest such persons, because they might otherwise very speedily get out of the way, and not be taken at all, though it might not be expedient to give the same power to arrest them when the goods are found in a house. There is also a further summary power given to a person to whom suspected goods are offered to be sold or to be pawned, to arrest the person offering them; and there are clearly the same reasons why a person who has received the goods and unlawfully tenders them to a pawnbroker should be arrested, because if not arrested he might probably speedily disappear. The legislature has, therefore, required that the constable or other person should arrest the suspected person summarily under the given circum-

stances. But the power of arrest given by the statute is confined to these particular cases: the one where the person is "having or conveying" the goods; the other where the goods are tendered by him for sale or pledge. This being the case, I think it throws a good deal of light upon s. 24 of the Metropolitan Police Courts Act, 1839, and we must take that and read it as a part of the same statute. Here is a power given of summarily arresting those who are found "having or conveying," evidently persons moving about the streets "having or conveying." Further, a summary power of arrest is given to the person to whom the goods are offered for sale or pledge. And I am inclined to think that the same construction would extend s. 24 to the case of a man who had been actually taken by the person to whom he had offered the goods for sale or pledge, as to a person arrested in the street, by a constable; but it is not necessary to decide that.

It has been a general rule for drawing deeds and other legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning, and it would be as well if those who are engaged in the preparation of Acts of Parliament would bear in mind that that is the real principle of construction. But in drawing Acts of Parliament, the legislature, as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change them; and, accordingly, in s. 24 we have "having in possession or conveying in any manner anything," whereas the words in s. 66 of the Metropolitan Police Act, 1839, were "having or conveying." I think, however, that the two expressions were intended to mean the same thing. "Having in his possession" may perhaps have been introduced to meet the case of the person who arrested the man when he came to offer the goods for sale or pledge. But "having or conveying" I think must be limited, making the one co-extensive with the other, and confining it to "having" ejusdem generis with "conveying."

There follow some other sections, and here again we shall have to look to see whether the meaning is extended. In the first place, according to the common and ordinary rule of interpretation we should not expect to have s. 24 relating to the subject of s. 25. The proper way would be, if it was meant that s. 24 should relate to matter in s. 25, to make it follow it, and to put s. 25 in the place of s. 24. This is by no means conclusive, but still it is a reasonable principle of construction. Then we find in s. 25 there is power to issue a search warrant; that search warrant, following the ordinary and general rule, is to be granted only if there is information on oath that there is reasonable ground for suspecting that goods stolen or unlawfully obtained are lodged in a certain place. The information must be, therefore, not that things suspected to be stolen or unlawfully obtained are lodged there, but that things actually stolen or unlawfully obtained are suspected to be lodged in the house. Upon this information the search warrant may be issued, and it is necessary in order to justify the breaking and entering the house.

In addition to that there is given a general power or warrant to the constable

"to take into custody and carry before the magistrate every person found in such house or place, who shall appear to have been privy to the deposit of any such thing, knowing, or having reasonable cause to suspect, the same to have been stolen or otherwise unlawfully obtained."

The constable, at common law, when he had taken the goods under this warrant having reason to believe that a felony had been committed, if he had reason to think that a person found there was a party to the felony, probably might arrest him, whether in the house or out of it. But here there is power given him to take a person into custody in the case of goods which have been unlawfully obtained. The whole of the section, however, is confined to

A the case where there has been information on oath that the things have been actually stolen or unlawfully obtained. But the mischief intended to be met by s. 66 of the Metropolitan Police Act, 1839, and s. 24 of the Metropolitan Police Courts Act, 1839, was evidently that of suspected goods being carried along the streets; as where there is a bag of coffee, for instance, found on a man, and there is reason to believe that it has been pilfered from some ship or warehouse, but from which particular ship or warehouse it is difficult to prove. B If a man is found carrying anything of this kind along the street, there is a summary power to arrest him, and to punish him; but I think in the case of the search warrant there must be an information on oath that the goods have actually been stolen or unlawfully obtained.

C Again, with regard to s. 26, it is very oddly worded. Where the person is brought before the magistrate charged with having goods in his possession actually stolen, and he gives information from whom he got them, the person he mentions may be brought before the magistrate, and instead of, as is the case under s. 24, imposing a fine, or sending him to prison for two months, the magistrate, if he find he had the goods in his possession, and had reasonable cause to believe the same to be stolen or unlawfully obtained, may send him to prison for three months—a different offence, with a heavier punishment. D We have not s. 26, however, before us now, and the question need not be decided; but it seems to apply only when the things are actually stolen or unlawfully obtained, and not also when there are only grounds for suspecting that they have been stolen or unlawfully obtained.

E Then there comes the other argument that I have mentioned before, which is, that s. 24 comes before s. 25 and s. 26; and one would naturally expect that if s. 24 was meant to apply to cases under ss. 25 and 26, it should follow them. The interpretation of the words taken fairly, and taking s. 66 of the previous Act with it, is, that "having in possession" and "conveying" in s. 24 mean the "having and conveying" mentioned in s. 66 of the Metropolitan Police Act, 1839, that authorize the summary arrest. I think, where there is this summary power of conviction given with a power of sentencing to imprisonment and hard labour, the proper construction of the Act is that which I have already mentioned, and that the legislature did not intend to oust a person from his right of trial by jury, except in the particular case to which I have referred. F I think the words of the statute sufficiently show that the legislature intended to confer this summary power only in the case where a person was "having and conveying" in the sense of "having" ejusdem generis with "conveying," G being in the streets or roads with them, or carrying them about, or perhaps loitering in the streets in such a way that it might be assumed he was carrying them, and probably in the case of his being taken into custody when he has brought them to a pawnbroker, or to a person to whom he offers them for H sale. I think, therefore, the Lord Mayor has exceeded his jurisdiction; for there is no pretence for saying that the present case came within that class of offences mentioned in ss. 25 and 26 of the Metropolitan Police Courts Act, 1839. If this had been a case in which summary arrest would have been lawful, I can scarcely think it would have been sufficient to oust the magistrate of his jurisdiction, if knowing that the constable might have taken a person into custody, I he had allowed him to be summoned instead. But on the other ground, I do not think the case comes within the Act which gives the summary power, and consequently the conviction must be reversed, and judgment given for the appellants. I

SHEE, J.—I am of the same opinion. It appears to me that s. 24 of the Metropolitan Police Courts Act, 1839, is merely supplementary, and enacted for the purpose of giving full effect to the provisions of s. 66 of the Metropolitan Police Act, 1839. That section enacts that it shall be lawful for any constable to

apprehend any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; and it enacts also that it shall be lawful for any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed, to apprehend and detain the person so offering the things. Then s. 69 of that statute provides :

"That every person taken into custody by any constable belonging to the metropolitan police, without warrant, except persons detained for the mere purpose of ascertaining their name or residence, shall be forthwith delivered into the custody of the constable in charge of the nearest station house, in order that such person may be secured until he can be brought before a magistrate, to be dealt with according to law."

It seems to me that s. 66 of the Metropolitan Police Act, 1839, applies only to offences, or to the suspicion of offences, out of doors—to street offences, cases in which circumstances occur in the street, which give reason to suspect that property has been stolen or unlawfully obtained. And it seems to me that s. 69 of that Act is totally inadequate to the prevention of such offences, because after providing that the offender shall be delivered into the custody of the constable, and shall be brought before the magistrate by the constable to be dealt with according to law, it does not explain how he is to be dealt with according to law. It is plain that before that Act was passed the magistrate could have done nothing but discharge him, there being no proof that he had actually stolen or received things knowing them to have been stolen, or that the goods were stolen. Therefore, the magistrate could have done nothing but discharge him. To supply that defect in that Act, the Metropolitan Police Courts Act, 1839, was passed only a week afterwards, in s. 24 of which it is provided, that every person who shall be brought before any of the magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour.

It seems to me that s. 66 of the former Act, and s. 24 of the later Act, relate only to street offences, or to the suspicion attaching to persons having in their possession or conveying things in the public streets—things which are in the view of the constable, or which in the ordinary course of the constable's employment might be brought to his notice; and I think that the Lord Mayor was mistaken in convicting the appellants under s. 24. The proper section under which to proceed against the appellants would have been s. 25 of the Metropolitan Police Courts Act, 1839; but then no doubt it was felt that it would be impossible to take the preliminary step required by that section, of making an information upon oath that the sacks had been stolen or unlawfully obtained. Section 25 seems to me to apply exactly to a case of this kind, where any person who can upon oath state that the things which are concealed or lodged in any dwelling-house or any other place have been stolen or unlawfully obtained; but s. 24 does not apply, and, therefore, judgment ought to be for the appellants.

LUSH, J.—I am also of opinion that s. 24 of the Metropolitan Police Courts Act, 1839, is merely supplementary to s. 66 of the prior Act, and that for two reasons.

First, that some such provision is necessary in order to effectuate the purposes contemplated by s. 66. That section supposes that a person is found in a public street with property upon him under such circumstances that there is good reason for suspecting that the property has been improperly come by—stolen; and that if he were not apprehended at once he might get out of the way, and evade detection altogether. Power is, therefore, given to stop such a person, without any proof or knowledge on the part of the constable that the

A property is stolen, but merely on suspicion. But then it would be useless to do that unless something could be done with the person when he was brought before the magistrate. Therefore, some additional provision was necessary. At common law, if he were brought before a magistrate, and there were no proof given that the things were stolen, he would be discharged; therefore, that section would have been inoperative unless it had been followed up by some such provision as that of s. 24. Under s. 24 one would reasonably expect to find that the offence would be punishable in some way or other. Hence we find s. 24 adapted to this state of things. It makes it an offence for a person to have in his possession, or convey in any manner, anything which may be reasonably suspected of being stolen or unlawfully obtained, without being able to give a satisfactory account of how he came by it.

C The second reason is founded upon the structure of s. 24 itself. It does not say, as though it were creating a new offence, "if any person have in his possession any property reasonably suspected of being stolen, without being able to give a satisfactory account of it, he shall be guilty of a misdemeanour," but it begins in this way:

D "That every person who shall be brought before any of the said magistrates charged with having in his possession, or conveying in any manner, anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour."

E The very structure, therefore, of the section refers one back to a previous provision, enabling the person to be brought before the magistrate. That we find in s. 66 of the prior Act. I am, therefore, of opinion that s. 24 of the Metropolitan Police Courts Act, 1839, is merely a supplement to s. 66 of the Metropolitan Police Act, 1839, and applies to the class of cases that would justify the apprehension of persons under s. 66, and to no others. For these reasons I am of opinion that judgment should be for the appellants.

Appeal allowed.

G

WEBB v. SADLER

H [COURT OF APPEAL IN CHANCERY (Lord Selborne, L.C., James and Mellish, L.JJ.), January 27, 1873]

[Reported 8 Ch.App. 419; 42 L.J.Ch. 498; 28 L.T. 388;
21 W.R. 394]

Power of Appointment—Exercise—Conditional power—Appointment with the consent of trustees.

I A husband and his wife, in exercise of a joint power of appointment over a fund in favour of the children of the marriage, appointed one-third of the fund to trustees upon such trusts as H. (a son of the marriage) should by deed, executed with the consent of the father during his life and after his death with the consent of the trustees of the father's will, or by will, appoint, and, in default of appointment, upon trust for H. for life, or until his bankruptcy or assignment if the bankruptcy or assignment should happen during the lives of the father and mother, or the life of the survivor of them, or within twenty-one years after the death of the survivor, and after H.'s death upon trust for his

executors or administrators as part of his personal estate, but if his interest should have determined, then on the trusts therein mentioned.

Held: the power given to H. was void as its exercise was made dependent on the consent of the trustees, but the limitation in default of appointment was valid, and H. took the appointed part of the fund absolutely subject to forfeiture on the happening of his bankruptcy or assignment within the prescribed period.

Equity—Conversion—Settlement—Power of sale—No trust for absolute sale.

Husband and wife had a joint power of appointment over real estate among the children of the marriage in such manner as they should think fit, and in default of and subject to such appointment the estate was to be held, subject to the parents' life interests, in trust for all the children to whom no share had been appointed at 21 or on marriage. The settlement contained a power of sale, but no trust for absolute sale. The husband and wife appointed two-fourths of the estate to H. and another child of the marriage, the appointment to H. being in the same terms as that of the personalty, and declared that the interests of the persons beneficially interested in the capital arising from any sale of the real estate, should be of the quality of personal and not of real estate.

Held: this was a good conversion of the real estate and H. took an absolute interest in his share subject to the same contingency as in the case of the personalty.

Notes. Applied: *Scotney v. Lomer* (1885), 29 Ch.D. 535. Considered: *Re Clay, Clay v. Clay* (1885), 54 L.J.Ch. 648. Applied: *Williamson v. Farwell* (1887), 35 Ch.D. 128. Considered: *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54; *Re Edwards' Will Trusts, Dalglish v. Leighton*, [1948] 1 All E.R. 821. Referred to: *Re Thompson, Machell v. Newman* (1886), 55 L.T. 85.

As to powers of appointment, see 30 HALSBURY'S LAWS (3rd Edn.) 205 et seq.; and for cases see 37 DIGEST (Repl.) 261 et seq.

Cases referred to:

- (1) *Long v. Watkinson, Long v. Long* (1852), 17 Beav. 471; 21 L.J.Ch. 844; 19 L.T.O.S. 309; 16 Jur. 235; 51 E.R. 1116; 24 Digest 951, 9622.
- (2) *Palin v. Hills* (1834), 1 My. & K. 470; 39 E.R. 759, L.C.; 44 Digest 893, 7522.

Also referred to in argument:

- Alexander v. Alexander* (1755), 2 Ves. Sen. 640; 28 E.R. 408; 37 Digest (Repl.) 261, 204.
- Fry v. Capper* (1853), Kay, 163; 2 W.R. 136; 69 E.R. 70; 37 Digest (Repl.) 128, 549.
- Carver v. Bowles* (1831), 2 Russ. & M. 301; 9 L.J.O.S.Ch. 91; 39 E.R. 409; 37 Digest (Repl.) 129, 564.
- Churchill v. Churchill* (1867), L.R. 5 Eq. 44; 37 L.J.Ch. 92; 16 W.R. 182; 37 Digest (Repl.) 370, 1051.
- Busby v. Salter*, Preston on Abstracts, vol. 2, p. 164.
- Re Teague's Settlement* (1870), L.R. 10 Eq. 564; 22 L.T. 742; 18 W.R. 752; 37 Digest (Repl.) 128, 551.
- Ingram v. Ingram* (1740), 2 Atk. 88; 26 E.R. 454, L.C.; 37 Digest (Repl.) 261, 202.
- Carr v. Atkinson* (1872), L.R. 14 Eq. 397; 41 L.J.Ch. 785; 26 L.T. 680; 20 W.R. 620; 37 Digest (Repl.) 262, 207.
- Wilson v. Mount* (1826), 2 Sim. & St. 493; 57 E.R. 435; 44 Digest 1063, 9157.
- Earlom v. Saunders* (1754), Amb. 241; 27 E.R. 161, L.C.; 20 Digest (Repl.) 371, 935.

Appeal from a decision of BACON, V.-C., reported L.R. 14 Eq. 533.

Two settlements, both dated Nov. 13, 1821, were executed prior to the marriage of George Stebbing Sadler and Louisa Firmin. By the first of these settlements

A certain personal estate, belonging to the intended wife, was settled upon trust for her for life for her separate use, without power of anticipation, with remainder to the intended husband for life, with remainder to the children of the marriage as the husband and wife jointly should by deed, or the survivor should by deed or will appoint, and in default of appointment upon trust for all the children of the marriage who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under that age, in equal shares. The deed contained no hotchpot clause. By the second settlement certain real estate, belonging to the intended husband, was vested in trustees to the use of the intended husband for life, with remainder to the use of the wife for life, with remainder to the use of the children of the marriage, as the husband and wife jointly should by deed appoint, and in default of appointment "in trust for all and every such child and children of the said George Stebbing Sadler by the said Louisa Firmin, to whom or for whose benefit no part or share of or in the said premises shall have been so appointed as aforesaid," in equal shares as tenants in common, sons taking at twenty-one and daughters at that age or marriage under that age. This deed contained a power of sale with trusts for the reinvestment of the proceeds in land to be settled to the same uses, but no absolute trust for sale.

There were issue of the marriage four children—George Thomas, Harcourt, Clara Sophia, and Henry Robert. Harcourt Sadler attained twenty-one, and died on April 5, 1852, intestate, and leaving his father his heir at law. On May 1, 1852, G. S. Sadler and Louisa his wife appointed one-third of the property comprised in the first settlement, subject to their own life interests, to George Thomas Sadler absolutely. On June 1, 1856, they appointed another third of the same property, subject to their own life interests, to Clara Sophia Sadler, who shortly afterwards married John Weir, when her share was settled. By a deed poll dated Dec. 19, 1859, they appointed the remaining third of this property to trustees upon trust, from and after the decease of the survivor of them, to raise thereout a sum of £1,500 upon certain trusts, and to stand possessed of the residue upon such trusts as Henry Robert Sadler at any time should by deed

"to be duly executed by him, but nevertheless with the consent in writing of the said G. S. Sadler during his life, and after his decease with the like consent of the persons or person who for the time being shall be the acting trustees or trustee under any last will and testament of the said G. S. Sadler, and whether therein named, or to be appointed under any power therein, or by the Court of Chancery, or other competent authority,"

such consent to be testified by his or their signature of the deed or deeds by which any such appointment or appointments should be made; or as Henry Robert Sadler should by will appoint; and in default of such appointment, upon trust to pay the income to Henry Robert Sadler for life, or until his interest should sooner determine under the provision thereafter contained; and from and after his decease, if his interest should not sooner have determined, upon trust for his executors or administrators as part of his personal estate; but if such interest should have determined, upon the like trusts as would have affected the residue of the same third share, if the same had been duly appointed in favour of Henry Robert Sadler only during his life or until the period of such determination.

"Provided always that if Henry Robert Sadler should at any time during the lives of G. S. Sadler and Louisa his wife or the life of the survivor of them, or during the period of twenty-one years next after the decease of such survivor, be declared bankrupt, or take the benefit of any Insolvent Debtors' Act, or assign, alien, charge, or in any manner incur or affect the income thereinbefore directed to be paid to him after the decease of the

survivor of G. S. Sadler and Louisa his wife, the trust thereinbefore declared for his benefit during his life should absolutely cease, and thenceforth during his life the same income should be held in trust for and be paid to the persons to whom the same would be payable if Henry Robert Sadler were then dead."

By another deed poll also dated Dec. 19, 1859, G. S. Sadler and Louisa his wife appointed two-fourths of the real estate comprised in the second settlement, subject to their own life interests, in favour of Clara Sophia Weir and Henry Robert Sadler, the trusts in favour of the latter being the same as those in the former deed poll. And by this deed the appointors declared that the shares and interests of the persons beneficially interested in the capital or principal moneys arising from any sale of the premises should be of the quality of personal and not of real estate, and that the same moneys should not be invested in the purchase of real estate.

On Jan. 14, 1866, George Thomas Sadler died intestate, leaving a widow and several children, two of whom were now of age. Later in the same year the real estate comprised in the second settlement was, at the request of G. S. Sadler and Louisa his wife, sold by the trustees under the power of sale contained in that deed. G. S. Sadler died on Aug. 21, 1869 and his widow on Feb. 12, 1870.

A bill was filed in June, 1870, by the plaintiffs, a married daughter of George Thomas Sadler and her husband, to determine the following questions: (i) whether the powers of appointment given by the deeds poll of Dec. 19, 1859, to Henry Robert Sadler were valid, and, if not, whether the limitations in default of their exercise failed also; (ii) whether a share in the real estate comprised in the second settlement had become vested in remainder in George Thomas Sadler, it was competent to the appointors by declaring that the proceeds of sale should be of the quality of personal estate, to defeat the title of the heir of George Thomas Sadler to the unappointed two-fourths of the real estate.

The declaration contained in the second settlement that the proceeds of the real estate should be of the quality of personal estate, was binding as against the heir-at-law of Harcourt Sadler.

Bacon, V.-C., held (i) that the whole of the appointments in favour of H. R. Sadler were invalid except to the extent of giving him an estate for life or until bankruptcy or assignment, and that his share subject to the life interest, went to the persons entitled in default of appointment; (ii) that the real estate was converted into personalty by the second deed poll. From this decision, except in so far as it related to the conversion of the real estate, Henry Robert Sadler appealed.

Osborne Morgan, Q.C., and G.O. Edwards for Henry Robert Sadler.

Amphlett, Q.C., and Crossley for the plaintiffs.

Kay, Q.C., and Warmington for the heir-at-law of Harcourt Sadler.

Hamilton Humphreys for the widow of George Thomas Sadler.

Eddis, Q.C., and Kingdon for Mrs. Weir's trustees.

Haynes for the executor of G. S. Sadler.

G. Murray and W. King for other parties.

LORD SELBORNE, L.C.—The first point is one of construction. There is no bias in the mind of the court on a question of construction. The sole object is to find out the meaning of the words which are used, and when that is done the legal effect has to be ascertained. Here it is quite clear that no power of appointment whatever is given to Henry Robert Sadler by either instrument of appointment, except the power to be exercised after the death of the parents with the consent in writing of the acting trustees or trustee who were persons to whom no such authority could be delegated independently of any question of remoteness. If, therefore, that is an inseparable condition of the exercise

of the power, the power altogether fails. We all think that it is an inseparable condition of the exercise of the power. There is no analogy between the effect of such a clause and the cases where there is a separate and superadded condition after the gift of an estate. Here there is no power except with consent.

The next question is whether the words "in default of and subject to any such limitation or appointment" are so connected with the void power that the void power failing they fail also. It seems to me that so to hold would be expressly contrary to the declared intention, which is that unless estates that would displace this gift to the son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument; and if the power is void, then no such estate could be created and the event never could arise which alone was meant to prevent the gift in favour of the son taking effect. The words "and subject to" show the same thing. If it had been intended to create a charge, and the gift made to the son was "subject to the charge," the charge not arising the son would have taken it free from that charge.

Then arises the third question on which we agree with the appellant. It does not seem to us, judging from the language of the vice-chancellor, that that question was so presented to him in argument as to receive from him that full consideration which might have led to a different determination. We have here a gift for life to H. R. Sadler followed by an absolute gift after death, the two being separated from each other for this reason only, that legal conditions of forfeiture are annexed to the estate during his life, and that interest is not to be absolute if forfeiture of the life estate takes place under those conditions. That being the scheme and purpose of the deed, it naturally follows that its framers separate, in point of expression, the life interest from the absolute reversionary interest, because they go on to say that if he alienates the income during his life or becomes bankrupt, that interest is to be forfeited, and, if so, the particular power given over the whole is to cease, and the interest given absolutely in the reversion is only to arise if and provided no such forfeiture should have taken place. But if that event is limited within such a period of time as the law allows and has not happened, then it seems to us there is a plain declaration of intention that the corpus is to be part of the personal estate. He has the whole life interest, and the whole corpus, after that life interest, is to be part of the personal estate. In my judgment you cannot, in a man's lifetime, make a reversion part of his personal estate simpliciter without giving him absolute powers of alienation over it. All persons who take beneficially take simply through him. If they take as creditors, it is because they have rights by law against the personal estate, and this was part of the personal estate; and if as legatees, not because there is a gift to the legatees here, but for a similar reason, namely, because he can dispose of his personal estate by will, and they take it only as part of his personal estate; so with respect to every other mode of alienation. In my judgment such a gift is exactly the same thing as if a testator had said: "In trust for the said Henry Robert Sadler his executors or administrators as part of his personal estate."

In a case much less simple than this, *Long v. Watkinson* (1), before Sir JOHN ROMILLY, M.R., a brother had made a will in favour of his sister. Contemplating on the face of the will the possibility of the event, which happened, of her dying in his life-time, the brother gave his personal estate to her absolutely, but if she died in his life-time then he said: "my instructions are then to pay over all the residue of my estate and effects to the executors or executrices which my said sister may appoint," but not adding, as here, as part of the personal estate. It was held even there that the administration must be on exactly the same principle as if it were part of her personal estate in her lifetime, and the Master of the Rolls expressly said this (17 Beav. at p. 474):

"In my opinion the contest whether the residuary legatee or the next of kin take the property is, in many cases, a contest arising from a mis-

apprehension of the character in which the executor or executrix takes the property. The executor or executrix who takes the property does so as a trustee and the person who takes the property beneficially takes it as a cestui que trust and not as a persona designata. It is, in my opinion, inaccurate to lay down as a rule that in such cases the fund belongs either to the residuary legatee or to the next of kin. It belongs to the persons who are interested in the estate of the person to whose executor it is given."

While the donee is alive who is interested in the property except himself? Everybody taking it after his death can only take it against him or his right; and such an estate is necessarily alienable in his lifetime and being in due limits of time, it is well appointed.

As to the real estate, it appears to me that it was competent, as I read the terms of the power, to modify the estate or interest in realty given to the objects of the power by the appointment in any reasonable and convenient manner that could be considered to be for their benefit. Among other modes of modification it was competent to the donee of the power to say the realty should be converted and held as personalty, and it was equally competent to do it as to an undivided share as to the whole.

As to the share, the appointors have said so in the plainest words by saying that the real estate, which for argument sake I will suppose continued in specie down to the time of the death of the life tenant is to go after his death to his executors as part of his personal estate. Nothing is more familiar to this court than real estate by virtue of a trust impressed upon it being enjoyed as personalty and vice versa, personal estate being enjoyed as realty. There is a clear intention that these shares of the real estate should go in that manner as personalty and be administered by the executors in the same way.

In my judgment, it is wholly unnecessary, and, therefore, improper to go into any ulterior question as to the effect of the exercise of the power of sale on the other shares of the property. The question here is as between the appellant and the respondents, and in favour of the appellant I hold that there is a good conversion in equity by the terms of the deed. The declaration of the vice-chancellor will, therefore, be altered accordingly.

JAMES, L.J.—I am of the same opinion. For some time there was an opinion entertained by the courts that the words "executors or administrators" following a gift for life were to be considered to mean next of kin, or that the executors were to take beneficially as personæ designatæ. That was acted on in *Palin v. Hills* (2), where LORD BROUGHAM reversed the decision of SIR JOHN LEACH, M.R.; but for many years there has been no question that "executors and administrators" mean executors and administrators and nothing else. In this settlement the additional words "as part of the personal estate" have been inserted for the very purpose (the instrument evidently being prepared by some gentleman acquainted with the law) of excluding any question whatever as to anybody being entitled but the personal representatives; and a gift to A. for life and after his death to his legal personal representatives is a valid absolute gift to A.

MELLISH, L.J.—I am of the same opinion.

ORDER: That at the period of twenty-one years from the death of the survivor of George Stebbing Sadler and Louisa, his wife, if Henry Robert Sadler shall not have become bankrupt or have taken the benefit of any Insolvent Debtors Act, or have assigned, aliened, charged, or in any manner encumbered or affected the income by the deed poll of Dec. 19, 1850, directed to be paid to him after the decease of the survivor of George Stebbing Sadler and Louisa, his wife, Henry Robert Sadler is absolutely entitled.

JENNER v. MORRIS

[COURT OF APPEAL IN CHANCERY (Lord Campbell, L.C., and Turner, L.J.), January 23, 31, 1861]

[Reported 3 De G.F. & J. 45; 30 L.J.Ch. 361; 3 L.T. 871;
25 J.P. 419; 7 Jur.N.S. 375; 9 W.R. 391; 45 E.R. 795]

Husband and Wife—"Necessaries"—*Advances by third party to deserted wife for necessaries*—*Debt owing by third party to husband*—*Equitable set-off of advances against debt*.

A person advancing to a married woman, deserted by her husband and left wholly without provision, sums of money which have been actually laid out in the purchase of necessaries for her, is, in a court of equity, entitled to stand in the place of the tradespeople supplying those necessaries, and the sums so advanced and laid out constitute an equitable set-off against a legal debt due to the husband from the person making those advances.

Where, therefore, a husband who had deserted his wife instituted a suit to enforce against the defendant's life-interest in real estate a judgment recovered by the husband against the defendant in an action at law, the defendant was **held** to be entitled to set off against the husband's claim the amount of sums advanced to the wife for necessaries.

Notes. Considered: *Weingarten v. Engel*, [1947] 1 All E.R. 425. Referred to: *Re Wood*, *Davidson v. Wood* (1863), 8 L.T. 476; *Deare v. Soutten* (1869), L.R. 9 Eq. 151.

As to contracts of wife during coverture, see 19 HALSBURY'S LAWS (3rd Edn.), 852 et seq.; and for cases see 27 DIGEST (Repl.) 196 et seq.

F Cases referred to:

- (1) *Harris v. Lee* (1718), 1 P.Wms. 482; 24 E.R. 482; sub nom. *Anon.*, 2 Eq. Cas. Abr. 135; Prec. Ch. 502; 27 Digest (Repl.) 183, 1369.
- (2) *May v. Skey* (1849), 16 Sim. 588; 18 L.J.Ch. 306; 13 Jur. 594; 60 E.R. 1002; 27 Digest (Repl.) 196, 1548.
- (3) *Hirst v. Tolson* (1849), 16 Sim. 620; 18 L.J.Ch. 308; 13 Jur. 596; affirmed (1850), 2 Mac. & G. 134; 2 H. & Tw. 359; 19 L.J.Ch. 441; 14 Jur. 559; 42 E.R. 52, L.C.; 12 Digest (Repl.) 667, 5161.
- (4) *Knox v. Bushell* (1857), 3 C.B.N.S. 334; 30 L.T.O.S. 153; 140 E.R. 769; 27 Digest (Repl.) 183, 1370.

Also referred to in argument:

- Marlow v. Pitfeild* (1719), 1 P.Wms. 558; 2 Eq. Cas. Abr. 516; 24 E.R. 516; 28 Digest (Repl.) 516, 331.
- Harrison v. Nettleship* (1833), 2 My. & K. 423; 3 L.J.Ch. 86; 39 E.R. 1005; 26 Digest (Repl.) 112, 778.
- Evans v. Brembridge* (1856), 8 De G.M. & G. 100; 25 L.J.Ch. 334; 27 L.T.O.S. 8; 2 Jur.N.S. 311; 4 W.R. 350; 44 E.R. 327, L.J.J.; 12 Digest (Repl.) 36, 121.
- Stevenson v. Hardie* (1773), 2 Wm. Bl. 872; 96 E.R. 513; sub nom. *Stephenson v. Hardy*, 3 Wils. 388; 27 Digest (Repl.) 174, 1283.
- Manby v. Scot* (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E.R. 1065, Ex. Ch.; 27 Digest (Repl.) 173, 1273.
- Terrell v. Higgs* (1857), 1 De G. & J. 388; 29 L.T.O.S. 306; 5 W.R. 746, C.A.
- Marten v. Whichelo* (1841), Cr. & Ph. 257.
- Molony v. Kernan* (1842), 2 Dr. & War. 31; 1 Digest (Repl.) 542, *1029.
- Rawson v. Haigh* (1824), 2 Bing. 99; 9 Moore, C.P. 217; 2 L.J.O.S.C.P. 130; 130 E.R. 242; 22 Digest (Repl.) 51, 318.

- Sandon v. Hooper* (1843), 6 Beav. 246; 12 L.J.Ch. 309; 49 E.R. 820; affirmed (1844), 14 L.J.Ch. 120, L.C.; 35 Digest (Repl.) 729, 3972.
- Phelps v. Prothero* (1848), 2 De G. & Sm. 274; 11 L.T.O.S. 412; 12 Jur. 667; 64 E.R. 123; 22 Digest (Repl.) 427, 4641.
- Darby v. Boucher* (1693), 1 Salk. 279.
- Earle v. Peale* (1711), 1 Salk. 386; 10 Mod. Rep. 66; 91 E.R. 336; 28 Digest (Repl.) 516, 328.
- Duncan v. Duncan* (1815), Coop. G. 254; 19 Ves. 394; 35 E.R. 549; 27 Digest (Repl.) 81, 617.
- Whyte v. O'Brien* (1824), 1 Sim. & St. 551; 57 E.R. 218; 40 Digest (Repl.) 411, 63.

Appeal by the plaintiff from a decision of KINDERSLEY, V.-C.

The bill was filed by Albert Lascelles Jenner, and stated indentures of lease and release, dated June 8, 1819, whereby certain manors, lands and hereditaments, in the county of Glamorgan, were appointed, released and assured to certain uses and upon certain trusts, as follows. The release mentioned was made between Sir John Morris (grandfather of the defendant) of the first part, John Morris, Esq. (the defendant's father) of the second part, and trustees of the third part, and the limitations were to Sir John Morris, the grandfather, for life, remainder to the trustees for a term of 1,000 years, to raise portions, and for other purposes; remainder to the trustees to preserve contingent remainders during the life of John Morris, party thereto; remainder to the use of the defendant for life, without impeachment of waste, with remainder to his first and other sons in tail male, and the term was limited to the trustees upon trust for raising and paying certain mortgage moneys and other sums therein mentioned, with powers enabling John Morris, party thereto, and each succeeding tenant for life, on succeeding to possession, to subject and charge the settled estates with portions for his younger children to the extent therein mentioned. The grandfather of the defendant died in 1819, and the defendant's father died in 1855. On his death, the defendant, Sir John Armine Morris, Bart., became entitled for his life to the same hereditaments, and he was now in possession thereof. The bill next stated that on May 5, 1856, the plaintiff recovered and obtained judgment in the Court of Exchequer against the defendant for the sum of £500 debt and £81 8s. 10d. costs, and the same judgment was duly registered and was still subsisting, and the plaintiff insisted that all the aforesaid lands and hereditaments were charged therewith. The prayer of the bill was for a declaration to that effect, for payment of the debt and costs, and in default for a foreclosure decree to the extent of the defendant's estate.

The defendant admitted the plaintiff's judgment by the answer, which also stated that the plaintiff married his, the defendant's sister, Henrietta Julia Morris, by whom he had two sons. Many years previously he deserted his wife, had since lived separate and apart from her, and had not maintained her or his sons. The defendant had, as well before as since the judgment, paid large sums of money greatly exceeding £500 to and for the maintenance and support of Henrietta Julia Jenner, which moneys had been laid out in the purchase of necessaries for her. The defendant claimed to be entitled to the repayment of these moneys from the plaintiff, and to stand in the place of the tradesmen and others who had supplied her with the necessaries paid for by means of such moneys. He further claimed to be entitled to set off the same against the sum for which the judgment was recovered, and the interest thereon. He submitted that by means thereof the whole of the money had in fact been paid, and that no part thereof remained due to the plaintiff. It further mentioned two garnishee orders on the defendant requiring him to pay to judgment-creditors of the husband two sums of £44 2s. 9d. and £68 7s. 8d., and it submitted that by reason of those amounts and of the amount so claimed by the defendant by way of set-off,

A the judgment was no longer subsisting, and that the settled hereditaments were not charged therewith. It further appeared that in July, 1842, the plaintiff and defendant had entered into an agreement whereby, in consideration of £250 advanced by the plaintiff to the defendant, the latter had agreed that in the event of his surviving his father he would pay to the plaintiff £500, and in the meantime £20 per annum in lieu of interest due to Mrs. Jenner in respect
 B of a charge which she had on the settled estates. The desertion by the plaintiff of his wife had taken place several years earlier, since which time he had contributed nothing to the support of that lady or his two children, and they had been ever since supported by her relations, and particularly by the defendant, whose claim, as set forth in the schedule to his answer, amounted to £1,067 3s. 4d. This claim, however, comprised amounts which were not, strictly speaking, supplied for Mrs. Jenner's use, or the purchase of necessaries for her. The above
 C mentioned judgment was recovered in an action begun by the plaintiff against the defendant to recover the £500 under the aforesaid agreement, and a verdict was found for the plaintiff.

KINDERSLEY, V.-C., held that the defendant was entitled to the benefit of the advances which he had made for the maintenance of the wife so far as the
 D matters supplied to her were necessaries, and that the plaintiff was only entitled to have a charge on the defendant's estate for the surplus, if any, after giving credit to the defendant for the advances. He found that the defendant had not proved distinctly the details of the necessaries which the wife was supplied with and directed an inquiry—whether during the time that the plaintiff and his wife had lived separate and apart from each other, the defendant had paid to
 E or on account of the plaintiff's wife, and when, any, and what sum or sums of money, for the purpose of providing her with necessaries, and whether such moneys, or any and what part or parts thereof, had been duly applied in providing her with necessaries, having regard to the plaintiff's circumstances and condition of life. The plaintiff appealed.

F *Glasse, Q.C.*, and *Herbert Smith* for the plaintiff.
Archibald Smith (Bailly, Q.C.), with him for the defendant.

Cur. adv. vult.

Jan. 31, 1861. The following judgments were read.

G **LORD CAMPBELL, L.C.**—The question in this case is whether the defendant has made out his right to an equitable set-off against the judgment-debt in respect of which the bill is filed. I am of opinion that the decree of KINDERSLEY, V.-C., in his favour ought to be affirmed.

First, as to the facts. I think that the defendant sufficiently proves that the plaintiff in 1847 deserted his wife without making any provision for her, and without any imputation of misconduct against her, so that any person who
 H supplied her with necessaries would have been entitled to sue her husband for the amount. The allegations to this effect appear to me to be sufficiently supported by the defendant's answer, which is made evidence; by his cross-examination, and by the plaintiff's letter to his wife, dated July 23, 1849, in which he admits his liability to the tradespeople with whom she had dealt for necessaries. Next, I think it is proved by the defendant's answer and the
 I schedule annexed to it, that during this time he did supply the plaintiff's wife with sums of money, which she applied in providing necessaries for herself, and that he actually paid sums of money to tradespeople who had supplied her with necessaries, in satisfaction of their demands. The amount is left uncertain, and the defendant includes in his demand sums paid in respect of the plaintiff's children, which certainly cannot be included in the set-off. Considering that the plaintiff did not amend his bill on the answer being put in (as he might have done) by denying the desertion and the payment of the money by the

defendant, and that the plaintiff has neither by himself or any other witness offered any evidence in contradiction, I think that a sufficient foundation is laid for the inquiry directed by the decree, if on the truth of the facts alleged the set-off ought to be allowed. A

Desertion and the advance of money to the wife, which money was actually applied in payment for necessities furnished to her, being established, the question arises whether the defendant who advanced this money can, in equity, B claim a set-off in respect of it against a legal debt due from him to the plaintiff, and sought to be enforced in equity? An action at law could not be maintained for such a claim. Those who supply the necessities to the deserted wife may sue the husband at law, she being considered his agent with uncountermandable authority to order the necessities on his credit. But courts of law will not C recognise any privity between the husband and a person who has supplied his wife with money to purchase necessities, or who pays the tradespeople who have furnished them. Nevertheless, it has been laid down from ancient times, that a court of equity will allow the party who has advanced the money which is proved to have been actually employed in paying for necessities furnished D to the deserted wife, to stand in the shoes of the tradespeople who so furnished the necessities, and to have a remedy for the amount against the husband. I do not find any technical reason given for this; but it may possibly be that equity considers that the tradespeople have, for valuable consideration, assigned to the party who advanced the money the legal debt which would be due to them from the husband for furnishing the necessities, and that although a chose in action cannot be assigned at law, a court of equity recognises the right of the assignee. Whatever may be the reason, the doctrine is explicitly laid down E in *Harris v. Lee* (1), and the other cases referred to in the argument.

Objection has been made to these authorities that they are very old, and that they do not appear to have been acted upon in modern times. But it may be said, on the other hand, that they may have been acted on without ever having been questioned, and that they are entitled to more respect from their antiquity. F I find that they are cited and treated as good law by subsequent text writers on this subject. Considering that to establish the equitable liability of the husband, proof is required that the money has actually been applied to the payment of the debt for which the husband would be liable at law, no hardship or inconvenience can arise from adhering to this doctrine. The circumstances which occurred in *Harris v. Lee* (1) afford an illustration of the benefit which may arise from it; unless money had been supplied beforehand to pay the G surgeon employed to attend the wife, she might have died of the disease communicated to her by her husband. One adverse case was cited, which I must notice (*May v. Skey* (2)), the marginal note being:

"A. having gone abroad and left his wife unprovided for, the plaintiff lent her money to purchase necessities, and she applied it accordingly: *Held*, H that the plaintiff could not sue A. for the money in a court of equity."

It appears, however, that the vice-chancellor who decided that case—not holding that there was not a debt due from A. to the plaintiff, which might be recovered—proceeded on the notion that this was a legal debt, the payment of which could not be directed by a court of equity. He more fully explains I this as the ratio decidendi, in the subsequent case, *Hirst v. Tolson* (3); but this is clearly erroneous. That no action at law could be maintained for such a demand was considered too clear for argument in the recent case, *Knox v. Bushell* (4).

The only other point which I have to notice is the objection very strenuously relied on by the plaintiff, that, at all events, the set-off cannot be admitted for any part of the defendant's demand which accrued before the judgment, or before the commencement of the action in which the judgment was re-

A covered, because, if it be an equitable defence under the Common Law Procedure Act, 1854, it might and ought to have been pleaded and taken advantage of in that action. It is unnecessary at present to enter into the controversy, whether it would be expedient, where there is an equitable answer to a demand made in an action at law, to compel the defendant to avail himself of it in a court of law, or to consider how far this object has as yet been accomplished
B by the legislature. In the present case the plaintiff's demand and the defendant's cross-demand are wholly unconnected with each other, and the defendant had no answer in bar of the plaintiff's demand. Therefore, if he had had a legal set-off, he was not bound to avail himself of it. He might have reserved it as the subject of a cross-action, or he might have availed himself of it by way of set-off in any subsequent action for a debt which the plaintiff might have
C brought against him. The equitable set-off might equally be reserved, and may now be rendered available in this equitable suit, as if, being a legal set-off, it might have been used in an action at law on the judgment, although the debt to be set off might have accrued before the commencement of the original action. For these reasons I am of opinion that the appeal should be dismissed with costs.

D

TURNER, L.J.—I agree in opinion with LORD CAMPBELL, L.C., in this case. The evidence before us seems to establish a case of desertion by the plaintiff, and I think that we are entitled, and indeed bound, to deal with the case on that footing.

E

There are only two questions in the case: First, whether laying out of consideration the proceedings at law, the defendant is entitled to relief in equity; and secondly, whether the defendant, if so entitled, is debarred from his right in consequence of his having set it up at law, by pleading an equitable plea.

F

As to the first point, the cases cited by the defendant clearly prove that, when those cases were decided, relief was considered to be due in equity in such circumstances as exist in this case; but we were urged by the plaintiff to disregard those cases. It was said that they were of ancient date, and the more modern case of *May v. Skey* (2) was cited as opposed to them. What has been said by LORD CAMPBELL, L.C., however, disposes of that case, and we are thrown back, therefore, on the old authorities.

G

In considering them it must be borne in mind that the decrees of the court very often furnish the best evidence which can now be had of the extent of its jurisdiction, and of the principles by which it is guided, and that in disregarding the older decisions of the court there is great danger of breaking in on its principles. This case seems to me to present a remarkable instance of that danger. In LORD REDESDALE's treatise upon PLEADING I find this statement with reference to the jurisdiction of the court (MITFORD, 5th Edn. p. 134):

H

I

"Cases frequently occur in which the principles by which the ordinary courts are guided in their administration of justice give a right, but from accident, or fraud, or defect in their mode of proceeding, those courts can afford no remedy or cannot give the most complete remedy; and sometimes the effect of a remedy attempted to be given by a court of ordinary jurisdiction is defeated by fraud or accident. In such cases courts of equity will interpose to give those remedies which the ordinary courts would give if their powers were equal to the purpose, and their mode of administering justice could reach the evil; and also to enforce remedies attempted to be given by those courts when their effect is so defeated."

His Lordship refers in a further part of the same treatise to the case of waste as an example, where the law has given a remedy to a certain extent for waste, and that remedy has been extended by this court. It is, therefore, a very ancient head of the jurisdiction of this court to interpose in cases in which the principles of the law give a right, but the forms of the law do not give a remedy.

What is the case here? It is beyond all question that the principle of the law is that the husband deserting his wife is liable for necessities supplied to her; but it is equally beyond question that, if money be advanced to the wife to purchase necessities, the money, although in fact so applied, cannot be recovered at law, because, according to the necessary form of the action at law for the recovery of the money, the court of law cannot look behind the advance, or enter into the question as to the application of the money. It appears to me, therefore, that the old cases which have been referred to are well founded on the principles of the court, and that we are bound to follow them. I think, therefore, that the plaintiff's argument on the first ground wholly fails. As to the second ground, it is quite new to me that the creation of a jurisdiction in courts of law can oust the jurisdiction of this court in matters originally within its cognisance, and I am of opinion that the plaintiff's case fails on this point also. This appeal, therefore, must, as I agree with LORD CAMPBELL, L.C., be dismissed, and with costs.

Appeal dismissed.

SMITH v. LONDON AND ST. KATHARINE DOCKS CO.

[COURT OF COMMON PLEAS (BOVILL, C.J., BYLES and KEATING, JJ.), April 24, 1868]

[Reported L.R. 3 C.P. 326; 37 L.J.C.P. 217; 18 L.T. 403;
16 W.R. 728; 3 Mar.L.C. 66]

Negligence—Duty of occupier of premises to visitor—Invitee—Docks—Duty of dock company—Gangway from shore to ship—Gangway rendered dangerous by company's servants.

After the usual business hours of docks belonging to the defendants, but before they were closed, the plaintiff went on board a vessel lying in the docks, pursuant to an invitation from one of the officers on board, and while there took an order for optical instruments. While he was on board the vessel servants of the defendants moved the vessel, and in doing so shifted a "horse" on which the gangway communicating with the shore rested. The plaintiff had no notice that the gangway had been disarranged, and, while he was returning along it, it turned over, and he was thrown into the water and injured. The gangway was the property of the defendants and under the control of their servants; it formed the only access between the vessel and the shore, and its dangerous state was known to the defendants' servants.

Held (KEATING, J., dubitante): (i) as the plaintiff was there on the business of a ship in the defendants' dock the only access to which was supplied by them, he was there on business in which they were interested, and, therefore, they were liable for injuries he sustained through the negligence of their servants: (ii) the plaintiff was not a mere volunteer; he passed along the stage by the tacit invitation of the defendants, and as the dangerous state of the stage was in the nature of a trap, and was known to the defendants, and not communicated by them to the plaintiff, they were liable for the injuries he sustained.

Notes. The liability of an occupier of premises to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them is now dealt with by ss. 2 and 3 of the Occupiers' Liability Act, 1957, which have effect in place of the rules of common law but the latter will continue to determine who is an occupier and to whom the duty is owed (s. 1). The distinction between the duty owed by an occupier of premises to an invitee and that which he owed to a

A licensee was abolished by the Act, s. 2 (1) of which prescribes a "common duty of care" which is owed by an occupier to all his visitors. By s. 1 (2) the persons to be treated as "visitors" are the persons "who would at common law be treated as invitees or licensees."

Considered: *Heaven v. Pender*, [1881-5] All E.R. Rep. 35. Distinguished: *O'Neil v. Everest* (1892), 61 L.J.Q.B. 453. Applied: *Miller v. Hancock*, [1891-4] All E.R. Rep. 736; *Lewis v. Ronald* (1909), 101 L.T. 534. Referred to: *King v. Great Western Rail. Co.* (1871), 24 L.T. 583; *Watkins v. Great Western Rail. Co.* (1877), 46 L.J.Q.B. 817; *Lucy v. Bawden*, [1914] 2 K.B. 318; *Elliott v. Roberts* (1915), 32 T.L.R. 71; *Brackley v. Midland Rail. Co.* (1916), 114 L.T. 1150; *Dunster v. Hollis*, [1918-19] All E.R. Rep. 949; *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; *Mersey Docks and Harbour Board v. Proctor*, [1923] All E.R. Rep. 134; *Jacobs v. L.C.C.*, [1949] 1 All E.R. 790; *Stowell v. Railway Executive*, [1949] 2 All E.R. 193.

As to duty of occupier to persons who are visitors, see 28 HALSBURY'S LAWS (3rd Edn.) 47-50, and as to duty in relation to goods supplied, see *ibid.* 58-62; and for cases see 36 DIGEST (Repl.) 48 et seq. As to master's duty not to expose servant to unnecessary risk, see 25 HALSBURY'S LAWS (3rd Edn.) 508 et seq.; and for cases see 41 DIGEST 982. For the Occupiers' Liability Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 832.

Case referred to:

(1) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586; 36 Digest (Repl.) 46, 246.

E Also referred to in argument:

Gautret v. Egerton, Jones v. Egerton (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gautret v. Egerton, Jones v. Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, 247.

Corby v. Hill (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 4 Jur.N.S. 512; 6 W.R. 575; 140 E.R. 1209; 36 Digest (Repl.) 67, 370.

F *Bolch v. Smith* (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 8 Jur.N.S. 197; 10 W.R. 387; 158 E.R. 666; sub nom: *Bolett v. Smith*, 6 L.T. 158; 36 Digest (Repl.) 66, 358.

Gallagher v. Humphrey (1862), 6 L.T. 684; 27 J.P. 5; 10 W.R. 664; 36 Digest (Repl.) 66, 357.

G **Rule Nisi** obtained by the defendants for an order of nonsuit in an action, in which the plaintiff claimed damages for injuries suffered by him as a result of the alleged negligence of the defendants, on the ground that the evidence disclosed no duty to the plaintiff for the breach of which the defendants were liable.

H The declaration stated that the defendants were possessed of docks, used by them for the purpose of docking and accommodating ships or vessels, and carried on the business of dock keepers, and in their business of dock keepers received ships and vessels into the docks for the purpose of loading and discharging cargoes, and of doing other things connected with the business of the ships or vessels and of the owners and cargoes thereof, and the defendants, in their business, provided proper accommodation for the ships or vessels, and means of communication between the ships or vessels and the shore for persons having business on board the ships or vessels and having occasion to pass between the ships or vessels and the shore for reward to the defendants, and the defendants, in their business, had received into the dock a ship, called the *Murray*, and had provided certain means of communication between the ship and the shore, that is to say, by means of a gangway extending from a certain jetty of the defendants to a certain other ship and of another gangway from the said other ship to the said ship called the *Murray*, and the defendants, by their servants, so negligently, carelessly, and improperly constructed the said gangways, and so

negligently, carelessly, and improperly conducted themselves in managing and taking care of the said gangways that, by reason thereof, the plaintiff, who was lawfully passing over the same, in crossing from the said ship to the said jetty, in and about certain business on board the said ships, fell and was thrown from off one of the said gangways into the water, and sunk under the said water, and was in great danger of his life. The defendants denied liability. A

At the trial before BYLES, J., there was evidence that the defendants were the proprietors of docks, and in the course of their business they provided gangways or stages as a means of access from the quay to the vessels lying alongside. These gangways were the property of the defendants, and were managed by their servants during the ordinary hours of business, but if they required any shifting or alteration after the ordinary business hours, this was usually done by persons on board the ships. The ordinary business of the docks was considered as over at 4 p.m., but the dock gates were not closed at that hour, and persons were allowed to enter until much later in the evening. The plaintiff was an optician, and at about 5 p.m. on the day of the accident he went to the defendants' docks in consequence of a request from an officer of one of the ships. The ship in question was lying next but one to the quay, and the plaintiff passed safely along a gangway which was the property of the defendants, and had been put up by their servants into the ship next the quay, and thence into the ship he went to visit, and while there he received orders for several instruments. During the time the plaintiff was on board this ship, it became necessary slightly to shift the position of the ship between it and the quay, and this was done by the defendants' servants, and while doing so they also shifted the position of the "horse" on which the stage leading to the shore rested, and thereby rendered the stage unsafe. Before this was re-adjusted, and while the defendants' servants were still engaged in moving the ship, the plaintiff having transacted his business, proceeded to return to the quay, and the stage appearing to him perfectly safe, he stepped upon it, which caused it to tilt over, and he was thrown into the water and seriously injured. B C D E F

The defendants' case at the trial was that their servants pointed out to the plaintiff that the stage was unsafe, but this the plaintiff denied. There was no other means of getting from the quay to the vessels in the docks but by these stages or by means of a boat, and it appeared that there was only one boat in the docks, which was generally used for other purposes. On this evidence it was submitted that no duty on the part of the defendants to the plaintiff was proved, and BYLES, J., reserved this point, leaving to the jury the questions whether the defendants had been guilty of negligence, and whether the plaintiff had been guilty of contributory negligence, both of which they answered in favour of the plaintiff, for whom a verdict was entered, with damages £60. G

Counsel for the defendants subsequently obtained a rule to enter a nonsuit on the grounds that the evidence disclosed no duty to the plaintiff for the breach of which the defendants were liable, or to arrest the judgment on the ground that the declaration disclosed no breach of duty. H

O'Malley, Q.C., and *Francis* showed cause.

Coleridge, Q.C., and *Murphy* supported the rule. I

BOYILL, C.J.—The first question is whether there was any evidence of a duty to the plaintiff to support the verdict on the declaration as now framed, and I am of opinion that there was.

The case for the plaintiff was, that there were several vessels in the docks of the defendants, who carried on the business of a dock company, and who undertook to provide, and actually did provide, not only dock room, but means of access by gangways to all the vessels which came into the docks in the course of the business they carried on. The access would be not only for the

A purpose of loading and discharging goods, but for the use of all the people in the vessel to land, and for persons to go on board on the ordinary business of the ship and of the persons on board. The means of access in the present case were entirely provided by the defendants, constructed by their servants, with their materials, on their premises and, when constructed, maintained by them; and they were responsible for the maintenance of it during the ordinary hours of business, that is, up to four o'clock in the afternoon. At the time this accident occurred it was after four o'clock, but it was light, and the gates of the docks were not closed, and although under ordinary circumstances the defendants would not be responsible for these gangways after four o'clock, in this case their servants were shifting some vessels, and undertook the management of this gangway and, therefore, in the particular circumstances there was no distinction between their liability before and after four o'clock. The defendants arrange the positions of the vessels in their docks, and provide means of access to them, and here there was no access to this vessel save only along the gangway over which the plaintiff was passing when the accident occurred. It was said that he might have gone to the vessel in a boat, but there was no evidence that there was any boat or any means of going to the vessel but by this gangway which was provided and attended to up to the time of the accident by the defendants' servants. Then it was proved that shortly before the accident the gangway was rendered dangerous, and there was evidence that the defendants' servants were perfectly well aware of the dangerous state it was in, and there is no doubt of that, because they tried to prove at the trial that they gave the plaintiff warning.

E The case, therefore, stands thus. The gangway was provided by the defendants, and was the only access to the vessel: the defendants were aware of the dangerous state it was in; the plaintiff went there ignorant of the danger, and found that this was the only access to the vessel; there was nothing from which he could infer that it was dangerous, and he thereupon passed on to the gangway and was thrown into the water and injured. At that very time the defendants' servants were about to arrange the gangway, and make it secure, and the jury have found that they were guilty of negligence, that they gave no sufficient warning to the plaintiff, and that there was no contributory negligence on his part.

F It is contended that there was no duty to the plaintiff. That the defendants did not do what they were bound to do for persons belonging to the ship there can be no doubt; but it is said that the plaintiff was not a person to whom they owed any duty, as he had no business with the defendants. I cannot appreciate that argument, because if the defendants carry on the business of the docks, and that consists of providing lying for ships and access to them for the persons on board, and those doing business with the ship, then providing access to the ships is as much the business of the dock company as anything else, and they are paid for it; and in that sense it is the business of the defendants, and the use of what they provide is, in the nature of a transaction, part of the business they undertake. The gangway was provided by the defendants, and they were paid by the shipowners, and being for the use of persons having business on the ship, and the only access to it, it seems to me that it is in the nature of an invitation by the defendants to all persons having business with the ship to use it. Counsel for the defendants said that if that were so it would give rights to all persons to go at all times; but that is not the case, as the defendants may close the docks at unseasonable hours. Here the plaintiff entered the docks by the defendants' permission; and if he had been a mere volunteer there would have been no duty to him; but if he had business on board the vessels, and was invited to go by a particular gangway, that was an invitation to use the gangway which the defendants knew to be dangerous, while he was ignorant of it. Both on principle and on the authorities, I cannot see anything more in the nature of a trap; and in that case it has been held that the action lies.

The plaintiff had a right to expect that the gangway was safe; nineteen out of twenty persons going on board the ships would have no business with the defendants, and it cannot be that persons who were on board the ships on business have no remedy when the defendants neglect to provide proper communication which they have undertaken to provide. It seems to me also that the gangway was held out to the plaintiff, and all persons having business on the ship as safe; and when it was in a dangerous state such persons were entitled to notice. Therefore, there was a duty to the plaintiff, and a breach of that duty for which the defendants are liable. A B

Then it is said that the judgment must be arrested because the declaration does not disclose a good cause of action. In dealing with that we must deal with it as a declaration after verdict, and assume that the language of the declaration has been expounded in the sense which would make it good; and, if there is any sense in which it can be good, the judge is presumed to have directed the jury in that sense, and the jury are presumed to have found the facts which would support it; and, if there is any objection and an amendment were applied for, we should amend as was done in *Indermaur v. Dames* (1). No such amendment has been applied for and, therefore, we must deal with it as it stands; and I think that it is sufficient, and, therefore, this rule must be discharged. C D

BYLES, J.—I am of the same opinion. Persons going out of the ship, the passengers, the crew, and the master would have a right to safe egress, and I think the same rule would apply to persons coming to the vessel. According to the evidence there was six feet of deep water between the quay and the vessel, and the only means of access was by means of this gangway, which was under the control of the defendants; the materials of which it was made were their property, and at the moment of the accident the gangway was being arranged by their servants. The plaintiff went on board the ship in consequence of an invitation from one of the officers of the ship, on business connected with the ship, and he had transacted business on the ship, and he could not get on or off but by this gangway. It seems to me that the jury were justified in finding a verdict as they did, and as to the arrest of judgment, I think the declaration was sufficient. E F

KEATING, J.—I entertained great doubts on both points—first, whether the evidence disclosed a duty on the part of the defendants to the plaintiff, the breach of which would give a right of action; and, secondly, I have great doubt if the declaration as it stands discloses such a cause of action, even with the intendments after verdict. Those doubts have not been removed, but I cannot say that they are sufficiently strong to induce me formally to dissent from the rest of the court, and, therefore, I concur in the judgment. G H

Rule discharged.

A IRELAND AND OTHERS v. LIVINGSTON

[HOUSE OF LORDS (Lord Chelmsford, Lord Westbury and Lord Colonsay), June 29, 30, 1871, February 15, April 30, 1872]

[Reported L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79;
1 Asp. M.L.C. 389]

Agent—Authority—Ambiguous instructions—Adoption of one meaning bona fide by agent—Intention of principal that instructions be read in other sense—Right of principal to repudiate acts of agent.

The respondent, a merchant in Liverpool, wrote to the appellants, commission agents in Mauritius, directing them to purchase for, and ship to, him, 500 tons of sugar, fifty tons more or less, at a certain price limit to cover cost, freight and insurance. The appellants, using due diligence, were unable to obtain more than 400 tons which were capable of being bought and shipped without exceeding the price fixed, and this they shipped in one vessel, intending, if possible, to procure the remaining quantity required to make up the order and to ship it in another. The respondent refused to accept the sugar sent on the ground that it was less than the quantity specified, and he wrote to cancel the order so as to prevent any further shipment. On the question whether his instructions required that the whole quantity ordered should be shipped in one vessel, the judges expressed different views as to their proper construction.

Held: if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent bona fide adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in the other sense, of which it is equally capable; accordingly, whatever might be the proper construction of the terms of the instructions, the respondent was under an obligation to accept the goods.

Agent—Purchase of goods—Purchase by agent for principal—Contract of sale by agent to principal—Stoppage in transitu by agent.

Per BLACKBURN, J.: An agent who, in executing an order, ships goods to his principal is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him and not to his unknown foreign correspondent. . . . The legal effect of the transaction between the commission merchant and the consignee who has given him the order is a contract of sale passing the property from the one to the other, and, consequently, the commission merchant is a vendor, and has the right of one as to stoppage in transitu.

Notes. Considered and Explained: *Jefferson v. Querner* (1874), 30 L.T. 867. Distinguished and Extended: *Imperial Ottoman Bank v. Cowan* (1874), 31 L.T. 336. Explained: *Re Tappenbeck, Ex parte Banner* (1876), 24 W.R. 476. Considered and Distinguished: *Cassaboglou v. Gibb* (1883), 11 Q.B.D. 797. Explained and Distinguished: *Lindsay, Gracie & Co. v. Barter* (1885), 1 T.L.R. 568. Considered: *Dufourcet v. Bishop* (1886), 18 Q.B.D. 373. Considered and Explained: *Loring v. Davis* (1886), 32 Ch.D. 625. Explained and Followed: *Swan v. Mellen* (No. 2) (1892), 36 Sol. Jo. 668. Considered and Applied: *Furness, Withy & Co. v. White*, [1894] 1 Q.B. 483. Explained and Followed: *Scholfield v. Londesborough*, [1895-9] All E.R. Rep. 282. Explained: *Dupont v. British South Africa Co.* (1901), 18 T.L.R. 24. Explained and Extended: *Miles v. Haslehurst* (1906), 23 T.L.R. 142. Considered and Explained: *Houlder v. Comr. of Public Works, Comr. of Public Works v. Houlder* [1908] A.C. 276. Explained and Extended: *Kepitigalla Rubber*

Estates v. National Bank of India, [1909] 2 K.B. 1010. Considered: *Biddell v. E. A Clemens Horst Co.*, [1911] 1 K.B. 934; *Landauer & Co. v. Craving and Speeding Bros.*, [1911-13] All E.R. Rep. 338. Considered and Explained: *Karberg & Co. v. Blythis, Green, Jourdain & Co.*, *Schneider v. Burgett and Newsam* (1915), 85 L.J.K.B. 665; *Weigall v. Runciman*, [1915] W.N. 401. Considered: *Gould v. South Eastern and Chatham Rail. Co.*, [1920] All E.R. Rep. 654; *Johnson v. Taylor*, [1920] A.C. 144. Applied: *Finn v. Shelton Iron, Steel and Coal Co.* (1924), 131 L.T. 213; *Westminster Bank v. Hilton* (1926), 136 L.T. 315. Considered: *Calico Printers' Association, Ltd. v. Barclays Bank* (1930), 145 L.T. 51; *Finska Cellulosaforeningen v. Westfield Paper Co.*, [1940] 4 All E.R. 473; *Morrison Steamship Co. v. Greystoke Castle S.S. (Cargo Owners)*, [1946] 2 All E.R. 696. Referred to: *Bank of England v. Vagliano Bros.*, [1891-4] All E.R. Rep. 93; *Ströms Bruks Aktie Bolag v. Hutchison*, [1905] A.C. 515; *E. Clemens Horst Co. v. Biddell Bros.*, [1911-13] All E.R. Rep. 93; *The Kronprinzessin Cecilie* (1915), 32 T.L.R. 139; *C. Groom, Ltd. v. Barber*, [1914-15] All E.R. Rep. 194; *Macmillan v. London Joint Stock Bank*, [1917] 2 K.B. 439; *Weigall v. Runciman* (1916), 85 L.J.K.B. 1187; *Manbre Saccharine Co., Ltd. v. Corn Products Co., Ltd.*, [1918-19] All E.R. Rep. 980; *Wilson, Holgate & Co. v. Belgian Grain and Produce Co.*, [1920] 2 K.B. 1; *Diamond Alkali Export Corpn. v. Bourgeois*, [1921] All E.R. Rep. 283; *Weiss, Biheller and Brooks v. Farmer*, [1923] 1 K.B. 226; *Portofino Tank Steamer Owners v. Berlin Derunaptha* (1934), 39 Com. Cas. 330; *Strathlorne Steamship Co. v. Andrew Weir & Co.* (1934), 40 Com. Cas. 168; *Colin and Shields v. W. Weddel & Co.*, [1952] 2 All E.R. 337.

As to ambiguous authority of agent, see 1 HALSBURY'S LAWS (3rd Edn.) 164, 183; as to agent's rights of stoppage in transitu, see *ibid.* 207; as to delivery of wrong quantity of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 97; as to c.i.f. contracts, see *ibid.* 164 et seq.; and for cases see 1 DIGEST (Repl.) 485-487, 748.

Cases referred to:

- (1) *Kreuger v. Blanck* (1870), L.R. 5 Exch. 179; 23 L.T. 128; 18 W.R. 813; 3 Mar. L.C. 470; sub nom. *Krenger v. Blanck*, 39 L.J.Ex. 160; 39 Digest (Repl.) 692, 1854.
- (2) *Johnston v. Kershaw* (1867), L.R. 2 Exch. 82; 36 L.J.Ex. 44; 15 L.T. 485; 15 W.R. 354; 1 Digest (Repl.) 482, 1259.
- (3) *Feise v. Wray* (1802), 3 East, 93; 102 E.R. 532; 1 Digest (Repl.) 647, 2225.

Also referred to in argument:

- Trueman v. Loder* (1840), 11 Ad. & El. 589; 3 Per. & Dav. 267; 9 L.J.Q.B. 165; 4 Jur. 934; 113 E.R. 539; 1 Digest (Repl.) 714, 2632.
- Bellingham v. Freer* (1837), 1 Moo. P.C.C. 333; 12 E.R. 841.

Appeal by the plaintiffs, commission agents, from a decision of the Court of Exchequer Chamber (KELLY, C.B., MARTIN and CHANNELL, BB., and KEATING, J.; MONTAGUE SMITH, J., and CLEASBY, B., dissenting), reported L.R. 5 Q.B. 516, on a Special Case reversing a verdict at the trial of the action awarding damages to the plaintiffs for the non-acceptance by the defendant of a quantity of sugar.

The appellants were commission agents in Mauritius; the respondent was a merchant at Liverpool. In July, 1864, the respondent sent to the appellants the following letter:

"Liverpool, July 25, 1864.

Dear Sir,—My opinion is that should the beet crop prove less than usual, there may be a good chance of something being made by importing cane sugar at about the limit I am going to give you as a maximum, say 26s. 9d. for Nos. 10 to 12, and you may ship me 500 tons to cover cost, freight, and insurance; fifty tons more or less of no moment if it enables you to get a suitable vessel. You will please provide insurance and draw

A upon me for costs thereof, as customary, attaching documents, and I engage to give same due protection on presentation. I should prefer the option of sending vessel to London, Liverpool, or the Clyde, but if that is not compassable, you may ship to either Liverpool or London."

B After the above letter had been written, Mr. Maitland, the appellants' agent at Liverpool, called at respondent's office, and, having been shown a copy of the letter, suggested, though without instructions from the appellants to do so, that it would be prudent for the respondent to send the following telegram to Mr. Ireland:

C "In writing to Mauritius, say Mr. Livingston's insurance is to be done with average, and, if possible, the ship to call for orders for a good port in the United Kingdom."

The respondent accordingly sent this telegram, which was forwarded by Mr. Ireland to the appellants at Mauritius. On Sept. 6, 1864, the appellants wrote to the respondent as follows:

D "We are in receipt of your esteemed favour of July 25, and take due note that in the hope of some good being done by importing sugar, you authorise us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. 10 to 12 D.S., at a cost of not exceeding 26s. 9d. per cwt., free on board, including costs, freight, and insurance; and your remarks regarding the destination of the vessel have also our attention, etc."

E When the letter of July 25 reached the appellants at Mauritius the price of sugar and rate of freight were too high to admit of the appellants purchasing and shipping at the limit prescribed by the respondent in his letter. In the course of September the appellants obtained an offer of freight at £2 10s. per ton by the ship *Ilma*, that freight being lower in consequence of the ship's agents being anxious to complete her cargo and despatch her, as her time charter had not much longer to run. The appellants then succeeded in purchasing from several brokers, in fourteen distinct lots, nearly 400 tons of sugar, of the specified quality, and shipped that quantity in the *Ilma* by Sept. 27. The appellants, though using all due diligence, were unable to obtain any more sugar of the specified quality, except at a price which would have exceeded the respondent's limit. On Oct. 26 the appellants received from the respondent a letter, dated Sept. 24, in which was this passage:

H "It escaped me to write to you in August, but I am hoping that the tenor of my letter in giving you limits will have prevented your acting for me until I have further written to you, i.e., conjecturing that your advices from other correspondents would supply the information as to a fuller supply of beet. The large receipt from Cuba, etc., has completely upset our prices for sugar, and it is difficult to form any opinion as to the future of the article. I would prefer for the present to do nothing, and am satisfied that low rates must rule for some time. . . . I will write to you further by the French steamer, on Oct. 7; but I fear your prices are not likely to fall to a point commensurate with our probable rates."

I This letter did not arrive till after the *Ilma* had sailed.

The appellants duly insured the sugar, and the cost price, together with other expenses, amounted to £9,468 11s.; for this sum the appellants drew a bill on the respondent, and remitted it to him, with the usual shipping documents, in letters of Sept. 20 and 30. The bill became due in February, 1865, but the respondent refused to pay it, and to accept the sugar on the ground that the sugar was not bought in accordance with his instructions, the quantity being less than he had directed, viz., 400 tons instead of 500 tons. The sugar was then

sold, the sale realizing £7,065 7s. 3d., after deducting expenses of the sale. A
This action was then brought for the difference between this amount and that of the bill.

To the pleas, alleging that the instructions of the respondent were not followed by the appellants, the appellants demurred, and on these demurrers the Court of Queen's Bench (SIR ALEXANDER COCKBURN, C.J., MELLOR and SHEE, JJ.) gave judgment in favour of the appellants: L.R. 2 Q.B. 99. On the trial of the issues before SIR ALEXANDER COCKBURN, C.J., the verdict was entered for the appellants, subject to the opinion of the court on a Case Stated; and in November, 1869, judgment was given for the appellants. The Court of Exchequer Chamber, however, reversed this judgment as above mentioned. Thereupon the present appeal was brought. B

The following judges were present at the hearing: MARTIN, B., BYLES, BLACKBURN, MONTAGUE SMITH and HANNEN, J.J., and CLEASBY, B. C

Giffard, Q.C., and Raymond for appellants.

Sir J. B. Karlake, Q.C., Butt, Q.C., and Crompton for respondent.

The question was put to the judges whether judgment ought to be entered for the appellants or for the respondent. D

Feb. 15, 1872. **CLEASBY, B.**—The question put to the judges in this case is whether judgment ought to be given for the appellants or for the respondent; and I answer it by saying that in my humble opinion the appellants are entitled to judgment. I have already expressed my opinion to that effect when the judgment in this case was given in the Exchequer Chamber. Upon further consideration I adhere to the judgment and reasons then given, and I am unwilling to occupy unnecessarily the time of your Lordships by repeating what is there expressed. It may be summed up in a few words. E

The answer to the question put depends upon the proper construction of two letters (July 25, 1864, from respondent to appellants, and Sept. 6, 1864, from appellants to respondent), with an addition to the first contained in a telegram. F
The second letter is only an acceptance of the instructions contained in the first, and the last sentence in the first letter gives a decisive key to its proper construction. It is in these words:

"I should prefer the option of sending vessel to London, Liverpool, or the Clyde, but if that is not compassable you may ship to either Liverpool or London." G

There are two events contemplated, because there is a preference. The preference is given to having a vessel at the disposal of the respondent as regards its destination. This involves necessarily that the whole cargo should belong to the respondent. He could not give a destination to a vessel containing cargo of other persons. The other alternative is shipping to one of two designated ports, London or Liverpool; and this can be as well done whether what is shipped is part of a cargo or a full cargo. As the first alternative of engaging a vessel to call for orders could not be had, the other alternative only remains, viz., to procure and ship 500 tons (fifty tons, more or less) to London or Liverpool. H
The question raised is whether, though the respondent's cargo need not occupy the whole ship, it is not essential that it should form one shipment on board one ship. I
Independently of any consideration founded upon the customary and necessary mode of executing such an order at Mauritius, it would be a reasonable construction of the instructions to say that if a vessel bound for one of the designated ports was ready to take 400 tons at an easy freight it would be right for the agent and his duty to take the opportunity afforded of acting upon the order; for the appellants at that time had by this letter of Sept. 6 accepted the employment of the respondent for the usual commission and reward,

A and were his agents, and bound to use due and reasonable care and diligence as such.

It was not a mere contract between vendor and vendee (like *Kreuger v. Blanck* (1), which will be shortly noticed), although after the goods were shipped a relation like that of vendor and vendee might arise. But when an order of this description is given to be executed at Mauritius (not an order of an unusual nature, but, as appears from the Case, a reasonable one), it seems to me B it would be unreasonable in dealing with the conduct of the agent to exclude from consideration the usual and customary mode of executing such orders. One statement appears to be conclusive of the case. For it is found as a fact that, supposing the instruction not to be limited to the engagement of an entire ship to call for orders, the appellants in shipping the 392 tons C acted in conformity with the usage, as it was, I submit, their duty to do.

One case was referred to in the course of the argument, and much relied upon by the learned counsel for the respondent, *Kreuger v. Blanck* (1). The decision in that case has really no bearing upon the present, for the following reasons: First, the propriety of executing the order by more than one shipment (which is the real question in the present case) was never under consideration; secondly, D in that case the question did not arise between principal and agent. The plaintiffs were timber merchants at Calmar in Sweden, and the defendant had ordered of them a certain cargo of laths. It was a case between vendor and vendee; there was one indivisible contract for a certain quantity, which the vendee was entitled to have executed before he could be called upon; thirdly, in that case the plaintiffs had shipped a cargo much larger than the E cargo ordered by the defendant, and upon the defendant refusing this larger cargo, the plaintiffs, when the vessel arrived at the port of discharge, selected out of the cargo a quantity corresponding with the defendant's order, and tendered it to him. There was no shipment made of the defendant's order, and the defendant thereby lost the benefit of giving a destination to the vessel; for the charter was to the Penarth Roads, to call for orders in the Bristol Channel, and F the defendant could not give these orders without accepting the whole cargo.

As this case has no bearing upon the present, I express no uncalled-for opinion as to the correctness of the judgment. In my humble opinion the appellants are entitled to succeed, and the judgment of the Queen's Bench to that effect ought to be upheld.

G **BLACKBURN, J.**—I will, with your Lordships' permission, deliver along with my own the answer of HANNEN, J., who authorises me to say he agrees in the reasons I am about to give to your Lordships. In answer to your Lordships' question, I have to say that in my opinion the judgment ought to be entered for the appellants.

The question depends almost entirely on the true construction of the letter H of July 25, 1864, from the respondent to the appellants. In that letter, as set out in the pleadings and Case, occurs the following passage:

"The limit I am going to give you as a maximum, say 26s. 9d. for numbers 10 to 12, and you may ship say 500 tons, to cover cost, freight, and insurance, 50 tons more or less, of no moment," etc.

I Probably if we had access to the original we should find that this is mis-copied, and that what was written was: "The limit I am going to give you as a maximum, say 26s. 9d., to cover cost, freight, and insurance, for Nos. 10 to 12, and you may ship me 500 tons, 50 tons, more or less of no moment," etc. Perhaps the words, "to cover cost, freight, and insurance," were interlined in the original, and the copyist has inserted the interlineation in the wrong place. At all events the letter must be construed as if the words were placed as I have suggested.

The terms at a price, "to cover cost, freight, and insurance payment by acceptance on receiving shipping documents," are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charterparty, bill of lading, and policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount which he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way. If the consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight, and insurance, the amount inserted in the invoice is the agreed price, and no commission is charged. In such a case it is obvious that if freight is high the consignor gets the less for the goods he supplies, if freight is low he gets the more. But inasmuch as he has contracted to supply the goods at this price he is bound to do so, though owing to the rise in prices at the port of shipment making him pay more for the goods, or of freight causing him to receive less himself, because the shipowner receives more, his bargain may turn out a bad one. On the other hand, if owing to the fall in prices in the port of shipment, or of freight, the bargain is a good one, the consignee still must pay the full agreed price. This results from the contract being one by which the one party binds himself absolutely to supply the goods in a vessel such as is stipulated for, at a fixed price, to be paid for in the customary manner; that is, part by acceptance on receipt of the customary documents, and part by paying the freight on delivery, and the other party binds himself to pay that fixed price. Each party there takes upon himself the risk of the rise or fall in price, and there is no contract of agency or trust between them, and, therefore, no commission is charged.

But it is also very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice is the actual cost and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature. It would be a positive fraud if, having bought the goods at a price including all charges below the maximum limit fixed in the order, he, the commission merchant, were instead of debiting his correspondent with that actual cost and commission, to debit him with the maximum limit; nor can I doubt that in an action brought against him as an agent for not accounting properly, this extra sum would be disallowed. The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering them, the freight being in no ways an element in the limit. But when, as in the present case, the limit is made to include cost, freight, and insurance, the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order; if it does the principal is not bound to take the goods. If by due exertions he can execute the order within those

A limits he is bound to do so as cheaply as he can, and to give his principal the benefit of that cheapness. The agent, therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission because there is a contract of agency.

I should apologise for stating so precisely what your Lordships doubtless know already, if it were not that I think one of the learned judges in the court below has fallen into a fallacy from not recollecting what I am sure he well knew. It is quite true that the agent who in thus executing an order ships goods to his principal is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house, and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall, to the owner of that wall; and just so does the property in the goods pass from the country producer to the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. The legal effect of the transaction between the commission merchant and the consignee who has given him the order is a contract of sale passing the property from the one to the other; and, consequently, the commission merchant is a vendor, and has the right of one as to stoppage in transitu. I, therefore, perfectly agree with the opinion expressed by MARTIN, B., in the court below, that the present is a contract between vendor and vendee; but I think he falls into a fallacy when he concludes therefrom that it is not a contract as between principal and agent. My opinion is, for the reasons I have indicated, that when the order was accepted by the appellants there was a contract of agency by which the appellants undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this super-added sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the appellants were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could.

If this view be correct, it shows that the point raised at your Lordships' Bar whether the evidence received was that of a custom does not really arise. A commission merchant using reasonable exertions to get the goods as cheap as possible ought to buy them in small parcels if the state of the market in the country is such that it is the reasonable way to get them. If the merchant would get the goods cheaper by giving a wholesale order to the manufacturer, which probably would be the case in England, where Manchester goods are ordered from a London or Liverpool commission agent, he ought to give the wholesale order. The evidence shows the circumstances under which the appellants acted, and that the course they pursued was a reasonable one under those circumstances.

I Having said thus much, I now come to what I take to be the real question, namely, What is the construction of the letter of July 25, 1864?

One question is whether the order required the appellants to procure a vessel which should carry the respondent's sugar and no other goods? I am of opinion that it does not. The letter expresses a wish that, if possible, the respondent should have the option of sending the vessel to London, Liverpool, or the Clyde. It is rarely possible to obtain a ship which is to call for orders unless the whole ship is chartered, and, therefore, it is probable that in order to give the respondent this option the appellants would have required to

charter the whole of a vessel. If a vessel could have been procured willing to obey the respondent's orders, and deliver his goods as required, I do not see what harm it would do the respondent if that ship was larger than was required, and the superfluous space was utilised in any way consistent with his contract. Therefore, if necessary, I should advise your Lordships to re-consider the decision of the Court of Exchequer in *Kreuger v. Blanck* (1). But it is not necessary to re-consider it, for the respondent gave the appellants the alternative of shipping either to Liverpool or London; and there is no reason at all why the shipper of goods direct to a port should take up the whole of the vessel.

The second question is whether the order for 500 tons, fifty more or less no object, and which, therefore, clearly required the appellants, if practicable, to procure the respondent at least 450 tons, is complied with by procuring about 392 tons, and shipping them in one vessel with the intention, if practicable, to procure the remaining quantity required to make up the order and ship them by another. As the respondent countermanded the order before the appellants could procure the other sixty tons, the case must be considered as if the appellants had actually procured and shipped the remaining sixty tons. This I have felt to be a more plausible objection than the other, but according to the view which I take of the law the appellants, having accepted the respondent's order, were not only entitled but bound to fulfil it in any reasonable way which they could. In *STORY ON AGENCY*, s. 170, it is said :

"The principal is not bound by the unauthorised acts of his agent, but is bound where the authority is substantially pursued, or so far as it is distinctly pursued. But the question may often arise whether in fact the agent has exceeded what may be deemed the substance of his authority. Thus, if a man should authorise an agent to buy 100 bales of cotton for him, and he should buy fifty at one time of one person, and fifty at another of a different person, or if he should buy fifty only, being unable to purchase more at any price, or at the price limited, the question might arise whether the authority was well executed. In general it may be answered that it was; because in such a case it would ordinarily be implied that the purchase might be made at different times of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed."

In *Johnston v. Kershaw* (2) the Court of Exchequer acted on this doctrine. In that case the order was from a Liverpool merchant to one at Pernambuco for 100 bales of cotton, and, though the order does not expressly say so, it is clear (from the usage of trade and the facts) that the 100 bales were to be shipped to Liverpool. The plaintiff purchased and shipped ninety-four bales only, and yet recovered their price, *CHANNELL, B.*, saying :

"I may add that the observation of *STORY, J.*, seems to me replete with common sense, and I make it the basis of my judgment. I am, therefore, of opinion this order must not be taken as an order to buy 100 specific bales of cotton at one time, but that the plaintiff by purchasing ninety-four bales has executed it with due and reasonable diligence."

This case was not noticed in the judgments in the Exchequer Chamber, but it is impossible to suppose that the three judges, *KELLY, C.B.*, and *MARTIN* and *CHANNELL, BB.*, who decided it, either overlooked their own decision, or intended to overrule it. I must suppose, therefore, that they distinguished it on the ground that in the order in the case at Bar there was enough to show that the respondent required one shipment, and one only, of the whole of what he ordered, so as to prevent that which would ordinarily have been due and reasonable diligence in the fulfilment of an order from being so in this Special Case.

A I do not doubt that the respondent might, by the use of proper terms, have so limited the appellants' authority, but I do not think he did so in fact. On this part of the case, MONTAGUE SMITH, J., has, in his judgment in the Court of Exchequer Chamber, accurately and clearly expressed what is my opinion. I cannot improve on what he has said, and, therefore, I refer to it without repeating it. It will be for your Lordships to decide whether the letter has the effect of so limiting the appellants' authority. For the reasons I have given I think it had not, and I am, therefore, of opinion that the judgment of the Exchequer Chamber is wrong.

C BYLES, J.—I think judgment ought to be entered for the appellants. The decision turns mainly on the construction of the letter of July 25, 1868; which letter seems to me to show that the relation existing between the parties was not that of vendor and vendee, but of agent and principal. The following expressions appear to me to indicate the relation of principal and agent; some of them more clearly, others less clearly; but all of them to be more naturally and easily reconcilable with the relation of principal and agent, than of buyer and seller. Without fatiguing your Lordships with separate observations on every one of these expressions, I would call attention to the words "circulars," "orders," "limit," "maximum," the expression "to cover cost," "draw upon me for costs." Moreover the words, "50 tons more or less are of no moment, if it enable you to get a suitable vessel," are, as it seems to me, very strong to show that this was an order from a principal to his agent; for otherwise the buyer would have put it into the power of the seller and exposed him to the temptation, should the price rise or fall, to vary the quantity sold to the extent of 20 or 25 per cent. to the disadvantage of the buyer. From the appellants' answer of Sept. 6 it is plain that they understood the respondent's letter as an authority to purchase and ship. I see nothing in the letter or telegram to make it an implied condition in the order that the whole quantity should be shipped in one ship, although that may have been and probably was contemplated by the respondent as the more probable event.

G MARTIN, B.—The question in this case is whether the respondent was bound to accept a bulk of 392 tons of sugar which was brought to London from Mauritius in a vessel called the *Ilma*. It depends almost entirely, if not altogether, upon a letter by the respondent to the appellants, dated July 25, 1864. The material part of the letter gives a limit as a maximum of 26s. 9d. per cwt. for certain qualities of sugar, and continues thus :

H "You may ship me 500 tons, to cover cost, freight, and insurance, 50 tons more or less of no moment, if it enables you to get a suitable vessel. You will please provide insurance and draw upon me for cost thereof as customary, attaching documents, and I engage to give same due protection on presentation. I should prefer the option of sending vessel to London, Liverpool, or the Clyde, but if that is not compassable you may ship either to Liverpool or London."

I About the same date a telegram was sent to one of the appellants, by the authority of the respondent, viz. :

"In writing to Mauritius, say Mr. Livingston's [the respondent] insurance is to be done with average, and, if possible, the ship to call for orders for a good port in the United Kingdom."

The question is whether this order must be performed by one bulk of sugar in one ship and conveyed to one port, or whether it may not be performed by two or more bulks of sugar in two or more ships. I do not think there can be any doubt as to the relation created between the appellants and the respondent

upon the former accepting the order contained in the letter. The appellants were merchants and commission agents, not planters, and upon accepting the order undertook to use due diligence to carry it out. When they bought the sugar they did so on their own account; and when they had collected a sufficient quantity to enable them to perform the order, and thought fit to appropriate it for or to the respondent, the relation of vendor and vendee would arise: *l'cise v. Wray* (3). A priori, I should think it likely that a Liverpool merchant ordering 500 tons of sugar from abroad to the United Kingdom would desire that it should constitute the entire cargo of one ship; this would give him greater facility for selling the cargo afloat, or for having the ship call for orders at Cork or Falmouth, and other advantages. I also think there is nothing more unlikely than that a merchant giving an order for 500 tons of sugar should intend that it was to be forwarded to him in several bulks, viz., 100 tons in one ship to London, another 100 tons in another ship to Liverpool, a third 100 tons in a third ship to Glasgow, and so on, or indeed in several separate bulks to one and the same port. I cannot think that a man of sense and intelligence would intentionally subject himself to be so dealt with. A merchant or agent abroad could not perform such an order by sending the 500 tons in bulks of a ton each in 500 different ships; and if he can forward it in more than one ship it must of necessity (in case of litigation) be a question for a jury whether the shipments were in reasonable bulks—a question, upon the result of which no man could form a judgment beforehand, and which would have to be decided by what is called the discretion, or, in other words, the caprice of a jury, and much more likely by their prejudices. I do not believe that any sane man would intentionally give such an order or subject himself to such a litigation. The question, however, must be decided by the letter and telegram. A similar question arose in the Court of Exchequer in *Kreuger v. Blanck* (1), and *CLEASBY, B.*, there stated in substance, as applicable to this case, and I think correctly,

“that the order is contained in the letter, that the question turns on the construction of it, and that the court ought to abide by the natural meaning of the words used, unless exceptional circumstances were found to the contrary.”

There are no exceptional circumstances in the present case, and the question is, What is the natural, grammatical, fair, and reasonable meaning of the letter? “Vessel” in the singular number is twice used. First, “a suitable vessel to carry 450 to 550 tons of sugar”; secondly, the respondent states his preference of the option of sending “the vessel” to London, Liverpool, or the Clyde. Again, the telegram states “if possible, the ship” is to call for orders for a good port in the United Kingdom. To me this seems to indicate in the clearest manner that there was to be one ship, one port, and one bulk. I have repeatedly read and considered it, and I could understand, if the appellants had bought all the sugar that could be procured at Mauritius within the respondent's limits, and had shipped it in one vessel for one of the named ports, it might have been contended that the respondent was bound to accept it as a fulfilment and completion of the order, but I cannot understand why it should be deemed the essential part of the order that 500 tons should be forwarded, but a non-essential part of the order that it should be forwarded in one vessel to one port. I do not desire to occupy your Lordships' time by further verbal criticism, but beg to refer you to the considered judgment of *KELLY, C.B.*, *CHANNELL, B.*, and *KEATING, J.*, whose reasoning is, in my opinion, conclusive in favour of the respondent.

As I have already said, I think the case depends upon the letter of July 25, and I think the custom stated in the Case has no bearing upon it, but I desire to call attention to the letter of the appellants to the respondent of Sept. 6,

A 1864, which to my mind clearly shows that the appellants understood the respondent's letter of July 25 in the sense in which I understand it. The appellants there write :

B "By the arrival of our packet of the 24th ultimo, we are in receipt of your esteemed favour of July 25, and take due note that in the hope of some good being done by importing sugar, you authorise us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. . . . at a cost not exceeding 26s. 9d. per ton free on board, including cost, freight, and insurance; and your remarks regarding the destination of the vessel have also our attention."

C Here it is to be observed that the appellants twice indicate their understanding of the respondent's letter; first they speak of "a cargo" about 500 tons, which clearly indicates one bulk, the full loading of a ship; and, secondly, they speak of the destination of the vessel in the singular number. This to my mind speaks as clearly as words can speak, that they were to provide one cargo and forward that cargo to England in one ship; and I cannot but think any intelligent practical man would understand it in the same sense. I, therefore, think that the respondent was under no obligation to accept the 393 tons shipped in the *Ilma*, and in my opinion the judgment of the Court of Exchequer Chamber was right; and my answer to your Lordships' question is that judgment ought to be entered for the respondent.

E Their Lordships took time for consideration.
April 30, 1872. The following opinions were read.

F **LORD CHELMSFORD.**—The difference of opinion which has prevailed among the judges in this case, shows that the order given to the appellants by the respondent in his letter of July 25, 1864 (upon which the question principally turns), is of doubtful construction; and this, in my mind, is a sufficient ground in itself for bringing me to the conclusion at which I have arrived.

I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent, though the appellants might, in some respects, be looked upon as vendors to the respondent, so as to give them a right of stoppage in transitu. But the transaction began as a contract of agency, and in that light I am disposed to consider it.

G It appears to me that, if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent bona fide adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in the other sense, of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority, to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms. This view of the case will, in my opinion, dispense with the necessity of determining which is the more correct construction of the contract, that which was adopted unanimously by the Court of Queen's Bench, and by two of the judges of the Exchequer Chamber, or that which the four other judges of the Exchequer Chamber considered to be the right interpretation of it. It is sufficient for the justification of the appellants, that the meaning which they affixed to the order of the respondent is that which is sanctioned by so many learned judges. It would be most unjust, after the appellants have honestly acted upon what they conceived to be the wishes of the respondent, as expressed in his order, that he should be allowed to repudiate the whole transaction, and throw the loss of it upon the appellants, in order (as his correspondence shows) to escape from a speculation which had become a losing one in consequence of the market prices of sugars having fallen. The short ground upon which I think the case may be

disposed of, renders it unnecessary for me to express my opinion as to the proper interpretation of the letters upon which the courts below have proceeded. A

I own that if I were called upon to do so I should have great difficulty in arriving at any satisfactory conclusion upon the subject, though, after much hesitation, I should have been inclined to adopt the opinion of the majority of the judges as to the construction of the contract. But this very difficulty confirms me in the view I have taken of the mode in which the case ought to be dealt with, for all the doubt and perplexity which hang over it have been occasioned by the respondent failing to express clearly and precisely how he wished the appellants to act. The appellants have construed the meaning of the respondent's language in a manner for which there was a reasonable excuse, if not a complete justification, and with an honest desire to perform their duty to him, and have obeyed his order according to their understanding of its meaning. In determining who is to bear the loss arising out of the transaction, it would be hard and unjust to make it fall upon the appellants, the innocent agents, who have followed what they honestly considered to be the directions of their principal, and it ought, in justice, to be borne by the respondent, who has brought it upon himself by his want of precision and certainty in the language employed by him in communicating his order to the appellants. I submit to your Lordships that the judgment of the Court of Exchequer Chamber ought to be reversed. B C D

LORD WESTBURY.—This is a case which depends entirely on its own peculiar circumstances. There is hardly any principle involved in it. The question turns on the construction of a certain letter. So far as it is necessary to express my opinion, I am of opinion that the conclusion arrived at by the majority of the judges on that question of construction is right. But whether it be right, or whether it be open to question, I concur entirely in the principles of the decision which has just been enunciated. I, therefore, come to the conclusion that the four judges in the Exchequer Chamber were wrong, and that judgment ought to be given for the appellants. E F

LORD COLONSAY.—I have only a few words to add. I do not know that we are compelled to fix absolutely the construction to be put on these documents. I am certainly of opinion that the construction put upon them by the Court of Queen's Bench is the true construction. I think that, in the position in which the appellants were placed as agents for the respondent, they were, in the circumstances which occurred, perfectly entitled to send the goods as they did. But I also think that the view taken by my noble and learned friend who first addressed the house is very conclusive of the case, and that it is unnecessary for us to go further than to arrive at that conclusion. The agents who sold the goods are not to be held responsible for having adopted one of the constructions of which the document, as transmitted to them by their principal, was fairly capable. G H

Appeal allowed.

A

CORY AND OTHERS v. THAMES IRONWORKS CO.

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn and Mellor, JJ.), January 17, 1868]

B

[Reported L.R. 3 Q.B. 181; 37 L.J.Q.B. 68; 17 L.T. 495;
16 W.R. 456]

Sale of Goods—Non-delivery—Damages—Article intended to be used by buyer for special purpose unknown to seller—Belief by seller that article to be applied to ordinary purposes.

C

Where the purchaser of a chattel intends to apply it for a special purpose not known to the seller, and the seller understands and believes that the article will be applied to ordinary purposes, the damages recoverable for non-delivery are to be measured by the profits which would be made by the ordinary use of the chattel.

D

Notes. Followed: *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), L.R. 6 Eq. 396. Considered: *Elbinger Akt. v. Armstrong* (1874), L.R. 9 Q.B. 473; *Bostock v. Nicholson*, [1904] 1 K.B. 725; *Payzu, Ltd. v. Saunders*, [1919] 2 K.B. 581. Considered and Applied: *Montevideo Gas and Drydock Co. v. Clan Line Steamers* (1921), 37 T.L.R. 544. Considered: *Saint Line, Ltd. v. Richardsons, Westgarth & Co.*, [1940] 2 K.B. 99; *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997. Referred to: *British Columbia Sawmill Co. v. Nettleship* (1868), L.R. 3 C.P. 499; *Barratt v. London, Brighton and South Coast Rail. Co.* (1877), De Colyar's County Court Cases, 195; *Monarch Steamship Co. v. A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1; *Marles v. Philip Trant & Sons, Ltd. (Mackinnon Third Party) (No. 2)*, [1953] 1 All E.R. 651.

E

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As to remoteness of damage in contract, see 11 HALSBURY'S LAWS (3rd Edn.) 274-276; as to damages for non-delivery of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 148 et seq.; as to damages for breach of building contract, see 3 HALSBURY'S LAWS (3rd Edn.) 486 et seq.; and for cases see 17 DIGEST (Repl.) 117 et seq.

Case referred to:

G

(1) *Hadley v. Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

Special Case to determine what damages, if any, the plaintiff was entitled to recover for the non-delivery by the defendants of a derrick.

H

The plaintiffs were coal merchants and shipowners, and had by far the largest import trade in coal from Newcastle and other places into the port of London. The defendants were iron manufacturers and shipbuilders in London. The plaintiffs had introduced at the docks where they discharged the cargoes of coal from their ships a new and expeditious mode of unloading the coal by means of iron buckets, which were worked by hydraulic pressure over powerful cranes, and at this time the plaintiffs' trade having considerably increased, they were desirous of improving the accommodation afforded in the discharge of their vessels by the above mode. Of this, however, the defendants were not aware. At this time the defendants had been building for a company called the Patent Derrick Co., Ltd. the hull of a large vessel called a patent boom derrick, which was constructed and filled with heavy and powerful machinery for raising sunken vessels and other similar purposes requiring great power. The derrick was a large flat-bottomed iron vessel or float two hundred and fifty feet long by ninety feet wide, and fourteen feet deep, divided by iron bulkheads of great strength into more

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than eighty compartments, measuring generally fifteen feet long by thirteen feet wide, and she was decked over all, and had hatchways leading from the deck to the interior. A

During the construction of this vessel the Patent Derrick Co. became insolvent, and as the defendants could not obtain payment for the vessel, they were obliged to take it upon their own hands, and sell it for the best price they could obtain. Accordingly, it was first put up for sale by auction on Aug. 28, 1861, but no sale being then effected, the plaintiffs proposed to purchase it from the defendants by private contract, and an agreement to purchase the derrick was signed on Oct. 1, 1861, the derrick to be delivered within three months. The plaintiffs purchased the derrick to erect and place in it large hydraulic cranes and machinery similar to that they had previously used at the docks, and by means of these cranes to tranship their coals from colliers into barges, without the necessity for any intermediate landing, the derrick for this purpose being moored in the River Thames, and the plaintiffs paying the conservators of the river a large rent for allowing it to remain there. The derrick was the first vessel of the kind that had ever been built in this country, and the purpose to which the plaintiffs sought to apply it was entirely novel and exceptional. No hull or other vessel had ever been fitted either by coal merchants or others in a similar way or for a similar purpose. The defendants were unaware of these special purposes for which the plaintiffs designed the derrick. They considered that the plaintiffs were purchasing it for use as a coal store, which was the most obvious use to which such vessels would be applied. It was not ready for delivery till May, 1862, and some damage had been done to it in the meantime, and actual delivery did not take place till July 1, 1862. B
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The plaintiffs, in anticipation of the delivery of the said hull in January, 1862, entered into a contract with Sir William Armstrong for the construction and delivery to them at a very heavy outlay of the necessary machinery for the purpose for which they purchased the said hull as aforesaid, and in consequence of the delay in the delivery of the hull by the defendants, the plaintiffs were prevented from taking delivery of the said machinery from Sir William Armstrong, and the plaintiffs, on July 25, 1862, paid Sir William Armstrong the sum of £3,000, the interest of which was lost to them. The plaintiffs also purchased at a large cost two steam tugs to be used in conjunction with the hull in towing the coal barges to and from the same, and which steam tugs were comparatively useless to the plaintiffs during the time the said hull was undelivered, and the interest of the money expended on the same was lost to the plaintiffs, but none of these circumstances were known to the defendants. The most obvious use to which the derrick would have been put by the plaintiffs (if not applied to the special purpose which they had in view) was to serve as a coal store, and the arbitrator found that the amount which the plaintiffs would have made by so using it or letting it for use was £420. He also found that £50 represented the amount of injury done to the derrick between the time of sale and delivery. The question for the decision of the court was whether the plaintiffs were entitled to recover against the defendants the whole or some, and if some, which of the heads of damage above enumerated. F
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Brown, Q.C. (with him *Watkin Williams*) for the plaintiffs. I

Coleridge, Q.C. (with him *Garth, Q.C.*, and *Philbrick*) for the defendants.

SIR ALEXANDER COCKBURN, C.J.—I think the construction sought to be put on *Hadley v. Baxendale* (1) in the present case is not the correct one. If it were then it would follow that whenever the seller of any article was not made aware of the special purpose contemplated by the purchaser, but thought the purpose an entirely different one, no damages could be recovered from the seller for not delivering it.

A I think the true principle is this, that where the buyer may have sustained a loss from the non-delivery of an article intended to be applied to some special purpose, the seller cannot be called on to pay it if it were not within the scope of his contemplation at the time of sale. Although the buyer sustains this actual damage, it would not be reasonable to call on the seller to pay it. But to the extent to which the seller contemplated that on non-delivery the profits which

B would otherwise be realised would be lost; to that extent he ought to be made to pay them. So far as he understood and believed that the article would be applied to ordinary purposes, to that extent it is no hardship to make him liable. This, I think, should be the measure of such damages.

C **BLACKBURN, J.**—I am entirely of the same opinion. I think it all comes to this: The measure of damages is what might reasonably be expected in the ordinary course of things to result from the non-fulfilment of the contract. The reason is that if exceptional damage were allowed it would be hard on the seller, because if he contemplated it he might have charged an increased price, or stipulated for more time, or guarded himself in some other way. The argument of counsel for the defendants would come to this, that damages are not recoverable

D except for that particular use of the thing sold which was in the contemplation of both the parties. That would not be just, nor do I think that that doctrine is expressed in *Hadley v. Baxendale* (1). What the arbitrator finds here is that what the defendants supposed when they were agreeing to furnish the derrick was that it was intended to be used in the most ordinary way, as a coal store, and I think that the plaintiffs should recover damages to the extent of what they

E have lost in that respect.

MELLOR, J., concurred.

Judgment for plaintiffs for £420 and £50.

SMITH v. WHITE

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), March 9, 10, 1866]

[Reported L. R. 1 Eq. 626; 35 L.J.Ch. 454; 14 L.T. 350;
30 J.P. 452; 14 W.R. 510]

Contract—Immoral purpose—Use of premises as brothel—Use by assignee of lease—Assignor aware of use—Right of assignor to recover from assignee for dilapidations.

H *Landlord and Tenant—Covenant—Covenant by assignee to indemnify assignor from performance of covenants in lease—Assignee's immoral use with assignor's knowledge—Enforcement of covenant.*

A lessee assigned his lease to L. who, to the lessee's knowledge and in contravention of a covenant in the lease, used the premises as a brothel. L. covenanted to perform the lessee's covenants and to keep him indemnified respecting the performance thereof. At the expiration of the term, L. being dead and his representatives having failed to satisfy the lessor's claim for dilapidations, the lessee was obliged to pay the lessor a sum in settlement of his claim. The lessee now sought to recover that sum from L.'s estate.

I **Held:** the lessee being aware of the use to which the premises were put, every right and obligation arising out of the contract of assignment, including the covenant of indemnity, was affected by the taint of immorality, and he could not recover as a creditor of L.'s estate.

Bowry v. Bennett (1) (1808), 1 Camp. 348, applied.

Notes. Referred to: *Upfill v. Wright*, [1911] 1 K.B. 506.

As to contracts being void on the ground of immorality, see 8 HALSBURY'S LAWS (3rd Edn.) 129, 149, and for cases see 12 DIGEST (Repl.) 309. As to letting for immoral purposes, see 23 HALSBURY'S LAWS (3rd Edn.) 433; and for cases see 31 DIGEST (Repl.) 159, 463.

Cases referred to:

- (1) *Bowry v. Bennett* (1808), 1 Camp. 348, N.P.; 12 Digest (Repl.) 308, 2370.
- (2) *Jennings v. Throgmorton* (1825), Ry. & M. 251, N.P.; 31 Digest (Repl.) 158, 2961.

Also referred to in argument:

Burnett v. Lynch (1826), 5 B. & C. 589; 8 Dow. & Ry.K.B. 368; 4 L.J.O.S.K.B. 274; 108 E.R. 220; 31 Digest (Repl.) 458, 5851.

Wolveridge v. Steward (1833), 1 Cr. & M. 644; 3 Moo. & S. 561; 3 Tyr. 637; 3 L.J.Ex. 360; 149 E.R. 557, Ex. Ch.; 31 Digest (Repl.) 458, 5849.

Gas Light and Coke Co. v. Turner (1840), 6 Bing. N.C. 324; 8 Scott. 609; 9 L.J.Ex. 336; 133 E.R. 127, Ex. Ch.; 31 Digest (Repl.) 159, 2970.

Fisher v. Bridges (1854), 3 E. & B. 642; 1 Jur.N.S. 157; 118 E.R. 1283; sub nom. *Bridges v. Fisher*, 23 L.J.Q.B. 276; 23 L.T.O.S. 223; 18 J.P. 599; 2 W.R. 706; 2 C.L.R. 928, Ex. Ch.; 12 Digest (Repl.) 310, 2387.

Collins v. Blantern (1767), 2 Wils. 341; 95 E.R. 847; 12 Digest (Repl.) 290, 2229.

Girardy v. Richardson (1793), 1 Esp. 13, N.P.; 31 Digest (Repl.) 158, 2958.

Ritchie v. Smith (1848), 6 C.B. 462; 3 New Mag. Cas. 56; 18 L.J.C.P. 9; 12 L.T.O.S. 148; 12 J.P. 822; 13 Jur. 63; 136 E.R. 1329.

Paxton v. Popham (1808), 9 East. 408; 103 E.R. 628; 35 Digest (Repl.) 315, 310.

R. v. Rice and Wilton (1866), L.R. 1 C.C.R. 21; 35 L.J.M.C. 93; 13 L.T. 678; 12 Jur.N.S. 126; 14 W.R. 288; 10 Cox, C.C. 155, C.C.R.; 15 Digest (Repl.) 903, 8707.

W—— v. B——, B—— v. W—— (1863), 32 Beav. 574; 55 E.R. 226; sub nom. *Willyams v. Bullmore, Bullmore v. Willyams*, 33 L.J.Ch. 461; 9 L.T. 216; 9 Jur.N.S. 1115, 11 W.R. 506; 12 Digest (Repl.) 310, 2388.

Houle v. Baxter (1802), 2 East. 177; 102 E.R. 565; 12 Digest (Repl.) 609, 4713.

Pownd v. Ferrand (1827), 6 B. & C. 439; 9 Dow. & Ry.K.B. 603; L.J.O.S.K.B. 176; 108 E.R. 513; 12 Digest (Repl.) 591, 4579.

Walker v. Perkins (1764), 1 Wm. Bl. 517; 3 Burr. 1568; 96 E.R. 299; 7 Digest (Repl.) 174, 57.

Bartlett v. Vinor (1692), Carth. 251; Skin. 322; 90 E.R. 750; 12 Digest (Repl.) 304, 2336.

Summons taken out in the administration of the estate of Edward John Lacey, the assignee of a lease, by which the assignor, the plaintiff, Henry Smith, under a covenant of indemnity in the deed of assignment, sought to recover from Lacey's estate a sum which he had paid to the head lessor for dilapidations under the lease.

The lease was granted in 1843 by the Marquis of Exeter to the plaintiff, who became lessee of the Fountain Tavern, in Catherine Street, Strand, for a term of twenty-one years, at a rental of £150. The lease contained a covenant to repair and to yield up the premises in good repair at the end of the term, and it also contained a covenant that the house should not be used as a brothel during the term.

In December, 1845, the plaintiff agreed to sell this lease, with the furniture and fixtures of the house, to Edward John Lacey for £1,400. This agreement was afterwards carried out by means of an under-lease, the rent being fixed at the rate of £9 per week; the under-lease containing a covenant that the house should not be used as a brothel, and a proviso for re-entry upon nonpayment of the rent or breach of any of the covenants.

A By deed dated in March, 1850, the plaintiff assigned these premises to Lacey for all the residue of the term granted by the lease of 1843. The assignment contained a covenant by Lacey to pay the rent, and observe and perform the lessee's (plaintiff's) covenants contained in the original lease, and to save, defend, keep harmless, and indemnify the plaintiff from the payment, observance, and performance thereof.

B In 1864, the lease of 1843 expired, and, Lacey being dead, and his representatives failing to pay the Marquis of Exeter's claim for dilapidations, the plaintiff was obliged to pay the sum of £65 in satisfaction of that claim. He now sought to have that sum repaid to him from Lacey's estate under the indemnity clause in the deed of assignment.

C Lacey's estate was being administered in chambers by summons taken out by the plaintiff; this summons was adjourned into court upon the question whether the estate was liable to answer this claim. The defence set up by Lacey's representatives was, that the contract being tainted with immorality the debt could not be recovered, as it was, a notorious fact that the house had been used as a brothel for many years past, since had it not been used as such, it could not have commanded so high a rent. The plaintiff swore that he derived no benefit from the purpose for which the house was used, but did not swear that he did not know it was used for immoral purposes.

Baily, Q.C., and *D. Jones* for the plaintiff.

Glasse, Q.C., and *Barnard* for persons interested in the estate of Lacey.

E **KINDERSLEY, V.-C.**—On the authorities cited it appears to be impossible to hold that the plaintiff has any right to recover this money from Lacey, as his claim arises out of an illegal transaction, that is, a transaction which was intended to carry into effect an immoral purpose. From the evidence it appears that for forty years the Fountain Tavern had been used as a brothel by persons who successively occupied it, either as lessees or otherwise, and that it was perfectly well-known to the plaintiff that it had been, and was continuing to be, so used. He granted an under-lease to Lacey, who already occupied it under him, and was a brothel-keeper, and known to be so by the plaintiff, at a rent of £9 a-week. Knowing this, and that that sum could not possibly be paid for this miserable place unless the house was used for that purpose, he contracted to assign the lease to Lacey, the premium for the assignment to be paid by instalments.

G It is clear, on the authorities, that out of such a contract as that no legal right can be created; and that no action can lie for the rent, or for breach of any covenant for anything arising out of the transaction. The case most nearly resembling this is *Jennings v. Throgmorton* (2), where a house was let to a prostitute, and when the lessor subsequently discovered that she was such, he still continued to allow her to reside and carry on the same calling. It was held in that case that the whole transaction was so tainted by immorality that the lessor could not recover. The only difference between that case and the present is, that in that case there was a weekly tenancy, so that the lessor might at any time have determined the tenancy without the impediment of any existing lease. There is another case of *Bowry v. Bennett* (1), where a milliner supplied articles of dress to a prostitute, knowing the purpose for which they were to be used, and it was there also held that the claim must fail by reason of the fact that she knew of the object, and expected to be paid out of the profits of the defendant's trade. That is exactly this case. The plaintiff knew that the means of paying the high rent which was to be paid by Lacey for the premises, would be derived from the profits of the immoral trade to be carried on in the house; and although he had no lien on those profits, he expected to be paid out of them, and knew that unless Lacey carried on such trade he would not be able to pay the rent. The principle, therefore, of *Bowry v. Bennett* (1) is applicable to the present case.

It has been argued on the part of the plaintiff that his claim is not a claim for rent, but for money which Lacey ought to have paid, and which the plaintiff has been forced to pay under his covenant with the Marquis of Exeter contained in the original lease; and that it is in effect money paid by the plaintiff to the use of Lacey, which ought to be repaid to him out of Lacey's estate. But it appears to me that this claim arises just as much out of the immoral contract, and is just as much affected by the taint of immorality as a claim for rent. Neither can the ingenious argument prevail that the lease being void, the assignment was only voluntary. I am of opinion that every right and obligation arising out of this contract is affected by the taint of immorality, and that the plaintiff cannot, therefore, be regarded as a creditor of Lacey.

Order accordingly.

BENNETT v. BENNETT

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), November 8, 9, 12, 1864]

[Reported 2 Drew. & Sm. 266; 34 L.J.Ch. 34; 11 L.T. 362;
10 Jur.N.S. 1170; 13 W.R. 66; 62 E.R. 623]

Will—Name—Condition of bequest that beneficiary should take testator's name—Satisfaction by taking testator's name as surname or as christian name.

A testator excepted from a general devise and bequest of his property certain real and personal estate "of which my sister A.B. shall only receive the interest and rent during her natural life, and afterwards to A.B.'s eldest son on his taking the name of M., but should he refuse to take the name of M., or my sister A.B. depart this life without a son, then the said property shall go to T.P. on his taking the name of M., and so on to his heirs, each taking the name of M., none of them being allowed to touch the principal, and no one shall, after my sister A.B., inherit the said property or enjoy the interest who does not take or possess the name of M." A.B., who had no issue at the testator's death, had subsequently four sons, to each of whom the name of M. was given at baptism.

Held: as to the realty, A.B. took an estate for life, with remainder in fee to her firstborn son, and as to the personalty, the firstborn son took absolutely subject to his mother's life-interest.

Held also: it was equally a compliance with the condition whether the beneficiary took the name of M. as a surname or as a Christian name.

Semble: the court will not necessarily hold a condition as to name and arms a condition subsequent, although it leans in favour of such a construction.

Notes. Considered: *Re Fry, Reynolds v. Denne*, [1945] 2 All E.R. 205. Referred to: *Re Greenwood, Goodhart v. Woodhead*, [1902] 2 Ch. 198; *Re Spitzel's Will Trusts, Spitzel v. Spitzel*, [1939] 2 All E.R. 266.

As to names and arms clauses, see 34 HALSBURY'S LAWS (3rd Edn.) 507-509; and for cases see 35 DIGEST (Repl.) 589-597.

Cases referred to in argument:

Doe d. Garrod v. Garrod (1831), 2 B. & Ad. 87; 9 L.J.O.S.K.B. 149; 109 E.R. 1076; 44 Digest 1279, 11067.

Jobson's Case (1597), Cro. Eliz. 576; 78 E.R. 820; 44 Digest 828, 6803.

Footner v. Cooper (1853), 2 Drew. 7.

- A** *Randall v. Tuchin* (1815), 6 Taunt. 410; 2 Marsh. 113; 128 E.R. 1094; 44 Digest 700, 5426.
- Doe d. Knott v. Lawton* (1838), 4 Bing. N.C. 455; 1 Arn. 204; 6 Scott, 303; 7 L.J.C.P. 288; 2 Jur. 443; 132 E.R. 863; 44 Digest 700, 5427.
- Knight v. Selby* (1841), 3 Man. & G. 92.
- B** *Robinson v. Hicks* (1758), 3 Bro. Parl. Cas. 180; 1 E.R. 1255; sub nom. *Robinson v. Robinson*, 1 Burr. 38; 1 Keny. 298; 2 Ves. Sen. 225, H.L.; 44 Digest 934, 7900.
- Doe d. Burrin v. Charlton* (1840), 1 Man. & G. 429; 1 Scott, N.R. 290; 133 E.R. 401; 44 Digest 1274, 11017.
- Knight v. Ellis* (1789), 2 Bro. C.C. 570; 29 E.R. 312, L.C.; 44 Digest 1263, 10911.
- C** *Re Wynch's Trusts, Ex parte Wynch* (1854), 5 De G.M. & G. 188; 2 Eq. Rep. 1025; 23 L.J.Ch. 930; 23 L.T.O.S. 259; 18 Jur. 659; 2 W.R. 570; 43 E.R. 842, L.C. & L.J.J.; 44 Digest 1264, 10919.
- Doe d. Gallini v. Gallini* (1835), 3 Ad. & El. 340; 4 Nev. & M.K.B. 894; 4 L.J.Ex. 337; 111 E.R. 442, Ex. Ch.; 44 Digest 1274, 11014.
- Monypenny v. Dering* (1852), 2 De G.M. & G. 145; 22 L.J.Ch. 313; 19 L.T.O.S. 320; 17 Jur. 467; 42 E.R. 826, L.C.; 44 Digest 1288, 11094.
- D** *Dunk v. Fenner* (1831), 2 Russ. & M. 557; 39 E.R. 506; 44 Digest 1259, 10875.
- Earl of Tyrone v. Marquis of Waterford* (1860), 1 De G.F. & J. 613; 29 L.J.Ch. 486; 2 L.T. 397; 6 Jur.N.S. 567; 8 W.R. 454; 45 E.R. 499, L.C. & L.J.J.; 44 Digest 1020, 8777.
- Hill v. Rattey* (1862), 2 John. & H. 634; 70 E.R. 1212; sub nom. *Hill v. Potts*, 31 L.J.Ch. 380; 5 L.T. 787; 8 Jur.N.S. 555; 10 W.R. 439; 39 Digest (Repl.) 146, 346.
- E** *Moore v. Cleghorn* (1847), 10 Beav. 423; 16 L.J.Ch. 469; 11 Jur. 958; 50 E.R. 645; affirmed (1848), 17 L.J.Ch. 400; 12 L.T.O.S. 265; 12 Jur. 591, L.C.; 44 Digest 989, 8459.
- F** *Smith v. Smith* (1861), 11 C.B.N.S. 121; 31 L.J.C.P. 25; 5 L.T. 447; 8 Jur.N.S. 459; 10 W.R. 18; 142 E.R. 741.
- Lyon v. Mitchell* (1816), 1 Madd. 467; 56 E.R. 172; 44 Digest 1261, 10894.
- Trent v. Hanning* (1804), 1 Bos. & P.N.R. 116; (1805), 10 Ves. 495; (1806), 7 East, 97; 3 Smith, K.B. 69; 103 E.R. 37; 43 Digest 728, 1650.
- Plenty v. West* (1848), 6 C.B. 201; 136 E.R. 1227; 44 Digest 666, 5051.
- G** *Milliner v. Robinson* (1600), Moore, K.B. 682; 72 E.R. 837; sub nom. *Bifield's Case*, cited 1 Vent. at p. 231; 44 Digest 934, 7898.
- Charlton v. Craven* (1823), cited 2 B. & C. at p. 524; 3 Dow. & Ry.K.B. at p. 808.
- Gulliver d. Corrie v. Ashby* (1766), 4 Burr. 1929; 1 Wm. Bl. 607; 98 E.R. 4; 35 Digest (Repl.) 792, 75.
- Woodhouse v. Herrick* (1855), 1 K. & J. 352; 3 Eq. Rep. 817; 24 L.J.Ch. 649; 3 W.R. 303; 69 E.R. 494; 35 Digest (Repl.) 792, 77.
- H** *Doe d. Luscombe v. Yates* (1822), 5 B. & Ald. 544; 1 Dow & Ry.K.B. 187; 106 E.R. 1289; 35 Digest (Repl.) 796, 94.
- Davies v. Lowndes* (1835), 1 Bing. N.C. 597; 1 Hodg. 125; 2 Scott, 71; 4 L.J.C.P. 214; 131 E.R. 1247; 35 Digest (Repl.) 786, 18.
- Egerton v. Earl Brownlow* (1853), 4 H.L. Cas. 1; 8 State Tr. N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 44 Digest 460, 2806.
- I** *Long v. Blackall* (1797), 3 Ves. 486; 30 E.R. 1119, L.C.; 44 Digest 897, 7562.
- Mellish v. Mellish* (1824), 2 B. & C. 520; 3 Dow. & Ry.K.B. 804; 2 L.J.O.S.K.B. 45; 107 E.R. 477; 44 Digest 934, 7903.
- Lovelace v. Lovelace* (1585), 1 And. 132; Cro. Eliz. 40; 123 E.R. 392; sub nom. *Lovelace's Case*, 2 Leon. 35; Sav. 75; 44 Digest 860, 7155.
- Minshull v. Minshull* (1737), West temp. Hard. 250; 1 Atk. 411; 25 E.R. 921; 44 Digest 600, 4259.
- Doe d. Bean v. Halley* (1798), 8 Term Rep. 5; 101 E.R. 1235; 44 Digest 937, 7919.

East v. Twyford (1851), 9 Hare, 713; 68 E.R. 700; affirmed (1853), 4 H.L.Cas. A 517, H.L.; 44 Digest 934, 7897.

Stevens v. Pyle (1861), 30 Beav. 284; 54 E.R. 898; 44 Digest 847, 7008.

Parr v. Swindels (1828), 4 Russ. 283; 6 L.J.O.S.Ch. 99; 38 E.R. 812; 44 Digest 1274, 11013.

Reves v. Herne (1717), 2 Eq. Cas. Abr. 215; 22 E.R. 183; 44 Digest 483, 3020.

Jackson v. Calvert (1860), 1 John. & H. 235; 70 E.R. 734; 44 Digest 1027, 8855.

Chandless v. Price (1796), 3 Ves. 99; 30 E.R. 914, L.C.; 44 Digest 939, 7952.

Edwards v. Hammond (1684), 3 Lev. 132; 1 Bos. & P. 324, n.; 83 E.R. 614; sub nom. *Stocker v. Edwards*, 2 Show. 398; 44 Digest 1037, 8950.

Bromfield v. Crowder (1805), 1 Bos. & P.N.R. 313; 127 E.R. 483; affirmed (1811), cited in 14 East, at p. 604, H.L.; 44 Digest 1042, 8986.

Doe d. Roake v. Nowell (1813), 1 M. & S. 327; affirmed sub nom. *Randoll v. Doe d. Roake* (1817), 5 Dow, 202; 3 E.R. 1302, H.L.; 44 Digest 1043, 8989.

Re Catt's Trusts (1864), 2 Hem. & M. 46; 4 New Rep. 88; 33 L.J.Ch. 495; 10 L.T. 409; 10 Jur.N.S. 536; 12 W.R. 739; 71 E.R. 377; 44 Digest 461, 2810.

Bill filed to determine the estates and interests of beneficiaries under a will and codicil and to obtain a declaration of their rights under those instruments and a disentailing deed.

The Rev. Thomas Millard Pitt, late of the city of Hereford, clerk, by his will, dated May 22, 1827, gave and devised all his real and personal estate to his sister Ann Bennett, the wife of Mr. William Bennett, for the term of her natural life, subject to certain legacies. He thereby made no disposition of the fee simple of the realty, or of the corpus of the personality. The testator made a codicil of even date with his will, which was as follows :

"This is a codicil to my last will and testament, by which I declare all interlineations bearing this mark * made before the signing of the will. I also under this codicil nominate and appoint Thomas Bird, Esq., Norfolk Terrace, and John Griffith, Esq., Widemarsh Street, trustees, as also their heirs and assigns, to both will and codicil, not making them accountable for any losses that may occur, except it be by their neglect, and the one shall not suffer for the other's negligence. 'Tis also my will and desire that my sister Mrs. A. Bennett shall do what she pleases with my remaining property, after paying the before-mentioned legacies, etc., excepting a tenement at Wyatt's Marsh, now in the occupation of Mr. James Morgan, containing about 5a. 3r. 11p., and fourteen hundred pounds, twelve of which are now in the Four per Cent. Funds, and the remaining two shall be in a few days from this present time, viz., May 22, 1827, of which Mrs. A. Bennett shall only receive the interest and rent during her natural life, and afterwards to my sister's eldest son on his taking the name of Millard, but should he refuse to take the name of Millard, or my sister Mrs. A. Bennett depart this life without a son, then the said tenement at Wyatt's Marsh, together with the £1,400, shall go to my cousin Thomas Pitt, eldest son of Mr. Thomas Pitt, of Brinston, in the county of Hereford, on his taking the name of Millard, and so on to his heirs, each taking the name of Millard, none of them being allowed to touch the principal, viz., Wyatt and £1,400, and no one shall after my sister Mrs. A. Bennett inherit the said property or enjoy the interest who does not take or possess the name of Millard."

The testator died on July 20, 1827, and his will was duly proved by his sister, Mrs. Ann Bennett, in the following year. Mrs. A. Bennett was the testator's heiress-at-law; her husband, William Bennett, died in 1854. On Feb. 19, 1864, Mrs. Bennett executed a disentailing deed of assurance (which was duly enrolled)

A of Wyatt's Marsh. Mrs. Bennett had four sons, all of whom were born since the date of the testator's will.

The present suit, in which Mrs. Bennett was plaintiff, and her four sons, Mr. Griffiths the surviving trustee of the will, and Mr. Walter William Pitt the heir-at-law of Thomas Pitt mentioned in the codicil, were defendants, was instituted for the purpose of determining the different estates and interests to which all or any of the parties were entitled under the will and codicil and the disentailing deed, and the bill prayed that under them it might be declared that Wyatt's Marsh was in equity subject to the uses limited in and by the disentailing assurance, and that the defendant John Griffiths might be ordered to convey the legal estate to the same uses, and deliver up to the plaintiff the title-deeds; and that the rights and interests of the plaintiff and other persons interested in the sums of stock now representing the bequest of £1,400 might be declared; and that Mr. Griffiths might be decreed to transfer the stock to the plaintiff, or according to the joint claims of the plaintiff and her eldest son, the Rev. William Millard Bennett.

Charles Hall (Casson with him) for the plaintiff.

F. Vaughan Hawkins for the Rev. W. M. Bennett, the plaintiff's eldest son.

John Pearson for the second son.

Cottrell for Mr. Griffiths, the trustee.

Blackmore for Mr. W. W. Pitt.

E **KINDERSLEY, V.-C.**—This codicil presents very great difficulty in its construction, and this is one of that class of cases in which the court is endeavouring to ascertain the intention of the testator when it is certain that the testator had no intention at all. All that the court can do is to take, first, the natural, primary interpretation; but if it perceives, from the words of the will, that the testator used words not in their primary sense, then only it should depart from that interpretation. The testator, if not a bachelor, at all events had no issue. F He had a sister, who at the time of his death had no son; she was his heiress-at-law, and it is assumed on all sides that she was also his sole next of kin.

The testator was possessed of both real and personal property. A portion of his realty consisted of a tenement at Wyatt's Marsh of nearly six acres. It was probably some attachment to this piece of land which induced him to separate it from the rest of his property, and make a separate disposition of it. G By his will he had given all his real and personal estate to his sister for her natural life, subject to certain legacies, the details of which are not material; some of them were general, and some specific. He made no disposition by his will as to the corpus of his residuary estate. Under the same date he made the codicil, by which he appointed Messrs. Bird and Griffiths

H "trustees, as also their heirs and assigns, to both will and codicil, not making them accountable, etc."

A question has been raised as to the effect of that appointment. Is it a devise to these gentlemen upon trust, or does it make them merely supervisors of the estate? I think that the testator intended to vest the legal estate in them. The I testator then proceeds to dispose of his property:

" 'Tis also my will and desire that my sister, Mrs. A. Bennett, shall do what she pleases with my remaining property after paying the before mentioned legacies."

If there were nothing more than this, it would be a gift to his sister in fee as to the realty, and a gift absolutely as to the personalty. But he proceeds to except two items of property, one real and one personal, "of which Mrs. A. Bennett shall only receive the interest and rent during her natural life." So

far there is a clear and explicit intention that Mrs. A. Bennett shall have nothing more than a life-interest in that property. "And afterwards to my sister's eldest son, on his taking the name of Millard."

If the will stopped there it would be a gift to the person who should happen to be her eldest son at some particular period, and would give him a vested estate taking effect on his birth. Would it be an estate for life or in fee? One of the grounds which is suggested for holding it an estate in fee is, that the estate to the trustees is an estate in fee, and that if that is so, as this gift is by way of exception out of a gift which is expressed by the terms "remaining property," which are sufficient to convey the fee, it has the effect of impressing upon the gift of the part excepted the character of a gift in fee, viz., that the gift of the excepted property is of the same extent as the gift of the property out of which it is excepted.

There then follow these words :

"But should he refuse to take the name of Millard, or my sister Mrs. A. Bennett depart this life without a son, then the said tenement at Wyatt's Marsh, together with the £1,400, shall go to my cousin Thomas Pitt, on his taking the name of Millard, and so on to his heirs, each taking the name of Millard, none of them being allowed to touch the principal, viz. Wyatt and £1,400, and no one shall, after my sister Mrs. A. Bennett, inherit the said property, or enjoy the interest, who does not take or possess the name of Millard."

It is contended that the effect of the words, "if my sister, Mrs. A. Bennett, depart this life without a son," is to give her a present immediate estate tail upon the testator's death, and cases have been cited for the purpose of showing that, although the gift to a son is a gift to an individual, still that this, followed by a gift over if the tenant for life should die without a son, is an evidence that the testator intended that the gift over should take effect, not on failure of a single son of the tenant for life, but not until all the issue male of the first tenant for life should fail. One thing is clear that, unless the whole context of the will compels the court to put that construction upon it, it will not do so, and there is nothing in the will that can induce me to come to the conclusion that such was the testator's intention. How can the gift to Mrs. Bennett for her life, and afterwards to her eldest son, be a gift to all her issue male, however remote? The gift to her eldest son is followed by the words, "should he refuse to take the name of Millard." How then can it be said that the intention was not to give to the eldest son as an individual? Is it possible to say that the testator's meaning is to give it over if all the issue male refuse to take the name of Millard? Then the words, "if she depart this life without a son," are exactly correlative to the gift to the eldest son.

Assuming that it is a gift to him in fee, it is a gift to herself for life, with remainder to her eldest son; and if she has no son, then over; and there is nothing which constrains the court to give any other meaning to the words. I am of opinion that Mrs. Bennett's is not an estate in tail male, but an estate for life, and I will now consider what estate her eldest son takes, and who the individual is that answers to that description. One contention is that it is the person answering the description of eldest son at Mrs. Bennett's death. *Prima facie*, however, the words would import that, whenever Mrs. Bennett had a son, that son would be the one intended to take under the gift. There is no ground for saying that the testator intended the gift to be contingent on the death of Mrs. Bennett. The words do not compel me to adopt that view, and I consider that the person who is to take under the gift is Mrs. Bennett's firstborn son, subject to his taking the name of Millard, and that he takes a fee-simple in the real estate, and an absolute estate in the personalty expectant upon his mother's death.

A There remains only the clause as to taking the name of Millard, which was prepared by one who was no lawyer. The effective form in use among conveyancers involves this ingredient where it is annexed to an estate in fee, that it must keep within the limits prescribed by the rule against perpetuities, and I am not aware that to that rule there is any exception in the case of clauses which have reference to taking name and arms. It is a different matter in the case of an estate tail, because the power of barring the entail is a sufficient protection; but where it is affixed to a gift in fee, the clause is void unless it must necessarily happen within a life or lives in being, and twenty-one years afterwards. This gift is framed in terms that would tend to show that it must be a condition precedent, because the limitation is to the sister's eldest son on his taking the name of Millard, and, therefore, according to the literal meaning of the language used, no estate would vest in him till he had taken the name of Millard. The court, however, has generally leaned towards considering similar conditions to be conditions subsequent. We have in this gift language used to show that it was not to take effect till the condition was performed, though it is followed by language to a contrary effect. If the condition is to be considered as precedent, it appears that the gift would be void, because no period is mentioned within which the condition is to be performed, as the eldest son might not exercise his option to take the name till he was sixty years of age. If, by the true construction, this is a condition subsequent, some time must be allowed for its performance, but here no time at all was mentioned.

E It is contended, on behalf of the eldest son, that the condition was performed almost immediately after his birth, as he was baptised by the name of Millard. The other side contend that that is not sufficient; the testator's intention was, that he should take the surname of Millard. I do not see that this is to be inferred from the will. These shifting clauses must always be construed strictly, and when the testator has said "take the name of Millard," it appears to me to be an equal compliance with the condition whether the Christian name or the surname be taken.

F There is no construction of this will which is not open to some difficulty, but I think that mine presents less difficulty than any other that can be suggested. I consider that the testator has expressed an intention to give an estate for life to Mrs. Bennett, with a remainder in fee to her eldest son, whenever he should come into esse, and that the testator also intended a divesting clause, should such eldest son not take the name of Millard. With regard to the question as to the personalty, even if there had been no gift of realty, I should come to the same conclusion with respect to the personalty.

Declaration accordingly.

FRITH AND OTHERS v. CARTLAND AND OTHERS

[VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), February 19, 20, 21, 1865]

[Reported 2 Hem. & M. 417; 34 L.J.Ch. 301; 12 L.T. 175;
11 Jur.N.S. 238; 13 W.R. 493; 71 E.R. 525]*Trust—Following trust funds—Trust money mixed with other property—Capable of being traced and identified.*

Bills amounting to £2,500 were accepted by the plaintiffs in reduction of cash advances made by them to E. to whom they entrusted them and who converted the bills into cash which he mixed with moneys of his own. E. then became bankrupt. After a number of transactions had been conducted by E., a sum of £2,637 was recovered, which the plaintiffs claimed from the official assignee in bankruptcy as against the general body of E.'s creditors.

Held: where trust money could be traced and identified, notwithstanding various transformations through which it had passed and the fact that it had been mixed with other property, it must be treated as trust property for the benefit of the cestuis que trust, and, therefore, the plaintiffs' claim succeeded.

Notes. *Birt v. Burt* (1877), 36 L.T. 943. Considered: *Re Hallett's Estate, Knatchbull v. Hallett, Cotterell v. Hallett*, [1874-80] All E.R. Rep. 793. Referred to: *Brown v. Adams* (1869), 4 Ch.App. 764; *Harris v. Truman* (1881), 7 Q.B.D. 340; *Re Diplock's Estate, Diplock v. Wintle*, [1947] 1 All E.R. 522.

As to following trust property wrongfully converted or alienated, see 38 HALSBURY'S LAWS (3rd Edn.) 1044; and for cases see 43 DIGEST 1018 et seq.

Case referred to:

- (1) *Pennell v. Deffell* (1853), 4 De G.M. & G. 372; 1 Eq. Rep. 579; 23 L.J.Ch. 115; 23 L.T.O.S. 126; 18 Jur. 273; 1 W.R. 499; 43 E.R. 551, L.J.J.; 43 DIGEST 1021, 4612.

Motion by the plaintiffs in the course of a bankruptcy petition to determine the plaintiffs' claim to a sum held by the assignee in bankruptcy.

The plaintiffs, who were merchants in partnership together, filed this bill against the official assignee and the creditors' assignee appointed under the bankruptcy of one Edwards, which it prayed that it might be declared that the plaintiffs were entitled to so much of a sum of £2,637 6s. and of a balance paid into a branch bank at Birmingham, as together was equal to the amount of moneys obtained by Edwards in respect of the discount of bills of exchange for £1,000, £1,000 and £500, accepted by the plaintiffs under the circumstances stated below; that such proportion might be ascertained and declared; and for payment thereof to plaintiffs by the official assignee.

In 1860 the plaintiffs had dealings and transactions with Edwards, a merchant at Birmingham, which extended over several years, and previously with him and his father Hy. Edwards, under the style of Edwards & Son, from 1853 to 1856. From the year 1856 up to the time of the bankruptcy of W. P. Edwards, the plaintiffs had mercantile transactions with him; the course of dealing being for him to consign goods abroad, of which he placed the shipping documents in plaintiff's hands, and against which plaintiffs made advances.

On May 18, 1860, Edwards called to obtain an acceptance against goods then being shipped at Liverpool, the plaintiffs' prior advances on other goods being at that time between £5,000 and £6,000. He then requested plaintiffs to accept bills to the amount of £2,500 for him to obtain discount on them, and to pay same over to plaintiffs, so as to reduce the cash advances due to them from him. This they agreed to do on the faith of such promise, accepting

two bills for £1,000 each, and one for £500. These bills, together with others, were taken by Edwards to Overend, Gurney & Co., who discounted them, and the total amount of the sums made payable by all such bills was £3,965. For this amount Overend, Gurney & Co. gave Edwards their cheque for £3,500, and they paid the balance less discount into the branch Bank of England at Birmingham. Edwards was adjudicated bankrupt on May 22, 1860, and his assignees obtained the amount of this cheque for £3,500, and the balance less discount.

The plaintiffs' bill then set out the particular number of bank-notes which Edwards had received in exchange for Overend & Co.'s cheque, and alleged that, instead of bringing the proceeds in pursuance of his express undertaking and trust upon which he (Edwards) had received said acceptances, he proceeded to apply and deal with same as follows: he paid to a Mr. Spielman, an exchange broker, five bank-notes for £100 each, part of the said proceeds, together with a Bank of England note for £500, and took from the said Mr. Spielman, in exchange for the said notes, four drafts on one Elias Warburg, at Hamburg. Edwards shortly afterwards left England and went to Hamburg, taking with him said drafts, and the residue of such proceeds, and he presented the said drafts to Warburg, who accepted two of them, and returned them to Edwards, and discounted the other two by giving him a letter of credit on a firm at Berlin. Edwards afterwards paid Bank of England notes, amounting to £700, to an account which he opened with the Vereins Bank, at Hamburg, and he paid other notes amounting to the sum of £1,000 to another bank at Hamburg, in exchange for a letter of credit on certain bankers at Stockholm.

Shortly after Edwards had left England, one of his creditors, a Mr. Sadler, with an officer, went in pursuit of him, and he was finally arrested in Stockholm and brought back to England. Sadler had obtained possession of the letter of credit and also obtained payment of the £700 lodged at the various banks, which produced £696 6s., and he also got the two drafts accepted by Elias Warburg. These securities together realised the sum of £2,637 6s., in the prayer of the bill mentioned. This sum had by arrangement been paid to the credit of the accountant in bankruptcy, in the name of the defendant Whitmore, the official assignee, to await the determination of the court as to who were entitled to share these proceeds, the estate of Edwards or the plaintiffs.

The answer of the defendants did not substantially displace the plaintiffs' case, and the cause came on on motion for decree. The evidence as to the dealings with the acceptances and discounting them was conclusive.

Rolt, Q.C., and *De Gex* for the plaintiffs.

W. M. James, Q.C., and *Bardswell* for the defendants.

H PAGE-WOOD, V.-C.—The contest in this case is as to the title to the proceeds of certain bills which the plaintiffs entrusted to a Mr. Edwards, who has since become bankrupt, and which Edwards converted into cash and mixed with moneys of his own. The greater part of these funds were traced through successive changes into letters of credit and foreign bills and notes, and ultimately into the hands of the bankrupt when he was arrested at Stockholm. Another transaction of the same kind occurred, in which Edwards had obtained a bill for £500 from a firm of Palmer and Clark, and converted it together with part of the proceeds of the plaintiffs' bills into a letter of credit for £1,000. No question is raised in this suit as to Palmer and Clark's title to be paid their £500 out of the moneys now available. On May 22 Edwards was adjudicated bankrupt, the transactions which I have described having taken place on the 18th and 19th of that month, and the question which now arises is as to the respective rights of the assignees and the original owners of the funds so applied by the bankrupt.

Pennell v. Deffell (1) is a very instructive case upon all questions of this kind. It does not indeed lay down any new principle, but it contains a particularly clear and able enunciation of established doctrines in their bearing upon circumstances of some difficulty. The guiding principle is, that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is, that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own. Upon these two principles *Pennell v. Deffell* (1) was decided, and it illustrates very strongly the manner in which the court will follow trust property. The sole question in every case is whether the property can or cannot be identified.

In the present case the evidence amounts to this. The bankrupt took £2,500 of bills belonging to the plaintiffs, and discounted them together with bills of his own. He received a cheque for £3,500, besides a further sum which was paid to his credit at the Bank of England. These dealings, and the conversion of the proceeds into credits on foreign banks, raise the same kind of case as was suggested by KNIGHT-BRUCE, L.J., in his judgment in *Pennell v. Deffell* (1). If a man has £1,000 of his own in a box on one side, and £1,000 of trust property in the same box on the other side, and then takes out £500 and applies it for his own purposes, the court will not allow him to say that that money was taken from the trust fund. The trust must have its £1,000 so long as a sufficient sum remains in the box. So here, Edwards could not be allowed to say that the £284 deposited in the Bank of England was his own, and that the trust portion of the fund was that which he took abroad with him, and from which he drew as he required for his own purposes. There is, therefore, no difficulty in treating that sum at the bank as belonging to the trust, together with what remains of the sum which he took abroad.

It appears that Edwards, after passing the property through various transformations, had at last a sum nearly sufficient, together with the money at the bank, to cover the amount of the plaintiffs' trust fund as well as Palmer's £500. During the interval he had spent something out of the mixed fund, which expenditure must be attributed to that portion which I may call his own, using the expression subject to the title of Palmer to the £500, about which no question is raised. Unless, therefore, the bankruptcy makes a difference, there can be no ground for denying the plaintiffs' title to the fund recovered, or for dividing it pro rata. The court attributes the ownership of the trust property to the cestui que trust so long as it can be traced. Here there is no difficulty in identifying it. Throughout the whole series of transformations the bankrupt always held a fund available to meet the claim of the trust. In *Pennell v. Deffell* (1) part of the trust fund had been paid into a bank, but it was not ear-marked, and was wiped out by subsequent drawings, and the whole ultimate balance could not be fixed with the trust, any more than a second £1,000 of stock which a trustee might happen to acquire after selling £1,000 of trust stock and spending the proceeds. So long, however, as the fund can be traced the trustee cannot assert his own title to it.

The argument of behalf of the assignees was very ingenious. It is quite unsupported by the answer, and is indeed a departure from the case there made; but independently of that difficulty, I think it could not prevail. The answer simply states the petition and adjudication, the bankrupt's departure for Hamburg, and then states that he paid away part of the proceeds of the bills to his father-in-law. It is not stated when this payment was made, but it is relied on as a fraud against the assignees. Then the real issue is raised, and very properly raised, with a due regard to the principles of the law. The

allegation is, in effect, that the funds recovered belong to the general creditors, unless the plaintiffs can prove the alleged trust, and identify the trust moneys. It appears to me that these matters are proved, subject only to the questions whether the doctrines applicable to the ordinary case of a trustee dealing with a trust fund can be applied to a case where a bankrupt has absconded, and a petition has been presented two days after his departure; or whether I can say that this money was not the bankrupt's in the sense in which it would be considered his but for the bankruptcy.

If I assume the payment of the father-in-law to have been made under pressure it would be perfectly good. As to the charges on the road, they cannot be recovered. The moneys were in all respects at the bankrupt's disposal, and the fallacy of the argument for the assignee lies in treating this fund as the money of the general creditors, merely because assignees have in certain cases a right to treat property as theirs as against wrongdoers who may have possession of it. The funds must, I think, be applied in recouping the trust, with the exception of a sum of £484, which it is not disputed represents the cheque obtained from Palmer and Clark, and must be retained to meet their claim. The expenses of recovering the fund to be borne rateably by this and the other portion of the fund.

PENNOCK v. PENNOCK

[VICE-CHANCELLOR'S COURT (Malins, V.-C.), November 24, 1871]

[Reported L.R. 13 Eq. 144; 41 L.J.Ch. 141; 25 L.T. 691;
20 W.R. 141]

Will—Gift—Life interest—Power to tenant to apply property absolutely—Enlargement to absolute interest.

A testatrix having a power under a marriage settlement to appoint certain shares of real estate appointed to her husband "in trust to stand possessed thereof, and to enjoy the rents, profits and income arising and to arise therefrom for his own absolute use and benefit for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after the decease of my said husband I direct the same, subject as aforesaid, to be equally divided among my nephews and nieces."

Held: the husband took a life interest with a power of absolute disposition over the fee, and, on his death without his having exercised the power, the gift over took effect.

Notes. Distinguished: *Re Ryder, Burton v. Keersley*, [1914-15] All E.R. Rep. 144. Referred to: *Re Wilcock's Trusts* (1875), 24 W.R. 290.

As to whether a life interest is enlarged to an absolute interest, see 39 HALSBURY'S LAWS (3rd Edn.) 1091-1092; and for cases see 37 DIGEST (Repl.) 247-248.

Cases referred to:

- (1) *Holmes v. Godson* (1856), 8 De G.M. & G. 152; 25 L.J.Ch. 317; 27 L.T.O.S. 8; 2 Jur.N.S. 383; 4 W.R. 415; 44 E.R. 347, L.J.J.; 44 Digest 447, 2703.
- (2) *Nowlan v. Walsh, Nowlan v. Wilde* (1851), 4 De G. & Sm. 584; 17 L.T.O.S. 292; 64 E.R. 967; 44 Digest 954, 8071.
- (3) *Re Maxwell's Will* (1857), 24 Beav. 246; 26 L.J.Ch. 854; 30 L.T.O.S. 49; 3 Jur.N.S. 902; 53 E.R. 352; 44 Digest 954, 8072.

- (4) *Bradley v. Wescott* (1807), 13 Ves. 445; 33 E.R. 361; 37 Digest (Repl.) 317, 646.
 (5) *Reith v. Seymour* (1828), 4 Russ. 263; 6 L.J.O.S.Ch. 97; 38 E.R. 804; 37 Digest (Repl.) 241, 57.

Also referred to in argument :

- Doe d. Stevenson v. Glover* (1845), 1 C.B. 448; 14 L.J.C.P. 169; 5 L.T.O.S. 54; 9 Jur. 493; 135 E.R. 615; 44 Digest 451, 2732.
Weale v. Ollive (No. 2) (1863), 32 Beav. 421; 55 E.R. 165; 44 Digest 965, 8176.
Re David's Trusts (1859), John. 495; 29 L.J.Ch. 116; 1 L.T. 130; 6 Jur.N.S. 94; 8 W.R. 39; 70 E.R. 517; 37 Digest (Repl.) 322, 692.
Barton v. Barton (1857), 3 K. & J. 512; 3 Jur.N.S. 808; 69 E.R. 1212; 44 Digest 447, 2704.
Re Mortlock's Trust (1857), 3 K. & J. 456; 26 L.J.Ch. 671; 69 E.R. 1189; 37 Digest (Repl.) 251, 136.

Petition for distribution of a fund in court representing the proceeds of the sale of real estate sold under a decree in a partition suit.

By a post-nuptial settlement dated July 5, 1869, an undivided share in realty was settled upon Hannah Hurst, the wife, for life, with a general power of appointment after the death. On Oct. 26, 1869, a suit for partition of the property in question was instituted, in which the husband and wife were plaintiffs, and on Jan. 29, 1870, a decree for sale was made. The property was sold on Aug. 3, 1870.

Hannah Hurst made her will, dated Jan. 4, 1870, and after reciting the settlement the will continued as follows :

"In exercise of the said power . . . I do hereby direct, limit, and appoint all the said parts and shares of and in the said . . . real estate . . . unto my said husband, John Hurst, his heirs, executors, administrators, and assigns, in trust to stand possessed thereof, and to enjoy the rents, profits, and income arising, and to arise therefrom for his own absolute use for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after the decease of my said husband I direct the same, subject as aforesaid, to be equally divided among such of my nephews and nieces as shall be then living, and the two children of my late nephew Joshua, they taking one share equally between them."

The will contained power for the husband to sell the property. Hannah Hurst died on June 9, 1870, and John Hurst died on June 22 following, intestate. The petition was presented by some of the nephews and nieces of Hannah Hurst.

Glasse, Q.C., and *Nalder* for the petitioners.

G. O. Edwards and *J. T. Humphrey* for parties in the same interest.

Pearson, Q.C., and *A. G. Marten* for the heir-at-law of John Hurst.

MALINS, V.-C.—This is a question of construction arising upon the will of a married woman, made in exercise of a power conferred upon her by her marriage settlement. It is admitted that the fact that the testatrix gave the property to her husband as trustee in the first instance does not affect the application of the rules of construction. [His Honour then read the part of the will above set out, and continued:] I have been referred to several cases, such as *Holmes v. Godson* (1), *Nowlan v. Walsh* (2), and *Re Maxwell's Will* (3), which show that where there is a gift in words such as are considered to confer an absolute interest, with a gift over in case of the death of the person in whose favour the gift is made, such a gift over is void. In such cases it has been most reasonably held that the power of making a testamentary disposition

was a necessary incident of property, and a gift over could not be made to depend upon the happening of that event. If the gift here had been "with power to appoint by deed or will," and in default of appointment to the nephews and nieces the case would have been clear, but it is said that if the testatrix had meant that she would have said so. I think she has expressed the same thing in very felicitous language, and in fewer words. It might also be asked why, if she intended an absolute gift, she expressed it to be for life only, and with perfect consistency followed it by a power of appointment and a gift over "from and after the decease" of her husband. It is argued that I must apply a strict rule of construction, and treat all those expressions as vain; but I am of opinion that the whole clause must be taken together as it stands; and that the husband had a life estate, with a power to acquire the entire interest if he wanted it, but that if he did not acquire it there was a gift over to the nephews and nieces. The result was that he died without doing anything to acquire the absolute interest, and the gift over must take effect.

Among the cases cited, *Re Maxwell's Will* (3) was very much pressed upon me. There a testator, after giving a fund to his son for life, and afterwards, in case of the son's death, leaving lawful issue, directing his executors to pay the fund to the son's surviving children, continued:

"But if he should die without lawful issue, I give and bequeath a moiety of the said capital stock to be disposed of as my said son shall think proper,"

and the son having died without issue, that was held to be an absolute gift of the moiety. That would also have been my construction of the words, and I think them perfectly clear. That case is certainly in accordance with *Bradley v. Westcott* (4), and consistent with *Reith v. Seymour* (5), which I do not find adverted to in any of the other cases cited; and the distinction between it and the present case is perfectly clear. In it there were words *prima facie* importing a gift of the absolute interest, but here there are no words of gift beyond those applying to the life estate. I am, therefore, of opinion that the husband took a life estate only, with a power over the fee simple, and that the gift to the nephews and nieces takes effect.

Order accordingly.

GILLAM v. TAYLOR

[VICE-CHANCELLOR'S COURT (Wickens, V.-C.), June 26, 1873]

[Reported L.R. 16 Eq. 581; 42 L.J.Ch. 674; 28 L.T. 833;
21 W.R. 823]*Charity—Relief of poverty—Gift in will to uncle's descendants "as they may severally need."*

A testator gave all the residue of his real and personal estate to trustees in trust "to be invested in government securities in their joint names, the interest of which shall from time to time be given to such of the lineal descendants of Richard Wilson, my dearest mother's brother, as they may severally need, and the said trustees of this fund shall make such provision as will insure a continuance of the said trust at their decease."

Held: the gift was charitable.

Notes. Considered: *A.-G. v. Northumberland* (1878), 38 L.T. 245. Explained: *Re Scarisbrick's Will Trusts*, *Cockshott v. Public Trustee*, [1951] 1 All E.R. 822. Referred to: *Re Compton, Powell v. Compton*, [1945] 1 All E.R. 198.

As to the charitable nature of gifts for the benefit of poor relations, see 4 HALSBURY'S LAWS (3rd Edn.) 216-217; and for cases see 8 DIGEST (Repl.) 316-319.

Cases referred to:

- (1) *A.-G. v. Price* (1810), 17 Ves. 371; 34 E.R. 143; 8 Digest (Repl.) 316, 19.
- (2) *Isaac v. Defriez* (1754), Amb. 595; 17 Ves. 373, n.; 27 E.R. 387; 44 Digest 890, 7479.
- (3) *Liley v. Hey* (1842), 1 Hare, 580; 11 L.J.Ch. 415; 66 E.R. 1162; sub nom. *Lilley v. Hey*, 6 Jur. 756; 8 Digest (Repl.) 318, 41.

Also referred to in argument:

- White v. White* (1802), 7 Ves. 423; 32 E.R. 171; 8 Digest (Repl.) 316, 16.
Mocatta v. Lonsada (1806), 12 Ves. 123.
Bernal v. Bernal (1838), 3 My. & Cr. 559; Coop. Pr. Cas. 55; 7 L.J.Ch. 115; 2 Jur. 273; 40 E.R. 1042, L.C.; 11 Digest (Repl.) 404, 593.
A.-G. v. Sidney Sussex College (1869), 4 Ch.App. 722; 38 L.J.Ch. 656; 34 J.P. 52, L.C.; 8 Digest (Repl.) 446, 1381.
Barnes v. Patch (1803), 6 Ves. 604; 32 E.R. 490; 44 Digest 991, 8497.
Cruwys v. Colman (1804), 9 Ves. 319; 32 E.R. 626; 44 Digest 888, 7449.
Grant v. Lynam (1828), 4 Russ. 292; 6 L.J.O.S.Ch. 129; 38 E.R. 815; 44 Digest 888, 7450.
Chapman v. Brown (1801), 6 Ves. 404; 31 E.R. 1115; 8 Digest (Repl.) 400, 917.
Fordyce v. Bridges (1847), 10 Beav. 90.
Leake v. Robinson (1817), 2 Mer. 363; 35 E.R. 979; 44 Digest 1056, 9092.
Dunnage v. White (1820), 1 Jac. & W. 583; 37 E.R. 490; 44 Digest 751, 6096.

Administration Suit to determine whether or not a gift of residue was charitable.

The Rev. Richard T. Wilson Taylor, by his will dated Dec. 11, 1870, after directing payment of all his debts, and giving to certain persons and charities specific and pecuniary legacies, gave the residue and remainder of all his real and personal estate to trustees in trust,

"to be invested in government securities in their joint names, the interest of which shall from time to time be given to such of the lineal descendants of Richard Wilson, my dearest mother's brother, as they may severally need, and the said trustees of this fund shall make such provisions as will insure a continuance of the said trust at their decease."

A The testator died on Dec. 12, 1870. The case now came on for further consideration upon a reviewal of the certificate of the chief clerk. The certificate showed that there were sixty descendants of Richard Wilson, and the principal question was whether the gift was charitable or not.

Greene, Q.C., and Joliffe for the plaintiffs, the trustees.

B Hemming for the Attorney General.

Dickinson, Q.C., and Stallard for the descendants of Richard Wilson.

Eddis, Q.C., and Henry Smith for an amuitant.

Karslake, Q.C., and W. W. Karslake for the heir-at-law, and next of kin.

C **WICKENS, V.-C.**—I have unwillingly come to the conclusion that I am bound by *A.-G. v. Price* (1) and *Isaac v. Defriez* (2), and I must treat this as a charitable bequest. It is remarkable that those cases were not considered by WIGRAM, V.-C., in *Liley v. Hey* (3) and of course one must treat WIGRAM, V.-C.'s decisions with the greatest respect. The true rule in all these cases is to do what SIR WILLIAM GRANT did in *A.-G. v. Price* (1), namely, to ascertain as far as possible what the true intention of the testator was, and I adopt his words. He says:

"This seems to be just as much in the nature of a charitable bequest as that [viz., in *Isaac v. Defriez* (2)]. It is to have perpetual continuance in favour of a description of poor; and is not like an immediate bequest of a sum to be distributed among poor relations."

E No doubt the word "poor" occurred in that case. The language is: "It is among my poor kinsmen and kinswomen, and among their offspring and issue." In *Isaac v. Defriez* (2) the testator's bequest was unto his own and his then present wife Dyfe Simpson's poorest relations, at the discretion of the executors; not abstractly poor, but to be divided equally among such persons as the executors considered to be the poorest relations. Every one might have £10,000 a year, but some might have £20,000 a year, and those who had £10,000 a year would take it. The words here seem to me to import beyond all question the creation of a perpetual fund or institution, on which no person, or persons, is or are to have a perpetual right, but which is to be given only to such as need, in the opinion of the trustees, and be given according to their necessities.

F If *A.-G. v. Price* (1) and *Isaac v. Defriez* (2) had been before WIGRAM, V.-C., in *Liley v. Hey* (3), I should have followed the more recent decision. As it is, I am not entitled to dissent from authorities so much in point, and, therefore, I hold this to be a charitable bequest.

G I direct a scheme as to so much of it as is pure personalty, and declare the failure for the benefit of the next of kin as to impure personalty, and benefit of the heir-at-law as to real estate.

H Order accordingly.

PRYOR v. PRYOR

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.J.J.), April 29, 1864]

[Reported 2 De G.J. & Sm. 205; 4 New Rep. 82; 33 L.J.Ch. 441;
10 L.T. 360; 10 Jur.N.S. 603; 12 W.R. 781; 46 E.R. 353]

Power of Appointment—Exercise—Fraudulent exercise—Bargain by appointee to appoint to non-object of power.

By a marriage settlement a power was given to the husband and the wife to appoint real estate to the children of their marriage. They exercised the power by appointing to two of their sons in fee on the understanding that they would re-settle the hereditaments partly in favour of children of the marriage and partly in favour of grandchildren who were not objects of the power. This intention was carried into effect by a re-settlement of the property made on the day following the deed of appointment.

Held: the appointment was a fraud on the power, and was void.

Semble: Such a case is distinguishable from that of an appointment in favour of one of the objects of the power with a view to marriage, executed in order that he may settle the appointed share for the benefit of himself and his children not objects of the power.

Notes. Considered: *Re Crawshay, Crawshay v. Crawshay*, [1886-90] All E.R. Rep. 724. Referred to: *Re Turner's Settled Estates* (1884), 28 Ch.D. 205; *Re Simpson, Chadderton v. Simpson*, [1952] 1 All E.R. 963.

As to antecedent agreements to benefit non-objects of the power, see 30 HALSBURY'S LAWS (3rd Edn.) 278-279; and for cases see 37 DIGEST (Repl.) 385-388.

Cases referred to in argument:

White v. St. Barbe (1813), 1 Ves. & B. 399; 35 E.R. 155; 37 Digest (Repl.) 387, 1197.

Wade v. Paget (1784), 1 Bro. C.C. 363; 1 Cox, Eq. Cas. 74; 28 E.R. 1180, L.C.; 37 Digest (Repl.) 373, 1078.

Goldsmid v. Goldsmid (1842), 2 Hare, 187; 12 L.J.Ch. 113; 7 Jur. 11; 67 E.R. 78; 37 Digest (Repl.) 386, 1193.

Tucker v. Tucker, Tucker v. Sanger (1824), 13 Price, 607.

Re Gosset's Settlement (1854), 19 Beav. 529; 52 E.R. 456; 37 Digest (Repl.) 387, 1198.

M'Queen v. Farquhar (1805), 11 Ves. 467; 32 E.R. 1168, L.C.; 37 Digest (Repl.) 390, 1215.

Birley v. Birley (1858), 25 Beav. 299; 27 L.J.Ch. 569; 31 L.T.O.S. 160; 4 Jur.N.S. 315; 6 W.R. 400; 53 E.R. 651; 37 Digest (Repl.) 386, 1185.

Daubeney v. Cockburn (1816), 1 Mer. 626; 35 E.R. 801; 37 Digest (Repl.) 385, 1181.

Duke of Portland v. Lady Topham (1864), post; 11 H.L.Cas. 32; 10 Jur.N.S. 501; 12 W.R. 697; 11 E.R. 1242; sub nom. *Duke of Portland v. Lady Topham*,

Lord Bentinck v. Lady Topham, 34 L.J.Ch. 113; 10 L.T. 355, H.L.; 37 Digest (Repl.) 375, 1112.

Appeal from a decision of PAGE-WOOD, V.-C., upon the hearing of the cause on further consideration, setting aside a deed exercising a power of appointment reserved to Mr. and Mrs. Pryor by their marriage settlement, dated in December, 1808, on the ground that it was made with an understanding that the appointees, who were within the power, should re-convey the appointed estates upon trusts for the benefit partly of persons who were, but partly also of persons who were not, objects of the power. The bill was filed by the trustees of the original settlement, and it is right to add that no unfair or corruptive motive was proved or alleged against any of the parties,

A By settlements of Dec. 10, 1808, made on the marriage of Vickris Pryor and Jane Anne Peacock, real estate was vested in the trustees in fee to be held by them upon the trusts declared in those deeds. By one of these indentures it was declared that the trustees should stand possessed of such property from and after the decease of Jane Anne Peacock, subject to a life-interest given to Vickris Pryor in the event of her dying in his lifetime, to the use of all **B** and every of the children of the body of the said Jane Anne Peacock by the said Vickris Pryor, her intended husband, to be begotten, in case there shall be more than one child, or of such one or more of them exclusive of the others or any other or others of them, in such parts, shares and proportions, for such estates and interests, to take effect in possession at such ages or times, charged and chargeable with such sum or sums of money, either annual **C** or in gross, and with, under and subject to such powers, provisoes, remainders and limitations over (such charges of any sum or sums of money, annual or in gross, and also such powers, provisoes, remainders and limitations over being for the benefit of the same children, or some or one of them), and in such manner in all respects to the use of an only child of the said marriage, and if there shall be but one such child, for such estate and interest, to take effect in **D** possession at such age or time and in such manner in all respects as the said Jane Anne Peacock and Vickris Pryor should at any time or times during their joint lives appoint by deed or instrument in writing (with a similar power to the survivor of husband and wife), and for want of and subject to any such appointment,

E "to the use of all and every the children, both sons and daughters, of the body of the said Jane Anne Peacock by the said Vickris Pryor, her intended husband, to be begotten, equally to be divided between them the said children, if there shall be more than one such child, share and share alike as tenants in common, and not as joint tenants, and of the several and respective heirs of the bodies of such children lawfully issuing,"

F with benefit of survivorship and accruer between these children if there should be more than one. In default of issue with divers remainders over, the ultimate limitation being to Thomas Caprel in fee.

There were five sons and four daughters of this marriage. One son died an infant previously to 1846, and one of the daughters died in 1838, having been **G** married, leaving a husband and one daughter surviving her.

By an indenture dated June 18, 1846 (which, however, ought to have been dated June 18, 1847, it having been then executed), Vickris Pryor and Jane Anne his wife, in exercise of the joint power of appointment reserved to them by the marriage settlements, appointed part of the property comprised therein (subject to their respective life-interests) to two of their sons, Felix and **H** Arthur, in fee as joint tenants.

By an indenture dated the following day, June 19, 1847, Felix and Arthur re-settled this property upon trust to secure an annuity of £50 for each of their sisters then living, during their lives, to their separate use without power of anticipation, and also to secure a like annuity of £50 to be paid to their brothers Richard and Thomas during their joint lives, and to the survivor **I** during his life, subject to such annuities, to the use of the four sons of the marriage then living, during their respective lives, in equal shares as tenants in common, and after the death of each respectively to the use of their children and issue in manner as therein mentioned, and in default of issue of the sons to the use of Jane Anne Pryor, her heirs and assigns.

On the death of Jane Anne Pryor (who survived her husband) questions arose whether the last-mentioned deeds were not a fraud upon the power or the objects of it. PAGE-WOOD, V.-C., held that the appointment was void, and that the trustees of the deed of 1847 held the property upon trust for the

persons entitled thereto under the original settlement in default of appointment. **A**
 Felix Pryor and Arthur Pryor and the infant children of Arthur Pryor appealed.

At the original hearing PAGE-WOOD, V.-C., directed an inquiry into the circumstances under which the appointment was executed, and upon that subject evidence was gone into in chambers. Some of that evidence was objected to, but the objections were overruled by the vice-chancellor, and the order now under appeal was made. The appellants also renewed their objections to parts of the evidence, and moved to discharge or vary the chief clerk's certificate. **B**
 The question of the admissibility of this evidence was discussed at some length; but, as their Lordships thought that it did not affect the case, they expressed no opinion upon it. For these reasons no further allusion to that evidence is made here. **C**

Sir Hugh Cairns, Q.C., and *Wickens* for the infant appellants.

Giffard and *Macnaghten* for Felix Pryor and Arthur Pryor.

Rasch for the plaintiffs.

Rolt, Q.C., and *Darby, Willcock, Q.C.*, and *Surrage, Daniel, Q.C.*, and *Fooks* for parties who would be entitled in default of appointment. **D**

KNIGHT-BRUCE, L.J.—If there is a limited power to be executed in favour of the objects of the power, and there is a belief and intention that so soon as the power shall have been executed the intended appointee will dispose of property in favour of persons not objects of the power; and if, besides the belief or knowledge of such intention, there is a bargain between the donee of the power and the appointee that the appointee shall dispose in favour of persons not objects of the power, and it is the result of the evidence that the execution of the power is the effect and consequence of the bargain, and would not have taken place but for a contract in fact, whether valid or invalid, between the donee and the appointee that it should be made, and it is the true result of the evidence that it would not otherwise have been made at all, then such an execution of the power is bad, in my judgment. The question here is to which class this execution belongs, and upon that question I am of opinion that it is altogether immaterial whether the evidence objected to is received or not received. In this particular case I am of opinion that nothing is required beyond the two deeds of June, 1847, contemporaneous deeds in substance and in fact, although one of them bears date in the year 1846. The first of them is an appointment of property to two of the objects of the power as joint tenants in fee; the second deed is a settlement by them (both being substantially contemporaneous, as I have already said), containing this recital: **E**
F
G

“And the said Felix Pryor and Arthur Pryor [these are the two appointees under the first instrument] being respectively desirous of making some provision for their said brothers and sisters out of the said hereditaments, and also of settling and assuring the said hereditaments described or mentioned in the said schedule to those persons upon the trusts and for the purposes and with the powers hereinafter mentioned respectively, for the purpose of carrying the said recited desire into effect, have agreed and determined to convey and assure” **H**
I

the property, and so on; then it is conveyed to a certain extent for the benefit of the brothers and sisters who are the objects of the power, and subject to that for the benefit of persons of a lower generation, who are not objects of the power.

The first question is whether it is possible as a matter of fact to persuade any reasonable being, upon these materials, that the settlement, so to speak, by the two brothers, Felix and Arthur Pryor, in favour of their brothers and

A sisters, had not been one of contract and bargain between them and their
B parents, the donees of the power—whether any person in his senses could
C be brought to believe that the parents would have made the appointment but
D for that contract and bargain? That standing alone would, I agree with counsel
for Felix and Arthur Pryor, be immaterial—such a matter of bargain in favour
of persons who were objects of the power would amount to nothing; it is
the association that proves the true nature of the case as to the grandchildren
of the donees of the power, and as it is, I think, an irresistible inference
that the settlement in favour of the brothers and sisters was matter of bargain,
so that the other part of the same transaction in favour of the grandchildren of the
donees of the power must also be taken, by any reasonable man acting as a
judge of fact, to have been also matter of bargain. I think it clear that the
two purposes were associated together; that one was not independent of the
other; that they formed parts of one entire design, which entire design was in
contradiction of the original settlement and in transgression of the law, and
was therefore void. It is an irregular transaction, which might have been
carried into effect, and I have no doubt in this case was carried into effect, by
well-meaning and honourable persons, but it is one which, viewed as upon the
evidence, the plainly and clearly admissible evidence, the law forbids. I agree
entirely with the vice-chancellor's conclusion, whether, as I have already said,
the disputed evidence is admitted or not admitted.

TURNER, L.J.—I also agree with the vice-chancellor's conclusion. I think
that, apart from the disputed evidence, this was a deliberate attempt to go
beyond the limits of the power. It has been attempted in argument to support
the case by the analogy of an appointment made to a daughter upon her
marriage, and a settlement by the daughter in favour of herself and the issue
of her marriage. I confess that I am inclined to suspect that analogy very
much, because the course of executing an appointment in favour of a
daughter upon her marriage, and then that daughter making a settlement, has
been pursued for a century, and there has never up to the present day been an
attempt made—at least I am not aware of any until the present argument—to
extend that doctrine generally. I will not discuss that question, however,
but I do not think that the analogy has really any application. When an
appointment is made in favour of a daughter or a son with a view to marriage,
then the question is in what mode the son or daughter is to enjoy it—whether
the daughter is to enjoy it by herself for instance, or through the medium of a
settlement to be made by her upon herself, and her children deriving their
enjoyment through her. Counsel for Felix and Arthur Pryor, most ingeniously, I
must say, endeavoured to apply that argument to the present case by saying:
“You may as well say that here the appointment in favour of the two sons in
order that they may appoint to their brothers and sisters and the issue of their
brothers and sisters, is also a mode of enjoyment of the brothers and sisters”;
but then it is to be observed that there is no occasion, no particular occasion,
for the appointment being made then, and if you cannot refer to any particular
occasion, I apprehend that you must refer to some other mode than the mode
of enjoyment of the person in whose favour the appointment is made, and then
you can refer it to no other intention than an intention to go beyond the
power. That appears to me to be a distinction between the case of an appoint-
ment or marriage settlement and a case of the description now before us. There-
fore, I do not think that this appointment can possibly be maintained consistently
with the authorities.

LORING v. THOMAS

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), June 25, 26, 27, July 25, 1861]

[Reported 1 Drew. & Sm. 497; 30 L.J.Ch. 789; 5 L.T. 269;
7 Jur.N.S. 1116; 9 W.R. 919; 62 E.R. 469]

Will—Children—Gift to child of share of residue—"In case child shall die in my lifetime" leaving issue, such issue "to represent and stand in place of his deceased parent," and be entitled to parent's share—Inclusion of issue of child already dead at date of will.

By her will the testatrix devised real estate to trustees on trust for sale and to hold the proceeds "as to one fourth part on trust to pay and divide the same equally between all and every the children of my deceased aunt D.D. Provided . . . that in case any child or children of the said D.D. shall die in my lifetime leaving any child or children who shall be living at my decease and who shall live to attain the age of 21 years then and in such case it is my will that the child or children of each such child so dying in my lifetime shall represent and stand in the place of his, her, or their deceased parent and shall be entitled to the same share in the moneys to arise by sale of the said freehold hereditaments which his, her, or their deceased parent would have been entitled to if living at the time of my decease."

Held: the language of the proviso, on its true construction, was so wide and general as to include, not only the issue of a child of D.D. who was living at the date of the will, but also the issue of a child of D.D. who was already dead at the date of the will.

Notes. Applied: *Parsons v. Gulliford* (1864), 10 L.T. 60. Distinguished: *Re Hotchkiss's Trusts* (1869), L.R. 8 Eq. 643. Applied: *Miles v. Tudway* (1883), 49 L.T. 664. Distinguished: *Re Webster's Estate, Widgeon v. Mello* (1883), 23 Ch.D. 737; *Re Hall, Branston v. Weightman* (1887), 57 L.T. 42. Considered: *Re Chinery, Chinery v. Hill* (1888), 39 Ch.D. 614. Distinguished: *Re Brown, Brown v. Brown* (1889), 58 L.J.Ch. 420. Followed: *Re Parsons, Blaker v. Parsons* (1894), 8 R. 430. Distinguished: *Re Ridley, Ridley v. Vaughan* (1898), 42 Sol. Jo. 307; *Re Offiler, Offiler v. Offiler* (1901), 83 L.T. 758; *Re Gorringer, Gorringer v. Gorringer*, [1906] 1 Ch. 319. Applied: *Re Stokes, Barlow v. Bullock* (1907), 52 Sol. Jo. 11. Approved: *Barraclough v. Cooper* (1905), [1908] 2 Ch. 121, n. Distinguished: *Re Cope, Cross v. Cross*, [1908-10] All E.R. Rep. 154. Followed: *Re Lambert, Corns v. Harrison*, [1908-10] All E.R. Rep. 521. Considered: *Re Walker, Walker v. Walker*, [1930] All E.R. Rep. 392. Followed: *Re Birchall, Re Valentine, Kennedy v. Birchall*, [1940] 1 All E.R. 545. Considered: *Mackintosh or Miller v. Gerrard*, [1947] A.C. 461; *Re Brooke's Will Trusts, Jubber v. Brooke*, [1953] 1 All E.R. 668. Referred to: *Bull v. Jones* (1862), 31 L.J.Ch. 858; *Phillips v. Phillips* (1864), 11 L.T. 472; *Re Potter's Trust* (1869), L.R. 8 Eq. 52; *Re Woolrich, Harris v. Harris* (1879), 11 Ch.D. 663; *Gibbons v. Gibbons* (1881), 6 App. Cas. 471; *Re Lucas's Will* (1881), 17 Ch.D. 788; *Re Musther, Groves v. Musther* (1890), 43 Ch.D. 569; *Gorringer v. Muhlstedt*, [1907] A.C. 225; *Re Metcalfe, Metcalfe v. Earle*, [1909] 1 Ch. 424; *Re Taylor, Taylor v. White* (1911), 56 Sol. Jo. 175; *Re Williams, Metcalf v. Williams*, [1914] 2 Ch. 61; *Re Kirk, Wethey v. Kirk* (1915), 85 L.J.Ch. 182; *Re Brown, Leeds v. Spencer*, [1917] 2 Ch. 232; *Re Rayner, Couch v. Warner*, [1925] All E.R. Rep. 484; *Re Booth's Will Trusts, Robbins v. King* (1940), 163 L.T. 77.

Cases referred to:

- (1) *Tytherleigh v. Harbin* (1835), 6 Sim. 329; 5 L.J.Ch. 15; 58 E.R. 617; 44 Digest 799, 6546.
- (2) *Christopherson v. Naylor* (1816), 1 Mer. 320; 35 E.R. 693; 44 Digest 793, 6502.

- A** (3) *Thornhill v. Thornhill* (1819), 4 Madd. 377; 56 E.R. 744; 44 Digest 803, 6569.
- (4) *Butter v. Ommaney* (1827), 4 Russ. 70; 6 L.J.O.S.Ch. 54; 38 E.R. 731; 44 Digest 763, 6221.
- (5) *Gray v. Garman* (1843), 2 Hare, 268; 12 L.J.Ch. 259; 7 Jur. 275; 67 E.R. 111; 44 Digest 793, 6504.
- B** (6) *Waugh v. Waugh* (1833), 2 My. & K. 41; 39 E.R. 860; 44 Digest 801, 6557.
- (7) *Giles v. Giles* (1837), 8 Sim. 360; 6 L.J.Ch. 176; 1 Jur. 234; 59 E.R. 143; 44 Digest 800, 6548.
- (8) *Jarvis v. Pond* (1839), 9 Sim. 549; 8 L.J.Ch. 167; 59 E.R. 470; 44 Digest 799, 6543.
- C** (9) *Bebb v. Beckwith* (1839), 2 Beav. 308; 48 E.R. 1199; 44 Digest 800, 6549.
- (10) *Coulthurst v. Carter* (1852), 15 Beav. 421; 21 L.J.Ch. 555; 20 L.T.O.S. 20; 16 Jur. 532; 51 E.R. 600; 44 Digest 792, 6497.
- (11) *Ive v. King* (1852), 16 Beav. 46; 21 L.J.Ch. 560; 20 L.T.O.S. 5; 16 Jur. 489; 51 E.R. 693; 44 Digest 991, 8484.
- (12) *Smith v. Pepper* (1859), 27 Beav. 86; 54 E.R. 34; 44 Digest 850, 7036.

D Also referred to in argument :

- Leigh v. Byron* (1853), 1 Sm. & G. 486; 1 Eq. Rep. 519; 22 L.J.Ch. 1064; 22 L.T.O.S. 32; 17 Jur. 822; 1 W.R. 407; 65 E.R. 213; 44 Digest 812, 6639.
- Radcliffe v. Buckley* (1804), 10 Ves. 195; 32 E.R. 819; 44 Digest 843, 6964.
- Re Porter's Trust* (1857), 4 K. & J. 188; 27 L.J.Ch. 196; 32 L.T.O.S. 86; 4 Jur.N.S. 20; 6 W.R. 187; 70 E.R. 79; 44 Digest 500, 3199.
- E** *Pride v. Fooks* (1858), 3 De G. & J. 252; 28 L.J.Ch. 81; 32 L.T.O.S. 358; 5 Jur.N.S. 158; 7 W.R. 109; 44 E.R. 1265; 44 Digest 844, 6974.
- Fenn v. Death* (1856), 23 Beav. 73; 2 Jur.N.S. 700; 4 W.R. 828; 53 E.R. 29; 44 Digest 844, 6973.
- Whyth v. Blackman* (1749), 1 Ves. Sen. 196; 27 E.R. 979; sub nom. *Whythe v. Thurlstone*, Amb. 555; 40 Digest (Repl.) 501, 130.
- F** *Gale v. Bennett* (1786), Amb. 681; 27 E.R. 442; 44 Digest 843, 6961.
- Crook v. Whitley* (1857), 7 De G.M. & G. 490; 26 L.J.Ch. 350; 3 Jur.N.S. 703; 5 W.R. 383; 44 E.R. 191; 44 Digest 824, 6748.
- Kelly v. Hammond* (1858), 26 Beav. 36; 53 E.R. 809; 44 Digest 818, 6692.
- G** *Edmunds v. Fessey* (1861), 29 Beav. 233; 30 L.J.Ch. 279; 7 Jur.N.S. 282; 9 W.R. 365; 54 E.R. 616; sub nom. *Edmonds v. Fessey*, 3 L.T. 765; 44 Digest 817, 6689.
- Forth v. Chapman* (1720), 1 P.Wms. 663; 2 Eq. Cas. Abr. 292, 359; 24 E.R. 559; 44 Digest 582, 4046.
- Hewet v. Ireland* (1718), 2 Coll. 344, n.; 1 P.Wms. 426; Gilb. Ch. 145; 24 E.R. 456; sub nom. *Hewitt v. Ireland*, Prec. Ch. 489; 2 Eq. Cas. Abr. 139; 44 Digest 571, 3886.
- H** *Pratt v. Mathew* (1856), 22 Beav. 328; 25 L.J.Ch. 409; 27 L.T.O.S. 74; 2 Jur.N.S. 364; 4 W.R. 418; 52 E.R. 1134; on appeal, 8 De G.M. & G. 522; 44 Digest 874, 7305.
- Manning v. Chambers* (1847), 1 De G. & Sm. 282; 16 L.J.Ch. 245; 9 L.T.O.S. 146; 11 Jur. 466; 63 E.R. 1069; 44 Digest 719, 6248.
- I** *Doe d. Jones v. Hallett* (1813), 1 M. & S. 124; 105 E.R. 47; 44 Digest 839, 6934.
- Peel v. Catlow* (1838), 9 Sim. 372; 7 L.J.Ch. 273; 2 Jur. 759; 59 E.R. 400; 44 Digest 855, 7095.
- Reeves v. Brymer* (1799), 4 Ves. 692; 31 E.R. 358; 44 Digest 574, 3916.
- Crooke v. Brookeing* (1689), 2 Vern. 106; 23 E.R. 679; 44 Digest 843, 6959.

Bill filed praying that trusts of a will might be executed and the estate administered by and under the direction and decree of the court, and that the

rights and interests of all parties in the proceeds of the sale of the estate might be ascertained. A

Baily, Q.C., and *N. Smart* for Mrs. Loring, the plaintiff.

Glasse, Q.C., for the heir-at-law.

Toller, Q.C., and *John Pearson* for Thomas Davies.

Fleming, Q.C., *Bazalgette, Q.C.*, *Shapter, Q.C.*, *Baggallay, Q.C.*, *Shebbeare, Charles Hall, Templer, Walford, Schomberg, Osborne (Nicholls with him) and F. O. Haynes* for parties interested. B

Cur. adv. vult.

July 25, 1861. **KINDERSLEY, V.-C.**, read the following judgment.—In this case the testatrix Mary Williams, who was a spinster, by her will devised her real estate to trustees, upon trust to permit the Rev. Vaughan Thomas and his wife, and the survivor of them, to receive the rents and profits during their lives, and after the death of the survivor of them then upon trust to sell. Then she directed in what manner the moneys to be produced by such sale should be applied, and she directs that the money should be held upon the following trusts: C

“As to one-fourth part, upon trust to pay and divide the same equally between all and every the children of my deceased aunt Dorothy Davies; as to the other fourth part, upon trust to pay and divide the same equally between all and every the children of my deceased aunt Elizabeth Besson; as to one other fourth part thereof, upon trust to pay and divide the same equally between all and every the children of my deceased uncle Francis Cooke; and as to the remaining fourth part thereof, upon trust to pay and divide the same equally between all and every the grandchildren of my deceased aunt Mary Dixon.” D

With regard to those bequests, of course, there is no question; but then follows this proviso: E

“Provided always, and I hereby declare, that in case any child or children of the said Dorothy Davies, Elizabeth Besson, or Francis Cooke, or the grandchild or grandchildren of the said Mary Dixon, shall die in my lifetime leaving any child or children who shall be living at my decease, and who shall live to attain the age of twenty-one years, then and in such case it is my will that the child or children of each such child or grandchild so dying in my lifetime shall represent and stand in the place of his, her, or their deceased parent or respective parents, and shall be entitled to the same share or shares in the moneys to arise by sale of the said freehold hereditaments which his, her, or their deceased parent or parents would have been entitled to if living at the time of my decease.” F

She goes on to direct that such shares shall be divided among such children, if more than one, in equal proportions. That, however, does not affect the question. At the date of the testatrix's will, which was Nov. 17, 1838, there were living of Dorothy Davies, the first aunt named, two children, and also the children of a deceased child, that deceased child being Thomas Lewis Owen Davies, whom I will call Thomas for convenience. Of Elizabeth Besson, the deceased aunt secondly named, there was no child living at the date of the will, but there were children of a deceased child. Of Francis Cooke, the uncle, there was living at the date of the will one child, and also several children of four deceased children. And of Mary Dixon, the fourthly named person, there were living four grandchildren and several children of her deceased grandchildren. G

The question is this: Taking the first gift of one-fourth as an instance, whether the children of that child of Dorothy Davies who was dead at the date of the will, H

A are entitled to take a share of that one-fourth given in the first instance to the children of Dorothy Davies? A similar question arises with respect to each of the other three-fourths; but it will simplify the consideration of the matter to take the case of the first fourth as if it were the only case upon which the question arises, for whatever is the right decision for that case must equally be right with respect to the others.

B We have, then, a bequest of one-fourth part of the moneys to arise from the sale of real estate which is to be sold after the deaths of two tenants for life to the children of the testatrix's then deceased aunt Dorothy Davies, with a proviso that in case any child of Dorothy Davies should die in the testatrix's lifetime, leaving children who should be living at the testatrix's death, and who should live to attain twenty-one, such last-mentioned children should represent and stand in the place of their deceased parent, and should be entitled to the same share which their deceased parent would have been entitled to if living at the testatrix's decease. Did the testatrix by this proviso intend to include only the children of any child of Dorothy Davies who might die between the date of the will and her (the testatrix's) decease; or did she mean to include also the children of that child of Dorothy Davies who was dead at the date of the will? In order to prevent confusion of language, I will speak of the first generation (that is, the children of Dorothy Davies) by the term "children," and when I speak of the second generation (that is, the children of those children) I will use the term "issue," or "issue of children," otherwise the perpetual occurrence of the word "children," as applied to two different generations, will occasion perplexity. And, for brevity's sake, I will use the term "predeceased children" to signify those of the first generation who were dead at the date of the will.

Of course, the question is one entirely of intention; and it is obvious that in cases of this kind a testator may mean to include as objects of his bounty, or he may mean to exclude, the issue of predeceased children. When a testator directs that issue shall represent or stand in the place of, or be substituted for, a deceased child, and take the share which their parent would have taken if living, he may intend such representation or substitution to apply only to the case of a child dying subsequently to the date of his will and before the time of his own death, or he may mean it to extend also to the case of a child who was already dead at the date of the will. The solution of the question which of the two he intended must, of course, depend on the language he has used in directing such representation or substitution. He may use language of such restricted import as to be inapplicable to any child but such as were living at the date of the will. But if he uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both.

I Before I proceed to examine in detail the language of this will, I will make one or two preliminary observations which, although they are little better than truisms, it will be useful to bear in mind, not only in considering the terms of this will, but also with reference to some of the decided cases bearing on the question. First I would observe that, with reference to a bequest to the children of A., there is this obvious distinction between a child of A. living at the date of the will, and a predeceased child of A., namely, that the former is one of those whom the testator intends to benefit by the bequest, whereas the latter (a predeceased child) not only cannot take under such a bequest, but he cannot be intended by the testator to benefit, for no one intends to make a bequest in favour of a dead person. If, therefore, a testator, in directing that the issue of a deceased child shall represent, or stand in the place of their parent, uses language importing that they shall take the share which he intended for the parent, the issue of a predeceased child cannot be included, because the testator

could not have intended to give any share to a child then already dead. On the other hand, I would observe that a predeceased child of A., and a child of A. living at the date of the will, stand upon the same footing in this respect, that not only are they both equally children of A., and answer that description, but they both equally answer the description of children of A. who would, if they were living at the testator's death, have been entitled to a share under a bequest to the children of A. That description is merely hypothetical; it speaks not of what will happen, or even of what may happen, but only of what would have happened upon a certain hypothesis; and putting a hypothetical case does not at all involve the assumption that the hypothesis is true, or even possible. Suppose a testator having by his will made a bequest to the children of A., were to add this: "One child of A. (Thomas) is already dead, and I direct that his issue shall represent him, and stand in his place, and shall be entitled to the same share as Thomas would have been entitled to if living at my decease." Surely that language would be perfectly correct and appropriate. Thomas, though already dead, and, therefore, incapable of taking a share, and not intended to take a share, would, upon the hypothesis of his being alive at the testator's death, have been entitled to a share under the bequest to the children of A., and the testator would be correctly speaking of the share which Thomas would have been entitled to upon that hypothesis, although the hypothesis is impossible.

I proceed now to consider the terms of this bequest. It is to be remarked that the testatrix does not express her intention in favour of the children of Dorothy Davies, and in favour of the issue of deceased children, in one and the same clause, but in two distinct clauses. It is not like *Tytherleigh v. Harbin* (1), a bequest in one single clause to such of the children of A. as shall be living at a certain period, and to the issue of such of them as shall be then dead; but there is, first, a bequest to the children of Dorothy Davies, and then, by a separate and distinct clause or proviso, the testatrix directs that the issue of deceased children shall represent their parent. But this circumstance does not appear to me to govern the question. There is nothing to preclude a testator, after having made a bequest in favour of a certain class, from directing, by a subsequent clause (whether by way of proviso or otherwise), that new objects not comprehended in or connected with the first-mentioned class, shall share with the members of that class. A testator, for example, may make a bequest to the children of A., and then, by a subsequent proviso, direct that the children of B. shall share with the children of A.; and in such case the effect would be precisely the same as if, by one single clause, he had bequeathed to the children of A. and the children of B.

The question then is: Who are the objects intended by the proviso? According to the fair and just interpretation of the language of the proviso, is the direction that the issue of deceased children of Dorothy Davies shall represent and stand in the place of their parents, restricted to the case of those children only who were living at the date of the will, and who might afterwards die in the testatrix's lifetime leaving issue; or is it expressed in terms so large and general as to include also the case of any children of Dorothy Davies who were already dead leaving issue? That is the question. It appears to me that, with one exception, every word of the proviso is adapted to include both of those cases. I say with one exception, and that exception is to be found in the words "shall die." The words are: "In case any child or children of the said Dorothy Davies shall die in my lifetime." Those words "shall die," in their strict and proper meaning, point to a future death, and if they ought to be construed according to that strict and proper meaning, then of course they can only refer to persons living at the time when those words were framed, and cannot include any person then already deceased. If instead of the words "shall die" the testatrix had used the words "shall be dead" or "shall have died," those words would have referred

A as much to predeceased children as to children subsequently dying. I will reserve the consideration of the question what construction ought to be put upon the words "shall die in my lifetime" until after I have examined the other parts of this proviso.

First, with respect to the words "in case any child or children of the said Dorothy Davies shall die in my lifetime." What is the meaning of the words
B "any child or children of the said Dorothy Davies?" The testatrix does not say "any of the said children of Dorothy Davies," nor "any such child or children of Dorothy Davies," nor "any of the children of Dorothy Davies to whom I before bequeathed the one-fourth." There is no reference to any particular class or portion of the children of Dorothy Davies, but the words are general,
C "any child or children of Dorothy Davies," and those words, according to their natural and proper construction, embrace all children of Dorothy Davies, as well those who were then already dead as those who were then living. Proceeding thus to the subsequent part of the clause, what is to be the consequence of any child or children of Dorothy Davies dying in the testatrix's lifetime?" Disencumbering the sentence from superfluous words which do not affect the sense,
D this is the direction of the testatrix: "Then and in such case the children of each such child so dying in my lifetime shall represent and stand in the place of their deceased parent, and shall be entitled to the same share which their deceased parent would have been entitled to if living at the time of my decease." The testatrix does not say "shall be entitled to their parent's share," nor does she say "shall be entitled to the share hereby intended for their parent"; but she
E says, "shall be entitled to the same share which their deceased parent would have been entitled to if living at the time of my decease." The share which she says that the children of a deceased child shall be entitled to is not a share which that deceased child will take, or can take, or is intended to take; but it is the share which that deceased child would have been entitled to upon a certain hypothesis, namely, the hypothesis of that child being alive at
F the testatrix's death; and unquestionably Thomas, the predeceased child of Dorothy Davies, would upon the hypothesis of his being alive at the time of the testatrix's death have been entitled to her share under the bequest to the children of Dorothy Davies.

With respect to the words "shall represent and stand in the place of their deceased parent," I confess I cannot see why the children of a predeceased child
G should not represent and stand in the place of their deceased parent—not, indeed, in respect of any share which that parent could take, or was intended to take, for, being already dead, he neither could take, nor was intended to take, any share; but in respect of the share which that parent would have been entitled to if living at the testatrix's decease, and that is the share in respect of which the testatrix directs that the children of a deceased child are to represent and stand
H in the place of their deceased parent. It appears to me, then, that the only words in this proviso which afford any ground for contending that it excludes the case of a predeceased child of Dorothy Davies are the words "shall die." And the question is whether those words are to be construed as pointing to a future death, which is their strict grammatical import, or to the event of being dead at a certain future period, without reference to the particular time at which the
I death may have occurred.

There are very numerous cases in which words in a will, which, according to their strict grammatical import, denote the future happening of a certain event, have been held to signify the fact of the event having happened, whether it actually occurred before or after the date of the will. I will only refer to *Christopherson v. Naylor* (2), which is in *pari materia* with the case now before the court. There the testator gave £800 to each of the children of his brother and three sisters which should be living at his (the testator's) decease, and added :

"But if any child or children of my said brother and sisters, or any of them, shall happen to die in my lifetime and leave any issue living at his or their decease, then the legacy or legacies hereby intended for such child or children so dying shall be in trust for his or their issue."

The question was, as it is here, whether the issue of a predeceased child could take. SIR WILLIAM GRANT, M.R., decided against them, on another ground altogether, but with respect to the words "shall happen to die," which, according to their strict grammatical import, point to a future death just as strongly as the words "shall die" in the present case, he expressed himself thus (1 Mer. at pp. 325, 326):

"The question, in this case, does not depend upon the words 'shall happen to die in my lifetime.' Though, according to strict construction, importing futurity, those words might have been understood as speaking of the event, at whatever time it might happen."

I consider this opinion of SIR WILLIAM GRANT, M.R., as high authority for construing the words "shall die in my lifetime" in the sense of "shall have died in my lifetime."

But, further, that such was the sense in which the testatrix used those words appears to me clear from the context. For the passage is this, omitting superfluous words: "in case any child or children of the said Dorothy Davies shall die in my lifetime leaving any children who shall be living at my decease and who shall live to attain the age of twenty-one years, then and in such case the children of each such child so dying shall represent and stand in the place of their deceased parent..." If the words "shall die" must be construed to refer only to a future death, so as to exclude such children of Dorothy Davies as had died before the date of the will, then the words "who shall live to attain the age of twenty-one years" must equally be construed to refer only to a future attainment of twenty-one years, so as to exclude such children of a deceased child of Dorothy Davies as had attained twenty-one before the date of the will; and the consequence of such construction would be that if a child of Dorothy Davies living at the date of the will afterwards died in the testatrix's lifetime, leaving children, all of whom had attained twenty-one before the date of the will, there could be no representation in that case. This would be so contrary to the testatrix's obvious intention, that the words "shall live to attain the age of twenty-one years" must be construed to refer only to the fact of attaining twenty-one without regard to the question whether the attainment of twenty-one happened before or after the date of the will. So I apprehend the words "shall die" must be construed to refer to the fact of death without regard to the question whether the death occurred before or after the date of the will. Upon the whole, I am of opinion that the language of the proviso, according to its true construction, is so wide and general as to include not only the case of such children of Dorothy Davies as were living at the date of the will, and might afterwards die in the testatrix's lifetime, but also the case of such children of Dorothy Davies as were already dead at the date of the will, leaving children, and that, therefore, the children of Thomas, who was dead at the date of the will, must be held to represent him and stand in his place, so as to take the share which Thomas would have taken if he had been living at the death of the testatrix. The same reasons will apply to the children of the predeceased child of Elizabeth Besson, and to the children of the four predeceased children of Francis Cooke, and to the children of the two deceased grandchildren of Mary Dixon.

With regard to the question of the second fourth in the first instance given to the children of Elizabeth Besson, and the last fourth, which is in the first instance given to the grandchildren of Mary Dixon, it appears to me that those cases tend to illustrate and confirm the view I have taken of the construction of this will. For, as to the one-fourth given in the first instance to the children of Elizabeth

A Besson, it appears that at the date of the will there were no children of Elizabeth Besson living at all. There were children of a predeceased child, but no children of Elizabeth Besson. Some evidence has been adduced for the purpose of showing that the testatrix well knew the state of all these families, and that she must have known there were no children of Elizabeth Besson living at the date of her will. I think that, although it is extremely probable, and I should conclude, that
B the testatrix in the course of her life knew when these different relations of hers died, yet at the time when she was making her will it was not clear to her mind whether there were any children of Elizabeth Besson living or not, otherwise she would hardly have given in the first instance to the children of Elizabeth Besson, if she knew that Elizabeth Besson had no children then living. When she came
C to the case of Mary Dixon, the case of the last fourth, she knows there has been but one child of Mary Dixon, and that child is dead. Therefore, she does not make the gift to the children of Mary Dixon, but to the grandchildren of Mary Dixon, who were the children of the predeceased child. I think, therefore, it is to be concluded that with regard to the second fourth, which is in the first instance given to the children of Elizabeth Besson, the testatrix was uncertain whether at the date of the will there were living any children of Elizabeth Besson, and in that state of uncertainty she says she gives to the children of Elizabeth Besson, and then follows the proviso which I have been commenting on with regard to the representation. When she comes to the last fourth, as I have observed with regard to Mary Dixon, where there was no child living, and she knew there was no child living, then she does not make any gift to the children,
E but goes at once to the grandchildren.

I will advert shortly to the cases on the subject, those which immediately bear on the question—the question being whether the issue of a predeceased child take. The first case is *Christopherson v. Naylor* (2), which I have already referred to on one point. There it was a gift by will of £800 to each and every child and children of testator's brother and sisters, A., B., C. and D., which should be
F living at the time of testator's decease. The will continued :

“But if any child or children of my said brother and sisters, or any of them, shall happen to die in my lifetime and leave any issue of the body or bodies of any such child or children living at, or born in due time after his or their decease, then the legacy or legacies hereby intended for such child or children so dying shall be upon trust for, and I give and bequeath the
G same to his, her, or their issue, such issue taking only the legacy or legacies which his or their parent or parents would have been entitled to if living at my decease.”

Here it is to be observed it is not a gift of £800 to the children of A., and £800 to the children of B., and so on. The proviso does not direct that the issue of
H the deceased children shall be substituted for and stand in the place of their parents, and to take the share which their parents would have taken if living at a future period; but it is, “the legacy or legacies hereby intended for such child or children so dying shall be upon trust for, and I give and bequeath the same to his, her, or their issue.” It is quite impossible that anything could go to any issue except some legacy that had been given to a child, and no legacy was
I given to a predeceased child, and the Master of the Rolls observes on that part of the case (1 Mer. at p. 326) :

“Nothing whatever is given to their issue except in the way of substitution. In order to claim, therefore, under the will these substituted legatees must point out the original legatees in whose place they demand to stand. But of the nephews and nieces of testator, none would have taken besides those who were living at the date of the will. The issue of those who were dead at that time can consequently show no object of substitution, and to give them original legacies would be in effect to make a new will for the testator.”

It appears to me that, although that case is a decision against the issue of a predeceased child, it tends strongly to confirm the view I have taken; and I am satisfied from the reasoning of SIR WILLIAM GRANT, M.R., that, if the words in that case had not been such as they are, but such as have occurred in the case now before me, SIR WILLIAM GRANT would have decided in favour of the issue of the predeceased child. I pass over *Thornhill v. Thornhill* (3), decided by SIR JOHN LEACH, M.R., because it does not arise on the immediate question here, and partly because it has been distinctly overruled.

The next case I would mention in order of date is *Butter v. Ommaney* (4) before SHADWELL, V.-C. There a testator gave the residue of his real and personal estate after the death of his wife and his brother Joseph to be equally divided between the children of his brothers and sisters and two others "who should be then living, and as to such of them as should be then dead, leaving a child or children," such child or children were to be and stand in the place or places of his, her, or their parent or parents. It all depends upon the question who was meant by the word "them"? The learned vice-chancellor held that the word "them" meant the children to whom the testator had before given the residue. Therefore, he excluded the issue of a predeceased child. There is a case which, although not in order of date, I will mention now, which is to the same effect. That is *Gray v. Garman* (5), decided by WIGRAM, V.-C. I mean decided on the same principle. It was the gift of real and personal estate to the wife for her life, and after her death the testator gave thus:

"all the residue of my estate and effects I desire may be equally divided between the brothers and sisters of my said wife, and in case any or either of them shall be dead at the time of the decease of my said wife leaving issue, then such issue to stand in the place of their respective parents or parent."

One of the wife's brothers had died before the date of the will, leaving children, and the vice-chancellor held that they were excluded on the ground, as he says, and only on this ground, that he considered the word "them" to mean, not children generally, in which case he would have decided directly the other way, but the brothers and sisters to whom the original gift had been made.

The next case in order is *Waugh v. Waugh* (6); but as that is the only case which it appears to me would conflict with the view I have taken of the present case, I shall reserve it till the last. *Tytherleigh v. Harbin* (1) is a case in which there was a devise of real estate in trust for Robert Tytherleigh for life,

"and after his death in trust to convey unto, between, or amongst all and every and such one or more of the child or children of the said Robert Tytherleigh who shall be living at the time of his decease, and the issue of such of them as shall be then dead leaving issue."

There the word "them" referred, not to children to whom the gift was made, but to children generally, and the words were added, "such issue to take between or amongst them the share only which their parents or parent would have been entitled to if then living, their heirs, executors and administrators, as tenants in common and not as joint tenants." There, inasmuch as the word "them" was clearly referred, not in the limited sense, to the children to whom the gift was made, but to children generally, it was held that the issue of the predeceased children were entitled to take.

Then follow *Giles v. Giles* (7) and *Jarvis v. Pond* (8), in which the decision was on failure of the issue of the predeceased children. They are very strong cases, and great difficulties were got over to arrive at that conclusion. *Giles v. Giles* (7) was this. The residuary personal estate was given to the trustees

"in trust for all and every the child and children of my body living at the decease of my wife, share and share alike, and if any such children or child shall be deceased before my wife, and such child or children shall leave issue

- A of their, his, or her body, then the children or child of such my son or daughter shall be entitled to the portion of such my son or daughter who may be deceased before the death of my wife on attaining twenty-one."

The testator happened to add this :

- B "Provided that until the portions herein provided for any of the said children of my said sons or daughters [in the plural] who may have died before their mother, shall become vested it shall be lawful. . . ."

C Then there was a power to apply the income to maintenance. At the date of the will the testator had four sons, but only one daughter, living, and the children of another daughter who had died before the date of the will, and all who were then living survived the testator. The vice-chancellor came to the conclusion—for he felt the difficulty of getting over the words "to the portion of such my son or daughter"—that the testator must have intended, when he spoke of daughters in the plural, to include the only daughter who was living at the date of the will, and the daughter who was dead at the date of the will.

- D *Jarvis v. Pond* (8) was decided very much on the same ground. The testatrix at the date of her will had two sons and two daughters living, one of whom was Mary Pond, and she had also the children of a son and daughter, both of whom were then dead. She gave the residue of her property to her daughter Mary Pond, i.e., one of the two daughters then living, for life,

- E "and after her decease I will that the said property be equally divided amongst such of my sons and daughters as may be living at the time of the decease of the said Mary Pond; and in case of the decease of any of my said sons or daughters, to have their father's or mother's part, to be equally divided amongst them."

- F The reference to "daughters" could not include Mary Pond. It was held that, inasmuch as she had used the word "daughters," and she had only one, it must have referred to a predeceased daughter as well as the other surviving daughter, and, therefore, that the issue of the predeceased daughter were entitled. But observe what difficulties were there got over. As the vice-chancellor observes in that case, no doubt he is doing violence to the language used by the testatrix by assigning a share to the father or mother when they could not have taken any, and were never intended to take any.

- G With regard to these cases, I regard them as indications of the struggle which the court would make to accomplish the object of including as much as possible the issue of predeceased children; and I may observe that in each case the vice-chancellor got over that on the ground that, as daughters were spoken of in the plural, and there was but one living to whom it could apply, it must be held to apply to a predeceased daughter. But it is possible that the testator might have had in view some after-born daughter. In the former case, of *Giles v. Giles* (7), SHADWELL, V.-C., said it was obvious the testator must have had more in his mind the remembrance of a predeceased daughter than he had in his mind the possibility of having another child, and that child being a daughter. However that may be, it was getting over enormous difficulties for the purpose of arriving at the conclusion that the issue of predeceased children were entitled. I confess, if those cases had come before me, I should have had great difficulty in arriving at that conclusion, but they are decisions in favour of the issue of predeceased children.

I In *Bebb v. Beckwith* (9), there was a

"bequest in trust for all and every the children of testator's late uncle J. B. deceased to be divided equally amongst them, and the issue of such of them as shall be deceased, share and share alike, such issue to be entitled to the share of his, her, or their deceased parents, equally amongst them."

Notwithstanding those words, LORD LANGDALE came to the conclusion that the child of a son of J. B., who had died before the date of the will, was entitled to take: I have not the smallest doubt in my mind that if the case before me had been before LORD LANGDALE, a multo fortiori, he would have decided this case in favour of the issue of a predeceased child. A

The next case I will refer to is *Coulthurst v. Carter* (10), before the present Master of the Rolls [SIR JOHN, later LORD, ROMILLY]. There was a bequest to the testatrix's niece for life, with a limitation to her issue; but if she died without issue surviving her (which event happened), then to the niece's mother for life, and after the death of both—the bequest on which the question turned—the testatrix gave one moiety B

“unto, between and amongst the child and children then living of Ann Armitage deceased, and the issue then living of any child or children of Ann Armitage dying in the lifetime of my said niece, and to their respective executors, administrators and assigns, share and share alike, the issue of any such deceased child or children of the said Ann Armitage nevertheless taking only the share or shares that their respective parent or parents would have taken if living at the death of my said niece.” C D

Then came these words :

“And in case any of the children of the said Ann Armitage shall die without issue in the lifetime of my said niece, then I give the share or shares of him, her, or them so dying to the children of Mary Haigh, who shall be living at the decease of my said niece.” E

The Master of the Rolls held that the issue of a child of Ann Armitage who died before the will was entitled to take. I do not refer to *Ive v. King* (11) because that was a gift to certain persons nominatim, and that does not come under the same principle.

The last case I shall mention is *Smith v. Pepper* (12). The testator there said : F

“And in regard to the relations of my departed wife, I give to each of her sisters and to her brother or to such of them as may be living at the time of my decease, £1,000 each, the said sum in the case of those who may not be in existence at my death to go to their respective descendants in such proportions as each may be entitled to under the laws which may then be in force for the distribution of unbequeathed property, and if either of the sisters or brother aforesaid shall at the time of my decease have departed this life without leaving any descendants, I give and bequeath the share of such brother or sisters to be divided in the lawful proportions amongst the remaining sisters or brother, or their descendants or descendant.” G

“Brother” in the singular was mentioned. In that case, a sister of the wife was dead at the date of the will, leaving children, and it was held that her children were excluded. In fact, it is obvious that the testator was intending there to give to certain persons, the sisters and brother then living of a testator's wife. H

Those are the only cases which very directly bear on the present, and it appears to me that, with the exception of *Waugh v. Waugh* (6), which I will shortly refer to, not one of those I have mentioned conflicts with the view I have taken, and I think some of them tend strongly to support that view. With regard to *Waugh v. Waugh* (6) that is directly in conflict. It was a bequest of £5,000 three per cents., in trust for John Waugh for life, and after his death upon certain trusts for his children and their issue, and in case there should be no child of John Waugh, nor any issue of a deceased child living at his death (which event happened), there was the bequest on which the question turned : I

“then in trust for all the brothers and sisters of John Waugh who shall be living at the time of his death, and the children then living of any of his

A brothers and sisters who shall have previously departed this life, equally to be divided amongst such brothers' and sisters' children, but so nevertheless that the children of such deceased brother and sister shall take only the share which their parent would have taken if living."

B That case is a compound of *Tytherleigh v. Harbin* (1) and the case now before me. Eleanor (the child of Alexander Waugh, a brother of John Waugh, which brother was dead at the date of the will), being a child of a predeceased brother of John Waugh, SIR JOHN LEACH, M.R., says (2 My. & K. at p. 45):

"It is plain that the words used in the first part of the bequest would comprise Eleanor, for she was the child of Alexander Waugh, a brother of John Waugh, who had died before John Waugh."

C So that so far he entirely concurs in the suggestion I have been making. He goes on thus:

D "but by the subsequent part of the gift it is expressed that the children of a deceased brother of John Waugh are to take only the share which their parent would have taken if living, by which is to be understood would have been taken under that bequest if living, and the parent of Eleanor being dead at the time of making the will, could have taken nothing under that bequest, and therefore Eleanor will not share in the £5,000."

E I take the liberty of not concurring in that reasoning. Alexander, the predeceased brother, though he could not take under a bequest to the brother on the hypothesis that he was dead, surely would have taken under a bequest to the brother on the hypothesis that he was living at the period pointed out, and would have taken under that bequest, and, therefore, I conceive, although it may be somewhat presumptuous for me to say so, that SIR JOHN LEACH did not apply sound reasoning to that case. I express that opinion with the less hesitation, because *Waugh v. Waugh* (6) is considered as a case that is overruled, and is not

F considered any longer an authority.

In conclusion, I will make one or two observations with regard to the language that is sometimes used in the cases and text-books on this subject. It is often spoken of as if the decision depended upon whether it was original gift or substitution. I do not mean to say that this language is not true and correct if used in the sense in which it is intended; but I think it is language that is a little apt to mislead, because, if you take one of the cases in which clearly the issue of a predeceased child was intended to be included, and is decided to be included, the issue of that child in one sense is substituted for or represents the deceased parent, but then they represent the deceased parent, not in respect of shares which that parent could take or would take under a bequest, but in respect of a share which the parent would have taken under the bequest on the hypothesis of the parent being alive at the time pointed out. Therefore, although it is clearly a case of vested bequest or original bequest, it is also a case of substitution in one sense. So, on the other hand, take the case of the issue of a child who was living at the date of the will, and afterwards dies in the lifetime of the testator. That case is always spoken of as a case of substitution. No doubt it is. The issue are substituted for the share which the parent was intended to take, and could take under the bequest to the children of A.; but it is also the case of original bequest, because, if there was not that clause, the issue would take nothing. Therefore, in both cases there is both original bequest and substitution, and it does not signify whether you use the word "substitution" or "representation," or any other analogous word, for there is no magic in the word. But I apprehend the question is whether the intention was to make the gift by way of substitution to the issue only of those who were alive at the date of the will, and those to whom a share was intended to be given, or whether it

was intended by the testator to make the substitution and representation apply to the case of the issue of those who had died before the date of the will; and of course that intention must be collected from the language used in the whole will. I make these observations, not for the purpose of dissenting from the language, but only as signifying that when the language is used it ought to be remembered in what sense it is used; otherwise I think it is apt to mislead.

There must be a declaration in accordance with the decision. The costs of all parties who for the purpose of the decision of the question were necessarily brought before the court, must come out of the estate as between solicitor and client.

SMITH v. HUGHES

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn and Hannen, JJ.), May 2, June 6, 1871]

[Reported L.R. 6 Q.B. 597; 40 L.J.Q.B. 221; 25 L.T. 329;
19 W.R. 1059]

Sale of Goods—Rejection—Defective quality—Belief by buyer that goods of certain quality—No warranty—Knowledge by seller of buyer's belief—Obligation to inform buyer of mistake—No fraud or deceit.

Per SIR ALEXANDER COCKBURN, C.J.: I take the true rule to be that where a specific article is offered for sale without express warranty or without circumstances from which the law will imply a warranty, as where, for instance, an article is ordered for a specific purpose and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule caveat emptor applies. . . . There is not, so far as I am aware, any authority for the proposition that a vendor who submits the subject-matter of sale to the inspection of the vendee is bound to state circumstances which may tend to detract from the estimate which the buyer may injudiciously have formed of its value.

Per BLACKBURN, J.: On the sale of a specific article, unless there be a warranty making it part of the bargain that the article possesses some particular quality, the buyer must take the article he has bought although it does not possess that quality. The buyer is so bound even if the seller was aware that the buyer thought that the article possessed that quality and would not have entered into the contract unless he had so thought, unless the seller was guilty of some fraud or deceit upon the buyer. A mere abstinence from disabusing the buyer of that impression is not fraud or deceit, for, whatever may be the case in a court of morals, there is no legal obligation on the seller to inform the buyer that he is under a mistake which has not been induced by the act of the seller. When specific goods are sold by sample which the buyer inspects instead of the bulk, the law is exactly the same if the sample truly represents the bulk, though, as it is more probable that the buyer in such a case would ask for some further warranty, slighter evidence would suffice to prove that it was intended that there should be such a warranty.

The plaintiff, a farmer, having new oats, asked the manager of the defendant, a trainer of racehorses, if he wanted to buy oats, and, on being answered by the

A manager that he was always ready to buy good oats, gave him a sample, and told him the price. The manager took away the sample, and next day bought the bulk, but afterwards he refused to accept the oats because they were new, whereas, he said, he had thought to buy old oats. The defendant being sued by the plaintiff in the county court, there was a conflict of testimony whether "old" oats had been mentioned at the bargaining. The judge told the jury to consider, first, whether the word "old" had been used in the conversation; if so, their verdict should be for the defendant. If not, they must consider secondly, whether the plaintiff believed that the defendant believed, or was under the impression, that he was contracting for the purchase of old oats. In either case, the learned judge told the jury, the defendant was entitled to the verdict. The jury found for the defendant.

Held: the passive acquiescence of the seller in the self-deception of the buyer did not, in the absence of fraud or deceit on the part of the seller, entitle the buyer to avoid the contract, and there must be a new trial.

Notes. Considered: *Pope and Pearson v. Buenos Ayres New Gas Co.* (1892), 8 T.L.R. 758. Applied: *Ewing and Lawson v. Hanbury* (1900), 16 T.L.R. 140; *Scott v. Coulson*, [1903] 1 Ch. 453; *London Holeproof Hosiery Co. v. Padmore* (1928), 44 T.L.R. 499. Considered: *Blay v. Pollard and Morris*, [1930] All E.R. Rep. 609; *Bell v. Lever Bros.*, [1931] All E.R. Rep. 1; *Sullivan v. Constable* (1932), 48 T.L.R. 369. Referred to: *Solle v. Butcher*, [1949] 2 All E.R. 1107; *A. Roberts & Co. v. Leicestershire County Council*, [1961] 2 All E.R. 545.

As to the conditions to be implied in contracts for the sale of goods by description or by sample, see 34 HALSBURY'S LAWS (3rd Edn.) 47-58, and s. 13 and s. 15 of the Sale of Goods Act, 1893 (22 HALSBURY'S STATUTES (2nd Edn.) 985). For cases see 39 DIGEST (Repl.) 507 et seq.

Cases referred to:

- (1) *Horsfall v. Thomas* (1862), 1 H. & C. 90; 2 F. & F. 785; 31 L.J.Ex. 322; 6 L.T. 462; 8 Jur.N.S. 721; 10 W.R. 650; 158 E.R. 813; 35 Digest (Repl.) 27, 184.
- (2) *Freeman v. Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 12 Digest (Repl.) 74, 414.
- (3) *Raffles v. Wichelhaus* (1864), 2 H. & C. 906; 33 L.J.Ex. 160; 159 E.R. 375; 35 Digest (Repl.) 106, 83.
- (4) *Scott v. Littledale* (1858), 8 E. & B. 815; 27 L.J.Q.B. 201; 4 Jur.N.S. 849; 120 E.R. 304; 35 Digest (Repl.) 112, 123.

Also referred to in argument:

- Mody v. Gregson* (1868), L.R. 4 Exch. 49; 38 L.J.Ex. 12; 19 L.T. 458; 17 W.R. 176, Ex. Ch.; 39 Digest (Repl.) 553, 835.
- Azemar v. Casella* (1867), L.R. 2 C.P. 677; 36 L.J.C.P. 263; 16 L.T. 571; 15 W.R. 998, Ex. Ch.; 39 Digest (Repl.) 534, 695.
- Hill v. Gray* (1816), 1 Stark. 434; 171 E.R. 521; 39 Digest (Repl.) 828, 2898.
- Keates v. Earl of Cadogan* (1851), 10 C.B. 591; 20 L.J.C.P. 76; 16 L.T.O.S. 367; 15 Jur. 428; 138 E.R. 234; 31 Digest (Repl.) 191, 3220.

Appeal by the plaintiff from a decision of the county court of Surrey, holden at Epsom, in an action in which the plaintiff sought to recover the sum of £34 15s. 8d. (viz., £27 4s. for 16 quarters of oats sold and delivered, £7 5s. loss on re-sale of 29 quarters of oats agreed to be purchased, but refused by the defendant, and 6s. 8d. storage).

Pollock, Q.C., and *Mellor* for the plaintiff.
Arthur Wilson for the defendant.

Cur. adv. vult.

June 6, 1871. 'The following opinions were read.

SIR ALEXANDER COCKBURN, C.J.—This was an action brought in the Epsom County Court upon a contract for the sale of a quantity of oats by the plaintiff to the defendant, which contract the defendant had refused to complete on the ground that the contract had been for the sale and purchase of old oats whereas the oats tendered by the plaintiff had been oats of the last crop, and, therefore, not in accordance with the contract. A

The plaintiff was a farmer, the defendant a trainer of racehorses. It appeared that the plaintiff, having some good winter oats to sell, applied to the defendant's manager to know if he wanted to buy oats, and, having received for answer that he (the manager) was always ready to buy good oats, exhibited to him a sample, saying at the same time that he had forty or fifty quarters of the same oats for sale at the price of 35s. per quarter. The manager took the sample, and on the following day wrote to say he would take the whole quantity at the price of 34s. a quarter. Thus far the parties were agreed; but there was a conflict of evidence between them whether anything passed at the interview between the plaintiff and the defendant's manager on the subject of the oats being old oats, the defendant asserting that he had expressly said that he was ready to buy old oats and that the plaintiff had replied that the oats were old oats, while the plaintiff denied that any reference had been made to the oats being old or new. The plaintiff having sent in a portion of the oats, the defendant, on meeting him afterwards, said: "Why, those were new oats you sent me!", to which the plaintiff having answered: "I knew they were. I had none other," the defendant replied: "I thought I was buying old oats; new oats are useless to me; you must take them back." This the plaintiff refused to do, and brought this action. B C D E F

It was stated by the defendant's manager that trainers as a rule always use old oats, and that his own practice was never to buy new oats if he could get old. But the plaintiff denied having known that the defendant never bought new oats, or that trainers did not use them; and, on the contrary, asserted that a trainer had recently offered him a price for new oats. Evidence was given for the defendant that 34s. a quarter was a very high price for new oats, and such as a prudent man of business would not have given. On the other hand, it appeared that oats were at the time very scarce and dear.

The learned judge of the county court left two questions to the jury, first, whether the word "old" had been used with reference to the oats in the conversation between the plaintiff and the defendant's manager; secondly, whether the plaintiff had believed that the defendant believed, or was under the impression that he was contracting for old oats, in either of which cases he directed the jury to find for the defendant. It is to be regretted that the jury were not required to give specific answers to the questions so left to them, for it is quite possible that their verdict may have been given for the defendant on the first ground, in which case there would, I think, be no doubt as to the propriety of the judge's direction, whereas now it is possible that the verdict of the jury—or at all events of some of them—may have proceeded on the second ground. We are called upon to consider and decide whether the ruling of the learned judge with reference to the second question was right. For this purpose we must assume that nothing was said on the subject of the defendant's manager desiring to buy old oats, nor of the oats having been said to be old, while, on the other hand, we must assume that the defendant's manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing directly or indirectly to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. G H I

The question is whether under such circumstances the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not. The oats offered to the defendant's manager were a specific parcel, of which the sample submitted to

A him formed a part. He kept the sample for twenty-four hours, and had, therefore, full opportunity of inspecting it, and forming his judgment upon it. Acting on his own judgment, he wrote to the plaintiff offering him a price. Having an opportunity of inspecting and judging of the sample, he is practically in the same position as if he had inspected the oats in bulk. It cannot be said that, if he had gone and personally inspected the oats in bulk, and then, believing—but without anything being said or done by the seller to bring about such a belief—that the oats were old, had offered a price for them, he would have been justified in repudiating the contract, because the seller, from the known habits of the buyer or other circumstances, had reason to infer that the buyer was ascribing to the oats a quality they did not possess, and did not deceive him. I take the true rule to be that where a specific article is offered for sale without express warranty or without circumstances from which the law will imply a warranty, as where, for instance, an article is ordered for a specific purpose and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule caveat emptor applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame.

E The question is not what a man of scrupulous morality or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding. STORY, J., in his work on CONTRACTS, vol. 1, para. 516, states the law as to concealment as follows:

G “The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed.”

He goes on to say:

H “Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of caveat emptor, he is not, ordinarily, bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee. . . . But an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract.”

I Further, distinguishing between extrinsic circumstances affecting the value of the subject-matter of a sale, and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, he points out that, with reference to the latter, the rule is that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case. In the doctrine thus laid down I entirely agree.

In the present case there was plainly no legal obligation on the plaintiff in the first instance to state whether the oats were new or old. He offered them for sale according to the sample, as he had a perfect right to do, and gave the buyer the fullest opportunity of inspecting the sample, which, practically, was equivalent to an inspection of the oats themselves. What, then, was there to create any trust or confidence between the parties so as to make it incumbent on the plaintiff to communicate the fact that the oats were not, as the defendant assumed them to be, old oats? If, indeed, the buyer, instead of acting on his own opinion, had asked the question whether the oats were old or new, or had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different. Or, even, if he had said anything which showed that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller, as a means of misleading him, might have amounted to a fraudulent concealment such as would have entitled the buyer to avoid the contract. Here, however, nothing of the sort occurs. The buyer in no way refers to the seller, but acts on his own judgment.

Horsfall v. Thomas (1), if that case can be considered good law, is an authority in point. In that case a gun, which had been manufactured for a purchaser, had, when delivered, a defect in it, which afterwards caused it to burst, yet it was held that, although the manufacturer, instead of making the purchaser acquainted with the defect, had resorted to a contrivance to conceal it, as the buyer had had an opportunity of inspecting the gun, and had accepted it without doing so, and had used it, it was not competent to him to avoid the contract on the ground of fraud. The case has, however, been questioned, and, dissenting altogether from the decision, I notice it only to say that my opinion in the present case is in no degree influenced by its authority.

In the case before us it must be taken that, as the defendant, on a portion of the oats being delivered, was able by inspection to ascertain that they were new oats, his manager might, by due inspection of the sample, have arrived at the same result. The case is, therefore, one of the sale and purchase of a specific article after inspection by the buyer. Under these circumstances the rule caveat emptor clearly applies, more especially as this cannot be put as a case of latent defect, but simply as one in which the seller did not make known to the buyer a circumstance affecting the quality of the thing sold. The oats in question were in no sense defective. On the contrary, they were good oats, and all that can be said is that they had not acquired the quality which greater age would have given them. There is not, so far as I am aware, any authority for the proposition that a vendor who submits the subject-matter of sale to the inspection of the vendee is bound to state circumstances which may tend to detract from the estimate which the buyer may injudiciously have formed of its value. Even the civil law and the foreign law founded upon it which require that the seller shall answer for latent defects have never gone the length of saying that, so long as the thing sold answers to the description under which it is sold, the seller is bound to disabuse the buyer as to any exaggerated estimate of its value.

It only remains to deal with an argument which was pressed upon us, that, as the defendant in the present case intended to buy old oats, and the plaintiff to sell new, the two minds were not ad idem, and that, consequently, there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of the particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted

A to make their age a condition of the contract. All that can be said is that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out to be unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price he, the buyer, was willing to give, or from his general habit as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel. The result is that, in my opinion, the learned judge of the county court was wrong in leaving the second question to the jury, and, consequently,

C the case must go down to a new trial.

BLACKBURN, J.—In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought, though it does not possess that quality. And I agree that, even if

D the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him. A mere abstinence from disabusing the purchaser of that impression is not fraud or deceit, for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the

E purchaser that he is under a mistake which has not been induced by the act of the vendor. I also agree that when a specific lot of goods are sold by sample, which the purchaser inspects instead of the bulk, the law is exactly the same if the sample truly represents the bulk, though, as it is more probable that the purchaser in such a case would ask for some further warranty, slighter evidence would suffice to prove that in fact it was intended that there should be such

F a warranty.

On this part of the case I have nothing to add to what the Lord Chief Justice has stated. But I have more difficulty about the second point raised in the case. I apprehend that if one of the parties intend to make a contract on one set of terms and the other intend to make a contract on another set of terms, or, as it is sometimes expressed, the parties are not ad idem, there

G is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v. Cooke* (2). If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to that party's terms.

H

The jury were directed that if they believed the word "old" was used they should find for the defendant, and this was right, for, if that was the case, it is obvious that the defendant did not intend to enter into a contract

I on the plaintiff's terms, that is, to buy the parcel of oats, without any stipulation as to their quality, nor could the plaintiff have been led to believe he was intending to do so. But the second direction raises the difficulty. I think that, if from that direction the jury would understand that they were first to consider whether they were satisfied that the defendant intended to buy this parcel of oats on the terms that it was part of his contract with the plaintiff that they were old oats, so as to have the warranty of the plaintiff to that effect, they were properly told that, if that was so, the defendants could not be bound to a contract without such warranty, unless the plaintiff was misled. But I doubt whether the direction would bring to the minds of the

jury the distinction between agreeing to take the oats, under the belief that the plaintiff contracted that they were old. The difference is the same as that between buying a horse believed to be sound, and buying one believed to be warranted sound, but I doubt if it was made obvious to the jury. I doubt this the more, because I do not see much evidence to justify a finding for the defendant on this latter ground if the word old was not used. There may have been more evidence than is stated in the case; and the demeanour of the witnesses may have strengthened the impression produced by the evidence there was, but it does not seem a very satisfactory verdict, if it proceeded on this latter ground. I agree, therefore, in the result that there should be a new trial.

HANNEN, J.—I think there should be a new trial in this case, not because the ruling of the county court judge was incorrect, but because, having regard to the evidence, I think it doubtful whether the jury sufficiently understood the direction they received to enable them to take it as their guide in determining the question submitted to them.

It appears from the evidence on both sides, that the plaintiff sold the oats in question by a sample which the defendant's agent took away for examination. The bargain was only completed after this sample had been in the defendant's possession for two days. This, without more, would lead to the conclusion that the defendant bought on his own judgment as to the quality of the oats represented by the sample, and with the usual warranty, only that the bulk should correspond with it [now embodied in the Sale of Goods Act, 1893, s. 15 (2) (a)]. There might, however, be superadded to this warranty an express condition that the oats should be old, and the defendant endeavoured by his evidence to establish that there was such an express bargain between him and the plaintiff. This was the first question the jury had to consider, but, as they have not stated whether they answered it in favour of the defendant, it is possible, and from the judge's report it is most probable, that they did not answer it, and the case must be considered on the assumption that there was no express stipulation that the oats were old. There might have been an implied term in the contract, arising from previous dealings or other circumstances, that the oats should be old, but the learned judge probably thought the evidence did not make it necessary that he should leave this question to the jury.

The second question which he did leave to them seems intended to ascertain whether there was any contract at all between the parties. It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them: *Raffles v. Wichelhaus* (3). But one of the parties to an apparent contract may by his own fault be precluded from setting up that he had entered into it in a different sense from that in which it was understood by the other party. Thus, in the case of a sale by sample, where the vendor by mistake exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor: *Scott v. Littledale* (4). But if in the last mentioned case the purchaser in the course of the negotiations preliminary to the contract had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality that a promise is to be performed "in that sense in which the promisor apprehended at the time the promisee received it," and may be thus expressed: "The promisor is not bound to fulfil a promise in a sense in

A which the promisee knew at the time the promisor did not intend it." In considering the question in that sense, a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning of which the promisor made it, is brought to the mind of the promisee whether by express words, or by conduct or previous dealings or other circumstances. If by any means B he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent.

If, therefore, in the present case the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense from that in which he meant it, and he is C thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent and not the real bargain. This was the question which the learned judge intended to leave to the jury, and, as I have already said, I do not think it was incorrect in its terms, but I think that it was likely to be misunderstood by the jury. The jury were asked whether they were of opinion, on the whole of the evidence, that the plaintiff believed the defendant D to believe, or to be under the impression, that he was contracting for the purchase of old oats; if so, there would be a verdict for the defendant. The jury may have understood this to mean that, if the plaintiff believed the defendant to believe that he was buying old oats, the defendant would be entitled to the verdict, but a belief on the part of the plaintiff that the defendant was E making a contract to buy the oats of which he offered him a sample under a mistaken belief that they were old would not relieve the defendant from liability unless his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment by him of a fact which it became his duty to communicate. In order to relieve the defendant, it was necessary that the jury should find, not merely that the plaintiff believed the defendant to believe F that he was buying old oats, but that he believed the defendant to believe that the plaintiff was contracting to sell old oats. I am more disposed to think that the jury did not understand the question in this last sense, because I can find very little, if any, evidence to support a finding upon it in favour of the defendant. It may be assumed that the defendant believed the oats were old, and it may be suspected that the plaintiff thought he so believed, but the G only evidence from which it can be inferred that the plaintiff believed that the defendant thought that the plaintiff was making it a term of the contract that the oats were old is that the defendant was a trainer, that trainers as a rule use old oats, and that the price given was high for new oats and more than a prudent man would have given.

H Having regard to the admitted fact that the defendant bought the oats after two days detention of the sample, I think that the evidence was not sufficient to justify the jury in answering the question put to them in the defendant's favour if they rightly understood it, and I, therefore, think there should be a new trial.

Order for a new trial.

CULLEN v. THOMSON AND OTHERS

[HOUSE OF LORDS (Lord Westbury, L.C., Lord Wensleydale and Lord Cranworth),
July 25, 1862]

[Reported 6 L.T. 870; 26 J.P. 611; 9 Jur.N.S. 85; 4 Macq. 424]

Company—Officers—Servants of shareholders, not of directors—Liability—False report—Facts supplied known to be false—Report signed by directors only.

The manager and assistant-manager [and semble the other officers] of a company are not the servants of the directors. They, and the directors, are the servants of the shareholders. Where directors issue false and fraudulent reports to the public, and the manager and assistant-manager of the company supply the detailed statements for such report, knowing them to be false and that they are to be used for purposes of deceit, and a third party, acting on such reports, purchases shares in the company and suffers loss thereby, each of those officers of the company is personally liable to the third party for the loss caused by the misrepresentations in the report, even though the report was signed only by the directors and not by the officers in question. Even assuming that the manager and assistant-manager were properly to be regarded as the servants of the directors, it could not be maintained that a servant who knowingly joined in and assisted his master in the commission of a fraud was not civilly responsible for the consequences. All persons directly concerned in the commission of a fraud are to be treated as principals.

Notes. Distinguished: *Peek v. Gurney*, ante. p. 116. Referred to: *Swift v. Winterbotham* (1873), L.R. 8 Q.B. 244; *Weir v. Bell* (1878), 3 Ex.D. 238; *Burdett v. Horne* (1911), 27 T.L.R. 402.

As to the offences by directors and officers of companies, see 6 HALSBURY'S LAWS (3rd Edn.) 440-453; and for cases see 9 DIGEST (Repl.) 559, 568, 575, 579, 581, 590.

Cases referred to in argument:

Lane v. Cotton (1701), 12 Mod. Rep. 472; 1 Com. 100; 1 Ld. Raym. 646; Carth. 487; Holt, K.B. 582; 1 Salk. 17; 88 E.R. 1458; 1 Digest (Repl.) 784, 3132.

Sands v. Child (1693), 4 Mod. Rep. 176; 3 Lev. 352; Salk. 31; Comb. 215; Carth. 294; Skin. 334.

Perkins v. Smith (1752), 1 Wils. 328; Say. 40; 95 E.R. 644; 1 Digest (Repl.) 786, 3145.

Stephens v. Elwall (1815), 4 M. & S. 259; 105 E.R. 830; 1 Digest (Repl.) 786, 3142.

Cranch v. White (1835), 1 Bing. N.C. 414; 1 Hodg. 61; 1 Scott, 314; 4 L.J.C.P. 113; 131 E.R. 1176; 1 Digest (Repl.) 787, 3150.

Powell v. Hoyland (1851), 6 Exch. 67; 20 L.J.Ex. 82; 16 L.T.O.S. 369; 155 E.R. 456; 1 Digest (Repl.) 787, 3153.

Evans v. Edmonds (1853), 13 C.B. 777; 1 C.L.R. 653; 22 L.J.C.P. 211; 21 L.T.O.S. 155; 17 Jur. 883; 1 W.R. 412; 138 E.R. 1407; 35 Digest (Repl.) 33, 239.

Thom v. Bigland (1853), 8 Exch. 725; 1 C.L.R. 38; 22 L.J.Ex. 243; 21 L.T.O.S. 62; 1 W.R. 290; 155 E.R. 1544; 1 Digest (Repl.) 498, 1358.

Appeal from a decision of the Court of Session in an action brought by the appellant, Cullen, a shareholder of the Edinburgh and Glasgow Bank, Ltd., to recover damages from a director, and also the respondents, the manager and secretary, of the company, on the ground that he had been induced by their false and fraudulent reports to purchase shares of the bank whereby he had suffered loss and damage.

The condescendence of the appellant set out that the bank was formed in 1844, the capital stock being divided into 200,000 shares of £5 each. The contract or

deed of co-partnery provided that if at any time it should be found that losses had been sustained equal to the whole of the reserved surplus fund, and also one-fourth of the capital, such loss should ipso facto dissolve the company. Sir W. Johnston, one of the respondents, was chairman of the directors from Feb. 1, 1849, till June, 1858, when the bank was declared insolvent; Mr. John Thomson was manager from January, 1850, till the final close of the bank in 1858, at a salary of £1,000 a year; and Kerr was secretary of the bank from the commencement till March, 1856, when he became assistant-manager, and so continued until the close of the bank in June, 1858.

In June, 1849, a special committee of directors, appointed for the purpose, made a report on the bank's affairs, which was engrossed in a private minute-book. Their report was laid before the directors, and showed, *inter alia*, that on Mar. 31, 1849, there was overdrawn by sundry parties in "cash accounts" opened with the bank £737,001 7s. 1d., and that there was overdrawn at same date, by sundry parties who had opened "deposit accounts" with the bank £27,164 8s. 11d., a total of £764,165 16s. 0d. The sum thus overdrawn was nearly four-fifths of the whole paid up capital of the bank. Further, the report showed that the credit actually allowed under the board's minutes to the parties who had obtained this £737,001 7s. 1d., amounted only to £88,729—in other words, these parties had been allowed by the directors, manager and secretary to draw £648,000 more than the contract or the board's minutes authorised them to draw. Many of the parties who had been thus permitted to overdraw their accounts were, at the date of said report, in bankrupt circumstances, and others in bad or doubtful credit, and most of whom ultimately became bankrupt. That they were in bankrupt circumstances at the time, or in bad or doubtful credit, was a fact well known to Sir W. Johnston, Mr. Kerr, and Mr. Thomson, but, notwithstanding this knowledge upon their part, they, with the other directors, issued a report to the shareholders in February, 1850, read at a general meeting where Sir W. Johnston acted as chairman, in which these facts were concealed from the shareholders, and the real state of the affairs of the company was misrepresented, with the intention and purpose of deceiving the appellant and others and inducing them to believe that the affairs of the bank were in a flourishing condition when they were the reverse.

The general meeting for the year 1850 took place in the month of February. To that meeting a report was required to be submitted of the true position of the bank. Sir W. Johnston, Mr. Kerr and Mr. Thomson, knew, and had special grounds for knowing, the position of the bank at that time, in consequence of the investigations of the committee. These parties, along with the other directors then in office, prepared and presented to two general meetings in February, 1850, a report in which they stated, *inter alia*, two things: (i) that during the year the bank had done a large and steadily increasing business, and the directors had much pleasure in declaring the annual dividend of 6 per cent. free of income-tax; (ii) that the losses during the two years immediately preceding the last had been more than were anticipated at the time by the directors, and they had accordingly written off the sum of £11,457 6s. 4d. from the reserved surplus fund. This report, the appellant alleged, was meant by the respondents to convey, and did convey, to the shareholders that the amount of bad debts incurred by the bank during the preceding two years was the precise sum of £11,457 6s. 4d., whereas at the time when this report was made the following facts were known to Johnston, Kerr, and Thomson, *viz.*, that in the month of March preceding there had been overdrawn by customers without security a total sum of £737,001 7s. 1d., and that of this sum no less than £466,465 12s. had been received by nine persons or firms, none of whom could meet their obligations to the bank. In the report it was also stated that there was a reserve fund, after deducting bad debts, to the amount of £106,140 11s. 9d., but there was no such reserve fund, and, according to the balance-sheet prepared by Johnston, the other directors, Kerr

and Thomson, the reserve fund was only £82,266 10s. 6d. The total loss written off eventually, as incurred through the nine parties mentioned, was £493,767 8s. 3d.

The appellant alleged that, acting and relying upon the statements contained in the report referred to and believing that the company was in a sound financial condition and that its shares were a safe investment for money, he was induced, not only to retain five shares of £5 each of the capital stock which he then held, but to buy, and he did buy, stock or shares by the expenditure of £2,408 16s. 6d. The Lord Ordinary (LORD KINLOCH) held that there was a good cause of action shown as against the director Sir W. Johnston, but as regarded the respondents Thomson and Kerr, his Lordship held the pleading irrelevant. In the course of his judgment he said that the duty of making yearly reports to the shareholders belonged to the directors, and the reports presented were the reports of the directors. The question, therefore, arose how the manager and secretary were to be made responsible for misrepresentations said to be contained in reports by the directors, to which, ostensibly at least, they were not parties, and to which, therefore, the appellant was not entitled to assume that they gave their attestation. It was not anywhere said that their names were appended to the reports, or that the representations were set forth as of either one or other of them. On appeal to the Inner House of the Court of Session, this judgment of the Lord Ordinary was affirmed. The LORD PRESIDENT, in giving judgment, said: The difficult part of the case is that which relates to Thomson and Kerr, and in regard to them I confess that I participate in the difficulty which the Lord Ordinary has expressed as to finding issuable matter against them. It does not appear that in this banking company the manager was a director. The manager and secretary were under the direction and control of the directors, and were to provide for them whatever information existed in the records of the establishment. I do not think that the record shows such a proper connection between these parties and the written statements here said to have contained the misrepresentations so as to render them responsible to persons who became purchasers of shares. LORD IVORY dissented, and thought the allegations were sufficient to furnish issues for a jury against the manager and secretary. LORD CURRIEHILL said: What was the position in this company of Mr. Thomson and Mr. Kerr? I think their position was that of servants—servants of a high class no doubt, but still the relation between them and the directors was that of master and servant. It is a very important matter indeed to extend liabilities which are established in certain circumstances against directors against those who are only the servants of those directors, who must obey instructions, and who may be dismissed by them at any time. I think there is no case made out in this record to fix liability upon parties in that position as to the preparation of the reports, which is the main ground of this action. LORD DEAS concurred with the majority. The appellant appealed.

Sir Fitzroy Kelly, Q.C., and Anderson, Q.C., for the appellant.

The Lord Advocate (Moncrieff), Sir Roundell Palmer, Q.C., Rolt, Q.C., and Neish for the respondents.

Their Lordships took time for consideration.

July 25, 1862. The following opinions were read.

LORD WESTBURY, L.C.—The action in which the present appeal has been presented was brought against one of the directors and two of the officers, viz. the manager and the assistant-manager, of a joint-stock banking company. It is founded on false and fraudulent representations contained in reports presented by the directors of the company to its shareholders, which reports were afterwards published to the world.

A The pleading of the appellant has been held to contain a sufficient cause of action against the director, but to be insufficient and irrelevant against the manager and the assistant-manager. This decision appears to rest upon two grounds—one (in which the judges of the Court of Session generally seem to concur), that the manager and the assistant-manager were the servants of the directors and must be treated as having acted under their direction and control; B the other, that the reports—that is, the fraudulent representations—were made by the directors alone, to whom exclusively credit must be taken to have been given by the public who were ignorant of any acts done by the managers and could not, therefore, have relied on their authority. Both these positions appear to me not to be well founded, either in fact or in law. It is, as I submit to your Lordships, an error in point of fact to say, that in this case the directors and the C managers stood in the relative position of master and servant. The directors and managers were officers, and all in a legal sense are servants of the company, that is, of the shareholders, but their respective positions and duties are clearly defined by the contract of partnership. It is true that the business is to be carried on under the superintendence and control of the directors, but it is obvious that in a joint-stock banking company the officers, on whose judgment, skill, D integrity and exertions the success of the undertaking would mainly depend, must be the managers. The condition of the affairs of the bank must, if the conduct of it be just and honest, appear from the books kept by the managers, and the reports of the directors would *prima facie* be accepted by all persons acquainted with the subject as the results of the accounts and statements of the managers. E Again, the managers of a joint-stock bank are well-known public officers whose due selection is more important than that of the directors themselves, for it may be taken as a fact, of which we cannot be judicially ignorant, that the credit of a banking establishment depends in no inconsiderable degree on the opinion entertained of the knowledge, ability and character of the manager.

I cannot, therefore, agree with the conclusion either that, on this contract of F partnership or deed of settlement, the managers are the mere servants of the directors or that the reports must be taken to have been accepted by the shareholders and the public, without any reference to the managers, and solely on the faith and credit given to the directors alone. On the contrary, I think it is clear, from the constitution of the company and the prescribed mode of transacting its business, that the shareholders would have a right to regard the G general reports, though, in form, the reports of the directors, as founded on the statements and accounts of the managers, and that the public would look on them in the same light. But let us assume that the managers are properly to be regarded as the servants of the directors, can it be maintained as a proposition of law that a servant who knowingly joins with and assists his master in the commission of a fraud is not civilly responsible for the consequences? All persons H directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another, and the reason is plain, for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of a fraud. Assuming, therefore, that a clear case of complicity in a fraud is alleged by this pleading against the manager and I the assistant-manager of the bank, I am of opinion that the fact, if it be one, of their being the servants of the directors, and having been parties to the fraud, under their orders, would be no answer or defence to an action for damages occasioned by the fraud. Neither morally nor legally would it be a justification.

The other question of law remains, namely, whether the remedy for false and fraudulent representations made to the public is limited to the persons who have avowedly made those representations, or whether persons who have joined in preparing and manufacturing such false representations are liable to the parties injured, although their names did not appear and were unknown to such parties?

Upon principle I think it right that in cases of fraud the remedy should be co-extensive with the injury, and that a right of action should be given to the party injured by the fraud against all persons who joined in committing it, although the concurrence of some of those persons might be unknown to the party injured at the time of the injury. Such I consider upon the decided cases to be the actual rule of law. It remains to inquire whether the pleading contains issuable matter against the respondents. Upon this I think no doubt could have been entertained but for the loose, rambling and irrelevant statements in this pleading, by which the relevant matter is overlaid and almost hidden. I would particularly refer to the averments contained in the articles of the pleading from 32 to 38 both inclusive. These articles contain averments which, if proved in fact, would, in my opinion, involve as a consequence the legal liability of Messrs. Thomson and Kerr. Having regard to the future proceedings in the cause, I abstain from dwelling more in detail upon the particular issuable matter contained in the allegations. Upon the whole, I must advise your Lordships to reverse the judgment complained of, and to declare that there is issuable matter in the record as against the present respondents, and with that declaration to remit the cause to the Court of Session.

LORD WENSLEYDALE.—This case is of very considerable importance, as it relates to the liability of a class of persons connected with joint-stock companies who have hitherto not been made responsible for false statements made by the directors of such companies. The question is whether there is set forth in the pleading with sufficient fullness and precision a cause of action on the part of the appellant against the respondents Thomson and Kerr, officers of a joint-stock company, both or either of which may be put into a course of trial.

After much consideration, I must advise your Lordships that there is. The question, I conceive, is whether, as the record stands, there is stated with reasonable particularity for the information of the respondents a sufficient cause of action against them or either of them. The charge meant to be insisted upon is that they knowingly and fraudulently made false representations of the state of the joint partnership with the real intent to cause the appellant to act on that representation, or under such circumstances as they must have supposed would probably induce a person in the situation of the appellant to act upon it and to buy shares in the partnership concern, and that the appellant in consequence did purchase and sustained loss thereby. There being fraud, and consequential loss arising from that fraud, there is a complete cause of action against the party guilty of that fraud. The action does not appear to be confined to a breach of their duty as officers of the joint-stock company, but to be founded on positive fraud; and though there may be a doubt whether there is a sufficient allegation of the duty of the respondents, or either of them, as officers, to make them responsible for the breach of it in not properly preparing the reports, it seems to me that there is a sufficient allegation of positive fraud by both of them—a fraud which, if not actually intended by them to cause the members of the joint-stock company to increase the number of their shares, yet they must, as reasonable men, have thought very likely to produce that result which it is averred with sufficient particularity to have done. If the fraud is proved, we need not inquire into the motive, though a motive may be suggested, namely, the continuance of their lucrative employment, which would be lost if the company became bankrupt.

The respondents were not, I think, properly the servants of the directors, though appointed by them and acting under their orders. Both they and the directors themselves were rather the servants of the company. Both owed a duty to the company, and both, if the allegation of fraud is proved, violated that duty. The case is not precisely that to which it was assimilated in the course of the argument at the Bar and in the opinions of some of the judges—that of a servant obeying his master's orders, and by virtue of those orders committing

a fraud on a third person. It is more like the case of two servants conspiring with each other to deceive their joint master, and effecting that object so as to produce damage to him. The case suggested is that of an active fraud—telling a positive untruth, and the concealment of material circumstances which, in many cases, it would be a duty incumbent on a person to disclose, but which in this case the respondents, from the nature of their employment, were bound to keep secret. If one servant combines with another knowingly to tell a positive untruth to the prejudice of his master, and it results in that prejudice, I think an action will lie; and if he combines with his master to do the same thing to the prejudice of a third person, and such consequence follows, I must say that I cannot see how the servant can be by law exempt. In some cases a man may innocently assist in a transaction which is a fraud on someone. Of course, such a person cannot be responsible criminally or civilly. Or he may be a partaker in the fraud to a limited extent, as, for instance, in the supposed case adverted to in the course of the argument—that of the printer of an alleged false statement, who may have known it to be false and yet may not have intended or known sufficiently the fraudulent purpose to which it was meant to be applied so as to make him responsible for the injurious consequence of it.

I will now advert to those parts of the pleading which contain, as I think, sufficient allegations of positive fraud to enable the court to frame the issue to be tried, and they have to be selected from a mass of matter loosely and insufficiently alleged as against the respondents. In a part of art. 30 of the appellant's pleading, it is alleged that Thomson and Kerr were cognisant of and active participants in the framing of the false and fraudulent reports after mentioned, which were presented to the shareholders at their annual meeting, and by means of which the plaintiff was deceived and defrauded. When it is said that they were cognisant, it must be intended that they knew of that falsehood. In art. 33 is a charge of wilful and fraudulent concealment, as to which I say nothing as respects Thomson and Kerr as they ought not generally to disclose anything, and it is unnecessary to consider whether in some cases a concealment of some circumstances may not have the effect of a positive misrepresentation, for there is also a charge against them of knowingly misrepresenting the affairs of the company, with the intention and purpose of deceiving the appellant and others, and by which the appellant was deceived, as the respondents fraudulently intended that he should be, and induced to believe that the affairs of the bank were in a flourishing condition when they were the reverse. Article 34 contains a special allegation of fraud in preparing and presenting a report in February, 1850, representing the losses by bad debts in such a way as to induce a belief that they were only £11,457, when the respondents knew in effect that they greatly exceeded that sum. To support this charge, it will not be enough to prove mere connivance. It must be proved that both of them took such an active part as to make the report their own act. It is alleged that they represented certain things, and that allegation must be proved, and the use of the term "connived" in a subsequent article cannot qualify or alter that statement. Article 39 charges the respondents with wilfully and fraudulently misrepresenting the state of the company's affairs, in fraudulently overestimating the securities beyond their real value, as known to themselves. Again, art. 42 contains issuable matter with a view to show Thomson to have concurred in making a wilfully false statement of the sufficiency of the funds of the company. Article 84 sets forth a verbal statement of Kerr, falsely and fraudulently made, which induced the appellant to buy more shares and also to keep what he had got. But the latter cause of action is, I understand, and I think properly, abandoned.

On the whole, I think there is issuable matter sufficiently stated to support some of the charges—those, for instance, before mentioned, which must form the subject of proper issues to be settled by the court. I will add that, concurring, as I do entirely, with the Lord Ordinary in most of the able and satisfactory

observations which he makes in his judgment in this case, I do not feel the difficulty which he suggests, that it is not sufficiently alleged that the appellant was induced to make his purchases relying on the personal representation of Messrs. Thomson and Kerr; that the case ought to be the same as if the representations had been made by them in direct personal communications; that there must be a special and direct allegation that the appellant proceeded on the personal warranty of Messrs. Thomson and Kerr. If they have been guilty parties to a fraud, which was intended, as I have explained before, to cause loss to the appellant, and the loss has resulted, they are responsible though their names were unknown to the appellant prior to the loss. It is, I conceive, enough to trace the loss to the fraud committed by the respondents, though the names of the parties to that fraud were not known at the time of the loss. Though the appellant may not have known the name of the author of the false representation, if he can prove his damage to have been the result of it, he is entitled to recover. I concur, therefore, with my noble and learned friend, that the cause ought to be remitted to the court below with the declaration which he has suggested.

LORD WESTBURY, L.C.—I am desired by my noble and learned friend **LORD CRANWORTH**, who heard the whole of the argument, to say that he entirely concurs in the conclusion at which your Lordships have arrived.

Appeal allowed.

CLOUGH v. LONDON AND NORTH WESTERN RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Byles, Blackburn, Keating, Mellor, Montague Smith and Lush, JJ.), January 17, 19, December 2, 1871]

[Reported L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708;
20 W.R. 189]

Contract—Rescission—Fraud—Validity of contract before election to rescind by party defrauded—Action on contract by party to fraud before rescission—Effect on right to rescind.

The fact that a contract has been induced by fraud does not render it void or prevent property, dealt with by it, passing. It merely gives the party defrauded a right, on discovering the fraud, to elect whether he will continue to treat the contract as binding or disaffirm it and resume his property. The contract continues valid until the party defrauded has determined his election by avoiding it; he may keep the question open so long as he does nothing to affirm the contract. The mere fact that a person who is party to the fraud has begun an action on the contract does not preclude the defrauded party from exercising his election to rescind.

Accordingly, where A. purchased goods from a company not intending to pay for them; the company delivered them to the defendants as carriers to deliver them, according to A.'s instructions, to the plaintiff; the defendants afterwards held the goods for the plaintiff, at his request, as warehousemen; A. becoming bankrupt, the company demanded the goods; and the defendants re-delivered them under the mistaken supposition that the transitus was not yet over,

Held: in an action of trover brought by the plaintiff against the defendants, an equitable plea of rescission of the contract on the ground of A.'s fraud, to

which the plaintiff was privy, would raise a good defence to the action, although the fraud was not discovered till the cross-examination of the plaintiff at the trial of the action.

Contract—Rescission—Fraud—Preclusion of defrauded party from exercising right to rescind—Interest in property acquired by innocent third party—Delay prejudicing wrongdoer—Affirmation of contract—Evidence—Lapse of time.

Per Curiam: So long as the party defrauded has made no election whether or not to rescind the contract he retains the right to determine the matter either way, subject to this, that if, while he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great it probably would be treated in practice as conclusive evidence to show that he has so determined. But we cannot see any principle, and are not aware of any authority, for saying that the mere fact that one who is a party to the fraud has commenced an action before the rescission is such a change of position as would preclude the defrauded party from exercising his election to rescind. Neither can we see the principle, nor discover the authority, for saying that it is necessary that there should be a declaration of his intention to rescind prior to the plea.

Contract—Rescission—Fraud—Resumption of property by party defrauded—Duty to return money or other advantage received from fraudulent party.

No man can at once treat a contract avoided by him on the ground of the fraud of the other party so as to resume the property which he parted with under it and at the same time keep the money or other advantages which he obtained under it.

Notes. Considered: *Morrison v. Universal Marine Insurance Co.* (1873), L.R. 8 Exch. 197; *R. v. Middleton* (1873), L.R. 2 C.C.R. 38; *Erlanger v. New Sombrero Phosphate Co.*, [1874-80] All E.R. Rep. 271; *Wakefield and Barnsley Banking Co. v. Normanton Local Board* (1881), 44 L.T. 697. Explained: *Scarf v. Jardine*, [1881-5] All E.R. Rep. 651. Considered: *James v. Young* (1884), 27 Ch.D. 652. Applied: *Dickson v. Murray* (1887), 3 T.L.R. 637. Considered: *Re Snyder Dynamite Projectile Co., Skelton's Case* (1893), 68 L.T. 210. Applied: *Aaron's Reefs v. Twiss*, [1896] A.C. 273. Considered: *Gordon v. Street*, [1899] 2 Q.B. 641; *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330. Explained: *R. v. Paulson*, [1921] 1 A.C. 271. Approved: *Abram Steamship Co. v. Westville Shipping Co.*, [1923] All E.R. Rep. 645. Applied: *Chao v. British Traders and Shippers, Ltd.*, [1954] 1 All E.R. 779. Referred to: *Allcard v. Skinner*, [1886-90] All E.R. Rep. 90; *Law v. Law*, [1904-7] All E.R. Rep. 526; *Boston Fruit Co. v. British and Foreign Marine Insurance Co.*, [1906] A.C. 336; *Bennett v. Whitehead*, [1926] 2 K.B. 380; *Peter Long and Partners v. Burns*, [1956] 3 All E.R. 207.

As to actions for rescission of contracts on the ground of fraud, see 26 HALSBURY'S LAWS (3rd Edn.) 874 et seq.; and for cases see 35 DIGEST (Repl.) 69 et seq.

Cases referred to:

- (1) *Stevenson v. Newnham* (1853), 13 C.B. 285; 22 L.J.C.P. 110; 20 L.T.O.S. 279; 17 Jur. 600; 18 E.R. 1208, Ex. Ch.; 35 Digest (Repl.) 76, 700.
- (2) *Billiter v. Young* (1856), 6 E. & B. 1; 26 L.T.O.S. 327; 2 Jur.N.S. 438; 119 E.R. 765; sub nom. *Young v. Billiter*, 25 L.J.Q.B. 169; 4 W.R. 369, Ex. Ch.; on appeal, sub nom. *Young v. Billiter* (1860), 8 H.L.Cas. 682; 30 L.J.Q.B. 153; 7 Jur.N.S. 269; 11 E.R. 596; sub nom. *Billiter v. Young*, 3 L.T. 196, H.L.; 22 Digest (Repl.) 272, 2748.
- (3) *Jones v. Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 290, 4252.

- (4) *Croft v. Lumley* (1858), 6 H.L.Cas. 672; 27 L.J.Q.B. 321; 31 L.T.O.S. 382; 22 J.P. 639; 4 Jur.N.S. 903; 6 W.R. 523; 10 E.R. 1459, H.L.; 31 Digest (Repl.) 513, 6369.
- (5) *Newnham v. Stevenson* (1851), 10 C.B. 713; 20 L.J.C.P. 111; 17 L.T.O.S. 5; 15 Jur. 360; 138 E.R. 282; 43 Digest 465, 2.

Also referred to in argument :

Stevens v. Austin, 1 Metcalfe, 557.

Clarke v. Dickson (1858), E.B. & E. 148; 27 L.J.Q.B. 223; 31 L.T.O.S. 97; 4 Jur.N.S. 832; 120 E.R. 463; 12 Digest (Repl.) 633, 4891.

Campbell v. Fleming (1834), 1 Ad. & El. 40; 3 Nev. & M.K.B. 834; 3 L.J.K.B. 136; 110 E.R. 1122; 39 Digest (Repl.) 831, 2926.

Deposit Life Assurance v. Ayscough (1856), 6 E. & B. 761; 26 L.J.Q.B. 29; 27 L.T.O.S. 183; 2 Jur.N.S. 812; 4 W.R. 611; 119 E.R. 1048; 9 Digest (Repl.) 117, 603.

Bwlch-y-Plwm Lead Mining Co. v. Baynes (1867), L.R. 2 Exch. 324; 36 L.J.Ex. 183; 16 L.T. 597; 15 W.R. 1108; 9 Digest (Repl.) 265, 1675.

Pease v. Gloahec, The Marie Joseph (1866), L.R. 1 P.C. 219; Brown & Lush. 449; 3 Moo. P.C.C.N.S. 556; 35 L.J.C.P. 66; 15 L.T. 6; 12 Jur.N.S. 677; 15 W.R. 201; 2 Mar. L.C. 394, P.C.; 39 Digest (Repl.) 771, 2472.

Kingsford v. Merry (1856), 1 H. & N. 503; 26 L.J.Ex. 83; 28 L.T.O.S. 236; 3 Jur.N.S. 68; 5 W.R. 151; 156 E.R. 1299, Ex. Ch.; 21 Digest (Repl.) 464, 1614.

Appeal by the defendants from a decision of the Court of Exchequer making absolute a rule nisi to set aside the verdict found for the defendants on the trial of an action brought to recover the value of nine pianofortes, which the plaintiff alleged to have been purchased of the London Pianoforte Co. by one William Adams, by him assigned to the plaintiff, and wrongfully detained from the plaintiff by the defendants, and to enter a verdict for the plaintiff for £205.

On May 18, 1866, the London Pianoforte Co. made a contract with Adams, by which they sold to him nine pianofortes, which he stated he was purchasing for exportation, for the price in all of £205. Adams paid them in cash £68, and accepted a bill at four months for £135 8s., which, together with a small discount of £1 12s., represented the whole price. The London Pianoforte Co. gave him a receipt, and received his directions to forward the pianos by rail to R. H. Clough, Temple Court, Liverpool, who, Adams stated, was his shipping agent. The London Pianoforte Co. sent them accordingly by the London and North Western Rail. Co., addressed as directed, and they arrived at Liverpool. Clough was not found at the address given, and the London and North Western Rail. Co., on May 21, wrote to the London Pianoforte Co. stating that this was the fact, and requesting their directions. Almost at the same time the London Pianoforte Co. received information that Adams was a bankrupt. They, at 9.30 a.m. on May 22, sent directions to the London and North Western Rail. Co. in London to stop the goods in transitu; but the railway company did not forward this notice to Liverpool by telegraph, and before this intimation arrived at Liverpool by train, Clough had called at the Liverpool station of the railway company, and enough took place between him and the company to put an end to the transitus, the company agreeing with him to hold the goods no longer as carriers but as warehousemen for him. The London Pianoforte Co., nevertheless, required the railway company to send the pianos back to London to them, and the railway company, on receiving an indemnity from them, did so. The London Pianoforte Co., on May 23, wrote to Adams, informing him that Clough had not been found at his address, and telling him that they had, in the meantime, ordered the pianos back until they heard from him. On May 27 Clough demanded the pianos from

the railway company, and heard that they had been returned to the London Pianoforte Co. On June 2 he issued the writ in the present action against the railway company.

On the trial of the action LUSH, J., left three questions to the jury, as follows:—(i) Did Adams obtain the goods with the intention of not paying for them? (ii) Did Clough in fact advance the £250? (iii) Did he, at the time he advanced, know of the fraudulent intention of Adams? The jury answered the above questions as follows: To the first: He did. To the second: He did, but not bona fide. To the third: Yes. On these findings LUSH, J., directed the verdict to be returned for the defendants, but, if the court should think that the defendants were not entitled to the verdict either on the pleas as they stood or on any possible amendment of them, the verdict should be entered for the plaintiff. In Hilary term, 1869, the plaintiff obtained a rule to set aside this verdict and enter a verdict for the plaintiff for £205, and in Easter term that rule was made absolute. The defendants appealed.

Quain, Q.C., and Popham Pike for the defendants.

Serjeant Simon and R. G. Williams for the plaintiff.

Cur. adv. vult.

Dec. 2, 1871. **MELLOR, J.**, read the judgment of the court in which he referred to the pleadings, stated the facts as set out above, and continued: Up to the time when the action was brought it is clear that the London Pianoforte Co. were treating the contract as an existing one, and were relying on their right to stop in transitu; there is nothing whatever to show that they were as yet aware that the contract was one which had been induced by fraud, so as to give them a right to avoid it on that ground. But at the trial they succeeded, on the cross-examination of Clough and Adams, in making a strong case to go to the jury that Adams, who had just been discharged from prison as a bankrupt, suing in forma pauperis, went to London with the plaintiff on a concerted plan to obtain the pianos without paying for them, in order that Clough might sell them by auction and obtain the proceeds; that the £68 was, in fact, Clough's money advanced for the purpose of carrying out the fraud; and that a document given in evidence, by which Adams acknowledged to have received £250 as an advance on the pianos was a part of the fraud. The pleas as to stoppage in transitu were not abandoned by the defendants, but insisted on. LUSH, J., most properly ruled that the evidence showed that the transitus was ended before the stoppage. It is stated in the Case that the bill and £68 remained and still remain in the possession of the London Pianoforte Co. Adams never demanded the return of either, nor did the pianoforte company ever offer to return them. It is to be observed that neither in the pleas as they stood before the leave to amend was given is there any averment that the London Pianoforte Co. were ready and willing to restore the £68, nor in the replication is there any averment that they still retained the money, though Adams claimed it. We learn from LUSH, J., that nothing whatever was said by either party, either in the examination of the witnesses, or in their address to the jury, on this point, or he would certainly have taken the opinion of the jury on it. There can be no doubt, as Adams was there present giving evidence on behalf of the plaintiff, and endeavouring to support the fraud, that the jury, if asked, must have found that neither he nor the plaintiff was ever ready and willing to receive back the money and bill, and thereby admit that the contract was fraudulent and voidable on that ground. No distinct evidence was given as to when the London Pianoforte Co. first became aware that the plaintiff was privy to the fraud. They clearly had enough information to lead them to assert it at the time when they pleaded the last plea; but probably they had not more than suspicion till

the plaintiff was cross-examined. No suggestion was made as to the importance of the date of their knowledge, and no question was asked of the jury on that head.

We think that we must construe the reservation as meaning that the plaintiff was not to have the verdict entered for him if on these facts and findings there was any defence which might have been made the subject of a good plea, on either legal or equitable grounds. If there was evidence of any such defence, but the opinion of the jury was not taken on some material point where it ought to have been, it may entitle the plaintiff to a new trial, but not to have the verdict entered for him. The last plea actually pleaded on the record to the third count only, which was most properly amended by applying it to all the counts, was not proved, as it averred that the discovery of the fraud was before any breach of contract by the defendants on the record, while in fact the evidence proved that it was after a breach of contract by them, and probably after the action was commenced. It certainly was before the case went to jury; and the pleas which the defendants have since the trial delivered, are subject to the same defect. But on the reservation the plaintiff is not to have the verdict entered for him if upon any possible amendment of the pleas the defendants would be entitled to the verdict.

We think a plea might be framed, stating that the goods had been sold to Adams and delivered by the London Pianoforte Co. to the railway company for the purpose of being delivered to the plaintiff under a contract induced by his fraud, to which the plaintiff was privy; that the London Pianoforte Co., under a mistaken supposition that the transitus was still subsisting, obtained from the railway company the re-delivery of the goods to them, which was a breach of the contract between the railway company and the plaintiff, but that afterwards, and after the action commenced, the London Pianoforte Co., having discovered the fraud, and that the plaintiff was privy to it, did elect to rescind and re-vest the property in the goods, and that this was done before any act was done by them, affirming or, otherwise, determining their election, and that no interest had vested in any innocent person, rendering it inequitable or unjust to rescind the contract; and that the plaintiff was inequitably proceeding with the suit with the purpose of obtaining, in damages from the defendants on the record and from the London Pianoforte Co., who were the real defendants, the value of the goods thus re-vested in the London Pianoforte Co. Such a plea, we think, would have been proved, and would have furnished a complete answer probably at law; but it is enough now to determine that it would have been good on equitable grounds. This is contrary to the judgments in the court below; and it is proper to point out what they seem to consider the fatal defects in such a plea, and then to render the reasons that make us think those not fatal.

The Chief Baron seems to base his judgment on the principle that it was necessary that there should be an averment in the plea, and proof at the trial, of some communication to the plaintiff, showing that the London Pianoforte Co. had elected to rescind the contract before the commencement of the action. The three other judges do not seem to put it on that ground; but they all agree with the Chief Baron in thinking that it was essential that the London Pianoforte Co. should do some act before and independent of delivering a plea, indicating their intention to avoid the contract, and that this act should be accompanied by an offer, or, at least, an expression of their readiness and willingness to hand over to Adams the £68 and the acceptance which they had received on the footing that the contract was valid, and which they had no right to retain after the contract was voided. These objections, if good, would certainly apply to the plea we have supposed, whether it was pleaded at law or on equitable grounds.

There is a further objection to the plea, as a plea at law, that the rescission came after the plaintiff had a vested cause of action against the London and

A North-Western Rail. Co., and that it could not operate to defeat that vested cause of action by relation. If it were necessary to decide this, we should have to say whether we would follow the opinion expressed in the judgment of the Exchequer Chamber in *Stevenson v. Newnham* (1) (13 C.B. at p. 303), delivered by PARKE, B., or the equally strong opinion expressed by CRESSWELL, J., in *Billiter v. Young* (2) (6 E. & B. at p. 33), apparently concurred in by the majority of the Exchequer Chamber in that case. It is not necessary to form any judgment as to this controverted point, for it is clear that, as a court of equity interferes on the principle of granting relief to the defrauded party from whom the fraudulent party, against conscience, seeks to obtain the fruits of his fraud, no such point could arise on a plea pleaded on equitable grounds, and, as the leave is reserved, it is enough if a good plea on equitable grounds could have been pleaded. It is also to be observed that the supposed plea being of a matter that occurred after action brought, the plaintiff might have confessed its truth, and taken judgment for his costs up to the time of the plea pleaded. But it is obvious here that the plaintiff never would have confessed it and acknowledged his fraud. He must be considered as having taken issue on it.

D We shall now proceed to examine the grounds on which the judges in the court below proceeded and to give our reasons for coming to a different conclusion. We agree completely with what is stated by all the judges below that the property in this case passed from the London Pianoforte Co. to Adams by the contract of sale. The fact that the contract was induced by fraud did not render the contract void or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. This was not controverted at the Bar, and it is not necessary to cite authorities for it. We further agree that the contract continues valid till the party defrauded has determined his election by avoiding the contract. It is stated in COMYNS' DIGEST, "Election," c. 2: "If a man once determines his election, it shall be determined for ever." As is also stated in COMYNS' DIGEST, "Election," c. 1, "a determination of a man's election shall be made by express words or by act." Consequently, we agree with what seems to be the opinion of all the judges below, that, if it can be shown that the London Pianoforte Co., at any time after knowledge of the fraud, either by express words or by unequivocal act affirmed the contract, their election has been determined for ever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract.

G The principle is precisely the same as that on which it is held that a landlord may elect to avoid a lease and bring ejectment when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by receipt of rent or other unequivocal act he shows his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention of treating the lease as void, he has determined his election, and cannot afterwards waive the forfeiture: see *Jones v. Carter* (3). We cannot do better than cite the language of BRAMWELL, B., in *Croft v. Lumley* (4), which precisely expresses what I mean. He says (6 H.L. Cas. at p. 705):

"The common expression, 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant, on which the lessor has a right of re-entry, he may elect to avoid or not to avoid the lease, and he may do so by deed or by word; if, with notice, he says, under circumstances that bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the statute of Anne), or demanding sub-

sequent rent, he elects not to avoid the lease; but if he says he will avoid, or does an act inconsistent with its continuance as bringing ejectment he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? or has he elected to avoid it? or has he made no election?"

In all this we agree, and think that, *mutatis mutandis*, it is applicable to the election to avoid a contract for fraud. In such cases the question is: Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? Or has he elected to avoid it? Or has he made no election? We think that so long as he has made no election, he retains the right to determine it either way, subject to this—that if, in the interval, while he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great it probably would be treated in practice as conclusive evidence to show that he has so determined. But we cannot see any principle, and are not aware of any authority, for saying that the mere fact that one who is party to the fraud has issued and commenced an action before the rescission, is such a change of position as would preclude the defrauded party from exercising his election to rescind. Neither can we see the principle nor discover the authority for saying that it is necessary that there should be a declaration of his intention to rescind prior to the plea. It seems to us clear, on principle, that a statement in a plea by the party from whom the property passed that he claims back the property on the ground that he was induced to part with it by fraud is as unequivocal a determination of his election to avoid the transaction as could well be made. Of course, if he had already determined his election the other way, or if such things have happened as preclude him from rescinding, the plea would have no effect, but after succeeding by means of such a plea, the person pleading it could never successfully set up the contract as still valid either against the plaintiff in the action in which the plea was pleaded, or any one else. He would, both by act and by word, have determined his election for ever, according to the doctrine laid down in *COMYNS' DIGEST*, "Election," c. 2, cl. 3.

No authority was cited on the argument, nor are we aware of any authority for saying that his unequivocal expression of his determination of his election must be preceded by some act in pais. *Newnham v. Stevenson* (5) was much relied on by the defendants' counsel, but in reality it decides nothing as to this point. The plaintiff there had obtained goods under a conveyance from one Saunders, made by him voluntarily, and in contemplation of bankruptcy, and while they were in his possession, and were his property, and before Saunders had become a bankrupt, the defendant wrongfully distrained on him. The Court of Common Pleas in their judgment say (10 C.B. at p. 723):

"By a transfer which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees at their election, and the title of the transferee is perfect, except so far as it is avoided by the assignees."

So far this is unquestioned law. The court then proceeds to deal with the evidence in the case before them:

"The assignees in this case were not proved to have done anything to affect the plaintiff's title. They had not demanded the goods; they had not even ratified the defendant's act; and the commencement of an action in trover, which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully, cannot, without

more, be taken to be an election on the part of the assignees to avoid the transfer."

It is upon this latter sentence that counsel for the plaintiff relied; but we think that it does not at all express an opinion that no statement, however explicit on the record, could amount to a determination of the election.

It is, however, quite true that no man can at once treat the contract as avoided by him so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he had obtained under it, and, therefore, the London Pianoforte Co., on rescinding the contract, were bound to restore to Adams the money and the acceptance which they had obtained from him. Probably a court of equity, if applied to for an injunction to prevent the plaintiff from continuing the action, would have made it a condition that the defendants should do equity by paying the plaintiff whatever the plaintiff had paid them under the contract; and probably, from analogy thereto, a court of law would require a party pleading a plea of this sort to bring into court any money which the plaintiff had paid to them. It is not necessary to determine how that may be, for Adams was no party to this action, and the defendants could not be required in this action between the plaintiff and themselves to bring into court money which, in consequence of the rescission of the contract, they held for the use of Adams. It may be that Adams in fact was only agent for the plaintiff, and that the money in reality belonged to the plaintiff; but that was not known to the defendants, and it does not lie in the plaintiff's mouth to object to the defendants' plea on the ground that they had not discovered the whole of his fraud. Neither does it lie in the plaintiff's mouth to object to the plea, because it does not contain a statement that they were ready and willing to return to Adams the money he had paid them, that being a matter affecting the rights of a stranger to the suit, but in no way affecting the rights of the plaintiff. If, indeed, it could have been shown that the bill had been negotiated, so as to put it out of the power of the London Pianoforte Co. to return it, or still more, if it had been the fact that Adams was willing to receive back the money, and that they had refused, there would have been ground for saying that they had already determined their election by affirming the contract; but nothing of the kind existed.

In fact, the only ground on which the jury could have been asked to find that the London Pianoforte Co. had affirmed the contract was that they pleaded and relied upon a plea of stoppage in transitu which, if they could have proved it, would have entitled them to resume their vendor's lien for the unpaid balance of the price without parting with the cash, and which was, therefore, so far inconsistent with a plea of rescission for fraud, the legal consequence of which would be that they could not retain the money. But different and quite inconsistent defences are raised every day in distinct pleas; and though the jury might perhaps have been asked on this to find that there had been an affirmance of the contract by holding the money, it was the plaintiff's business to raise the point at the trial, and ask that it should be submitted to the jury. Probably, if this point were present to the minds of the plaintiff's counsel at the time of the trial, they abstained from raising it from a well-founded belief that the jury would have found nothing in favour of the plaintiff which they could reasonably have found against him. Having abstained from raising the point before, it is too late for them to do so now. We think, therefore, that the plaintiff is not entitled to a new trial in order to have this point left to a jury. And as we think that the facts proved did constitute a defence, we think the rule should not have been made absolute, and that we should now discharge it, leaving the verdict for the defendants.

Rule discharged.

DUKE OF BUCCLEUCH *v.* METROPOLITAN BOARD OF WORKS

[HOUSE OF LORDS (Lord Chelmsford, L.C., Lord Westbury, Lord Colonsay and Lord Cairns), June 29, 1871, February 15, April 30, 1872]

[Reported L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1;
36 J.P. 724]

Arbitration—Award—Action on—Umpire as witness—Competency—Extent to which evidence admissible.

Compulsory Purchase—Compensation—Injurious affection of land not acquired—Construction of highway near dwelling-house—Depreciation in value.

The appellant was the lessee of a house and premises abutting on the river Thames at Whitehall for the residue of a term of 99 years. Part of the premises consisted of a causeway, leading from the garden of the house and running out into the river at low water mark, which had for a long period been used for landing and embarking goods. Under the powers of the Thames Embankment Act, 1862, which incorporated the provisions of the Lands Clauses Consolidation Act, 1845, the respondents constructed an embankment, and in doing so took away the causeway and a landing place connected with it and cut off direct access from the appellant's premises to the river by the construction along the embankment of a public highway. The appellant claimed compensation, and the parties, under s. 25 of the Lands Clauses Consolidation Act, 1845, appointed arbitrators. They in turn appointed an umpire who eventually awarded £8,325 to the appellant. This sum the respondents refused to pay, and an action on the award was brought.

Held: (i) the umpire was a competent witness in the action to prove what matters he took into consideration when making his award, but not what reasons influenced his mind in determining the quantum of compensation; (ii) the umpire was entitled, under s. 63 of the Lands Clauses Consolidation Act, 1845 (which provides that an arbitrator in awarding compensation may regard not only the value of the land compulsorily acquired, but also the damage sustained by the landowner by reason of the injuriously affecting of other land owned by him), to consider, not only the damage which the appellant suffered by being deprived of the causeway and his access to the river, but also the injurious affecting of the house by its being depreciated in value by the interposition between it and the river of a public highway.

Notes. Considered: *McCarthy v. Metropolitan Board of Works* (1872), L.R. 7 C.P. 508; *Cowper Essex v. Acton Local Board*, [1886-90] All E.R. Rep. 901; *Re London, Tilbury and Southend Rail. Co. and Gower's Walk Schools Trustees* (1889), 24 Q.B.D. 326. Followed: *O'Rourke v. Railways Comr.* (1890), 15 App. Cas. 371. Considered: *Re Whiteley and Roberts*, [1891] 1 Ch. 558. Distinguished: *Re Tyne-mouth Corpn. and Duke of Northumberland* (1900), 67 J.P. 425. Considered: *London and India Dock Co. v. North London Rail. Co.* (1903), Times, Feb. 6; *R. v. Mountford*, *Ex parte London United Tramways*, [1906] 2 K.B. 814; *Recher v. North British and Mercantile Insurance*, [1915] 3 K.B. 277. Applied: *Rockingham Sisters of Charity v. R.*, [1922] 2 A.C. 315; *Ward v. Shell-Mex and B.P., Ltd.*, [1951] 2 All E.R. 904. Considered: *McKinley v. McKinley*, [1960] 1 All E.R. 476. Explained: *Minister of Transport v. Edwards*, [1964] 1 All E.R. 483. Referred to: *City of Glasgow Union Rail. Co. v. Hunter* (1870), L.R. 2 Sc. & Div. 78; *Holt v. Gas Light and Coke Co.* (1872), L.R. 7 Q.B. 728; *Ripley v. Great Northern Railways Comr.* (1875), 23 W.R. 685; *Rhodes v. Airedale Drainage Comrs.*, [1874-80] All E.R. Rep. 515; *Lyon v. Fishmongers Co.* (1876), 1 App. Cas. 662; *R. v. Sheward* (1880), 9 Q.B.D. 741; *Caledonian Rail. Co. v. Walker's Trustees*, [1881-5] All E.R.

Rep. 592; *Re Whiteley and Roberts*, [1891] 1 Ch. 558; *R. v. Scard* (1894), 10 T.L.R. 545; *Falkingham v. Victorian Railways Comr.*, [1900] A.C. 452; *London and North Western Rail. Co. v. Walker* (1903), 72 L.J.K.B. 578; *Re London and North Western Rail. Co. and Reddaway* (1907), 71 J.P. 150; *Odlum v. Vancouver City* (1915), 85 L.J.P.C. 95; *Larrinaga v. Société Franco-Américaine des Phosphates de Médulla* (1922), 92 L.J.K.B. 45; *A.-G. for Manitoba v. Kelly*, [1922] All E.R. Rep. 69; *Horn v. Sunderland Corpn.*, [1941] 1 All E.R. 480.

As to actions on awards, see 2 HALSBURY'S LAWS (3rd Edn.) 51; and for cases see 2 DIGEST (Repl.) 706-709. As to compensation for injurious affection, see 10 HALSBURY'S LAWS (3rd Edn.) 147-162; and for cases see 11 DIGEST (Repl.) 140 et seq.

Cases referred to :

- (1) *Hammersmith and City Rail. Co. v. Brand* (1869), ante p. 60; L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 11 Digest (Repl.) 106, 29.
- (2) *City of Glasgow Union Rail Co. v. Hunter* (1870), L.R. 2 Sc. & Div. 78; 34 J.P. 612, H.L.; 11 Digest (Repl.) 161, 349.

Also referred to in argument :

Re Dare Valley Rail. Co. (1868), L.R. 6 Eq. 429; sub nom. *Re Rhys and Richards and Dare Valley Rail. Co.* 37 L.J.Ch. 719; 2 Digest (Repl.) 654, 1736.

Hodgkinson v. Fernie (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 6 W.R. 181; 140 E.R. 712; 2 Digest (Repl.) 656, 1762.

Johnson v. Durant (1830), 4 C. & P. 327; 22 Digest (Repl.) 399, 4276.

Ponsford v. Swaine (1861), 1 John. & H. 433; 4 L.T. 15; 70 E.R. 816; 2 Digest (Repl.) 549, 845.

Mortimer v. South Wales Rail. Co. (1859), 1 E. & B. 375; 11 Digest (Repl.) 222, 875.

A.-G. v. Johnson (1819), 2 Wils. Ch. 87; 37 E.R. 240; 44 Digest 127, 1022.

Gann v. Whitstable Free Fishers (1865), 11 H.L.Cas. 192; 20 C.B.N.S. 1; 5 New Rep. 432; 35 L.J.C.P. 29; 12 L.T. 150; 29 J.P. 243; 13 W.R. 589; 2 Mar. L.C. 179; 11 E.R. 1305, H.L.; 36 Digest (Repl.) 322, 671.

Ricket v. Metropolitan Rail. Co. (Directors, etc.) (1867), L.R. 2 H.L. 175; 36 L.J.Q.B. 205; 16 L.T. 542; 31 J.P. 484; 15 W.R. 937, H.L.; 11 Digest (Repl.) 150, 281.

Mason v. Hill (1833), 5 B. & Ad. 1; 2 Nev. & M.K.B. 747; 1 L.J.K.B. 118; 110 E.R. 692; 19 Digest (Repl.) 92, 531.

Miner v. Gilmour (1859), 12 Moo. P.C.C. 131; 33 L.T.O.S. 98; 7 W.R. 328; 14 E.R. 861, P.C.; 44 Digest 16, 79.

Sampson v. Hoddinott (1857), 1 C.B.N.S. 590; 26 L.J.C.P. 148; 28 L.T.O.S. 304; 21 J.P. 375; 3 Jur.N.S. 243; 5 W.R. 230; 140 E.R. 242; affirmed, 3 C.B.N.S. 596; 140 E.R. 875, Ex. Ch.; 19 Digest (Repl.) 161, 1066.

Re Stockport, Timperley and Altrincham Rail. Co. (1864), 33 L.J.Q.B. 251; 10 Jur.N.S. 614; sub nom. *R. v. Cheshire (Clerk of the Peace)*, 4 New Rep. 167; 12 W.R. 762; sub nom. *Leigh v. Stockport, Timperley and Altrincham Rail. Co.*, 10 L.T. 426; 11 Digest (Repl.) 143, 226.

Caledonian Rail. Co. v. Ogilvy (1855), 25 L.T.O.S. 106; 2 Macq. 229, H.L.; 11 Digest (Repl.) 149, 276.

R. v. Eastern Counties Rail. Co. (1841), 2 Q.B. 347; 2 Ry. & Can. Cas. 736; 1 Gal. & Dav. 589; 11 L.J.Q.B. 66; 114 E.R. 136; 11 Digest (Repl.) 149, 271.

Re Penny (1857), 7 E. & B. 660; 26 L.J.Q.B. 225; 3 Jur.N.S. 957; 5 W.R. 612; 119 E.R. 1390; sub nom. *R. v. South-Eastern Rail. Co.* 29 L.T.O.S. 124; 11 Digest (Repl.) 156, 310.

Brophy v. Holmes (1828), 2 Moll. 1; 2 Digest (Repl.) 669, *1390. A

Lord v. Sydney City Comrs. (1859), 12 Moo. P.C.C. 473; 33 L.T.O.S. 1; 7 W.R. 267; 14 E.R. 991, P.C.; 17 Digest (Repl.) 303, 1098.

Appeal from a decision of the Court of Exchequer Chamber, in part affirming, and in part reversing, a decision of the Court of Exchequer.

The appellant, the Duke of Buccleuch, was tenant to the Crown of Montague House in Whitehall Place. At the time the Metropolitan Board of Works was proceeding to construct the embankment on the north side of the river Thames, the duke held the premises under a lease dated April 19, 1810, for a term of sixty-two years from Jan. 5, 1806, by the description of B

"all the piece of ground, etc., abutting eastward on the river Thames, on which Montague House stood, together (inter alia) with all easements, waters, watercourses, profits, commodities, advantages, and appurtenances whatsoever to the said piece of ground belonging or appertaining, or there-with or with any part thereof held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof." C

This lease would have expired in January, 1868, but before its expiration, the duke, by agreements with the Crown upon spending £20,000 upon the premises in rebuilding the house and in other improvements, was to be entitled to a renewal for a term of ninety-nine years. He had performed his part under these agreements, and, therefore, at the time of the execution of the works by the Metropolitan Board of Works under the Thames Embankment Act, 1862, his interest in Montague House and premises was that of a lessee for the residue D of a term of 99 years. E

Montague House and premises were bounded on the river side by a wall, along the whole length of which, at high water, the river flowed. There was a gate in this wall, usually kept locked, which led from some stairs in the garden of the house to a causeway or pier which ran out into the river at low water mark. The causeway had been used for more than forty years for landing coal from barges and for bringing vegetables, etc., for the use of the tenants in Montague House, who always repaired the causeway at their own expense when it needed repair. By the Thames Embankment Act, 1862, the Metropolitan Board of Works was authorised to construct an embankment on the north side of the Thames, from Westminster Bridge to Blackfriars Bridge. In the course of performing the necessary works it became necessary to remove the causeway and the landing-place connected therewith, and also entirely to shut off Montague House and premises from direct access to the river. In the place where the water previously flowed a solid embankment was made which subsequently became a public highway. The appellant gave the respondents notice that he claimed compensation as well for the entering upon and taking by them of the causeway, pier, or jetty, as for the removal and obstruction of the use and enjoyment of the landing-place, and for all other damage sustained or to be sustained by him by such injurious affecting of his said messuage or dwelling house, and other lands, premises, and hereditaments. He further gave notice under the provisions of the Lands Clauses Consolidation Acts (which were incorporated with the Thames Embankment Act) that he desired to have the amount of such compensation settled by arbitration. F G H I

Arbitrators were named by the respective parties, and they nominated Mr. Charles Pollock, Q.C., as umpire. Mr. Pollock having taken upon himself the reference, ultimately made an award in the following terms:

"I award, order, and determine that there is due from the Metropolitan Board of Works, to the Duke of Buccleuch and Queensberry, the sum of £8,325 as and for compensation for the interest of the Duke of Buccleuch and Queensberry in the causeway, pier, and jetty, and for the shutting up

A of the landing-place, and for the damage by the depreciation of the mansion house, lands, tenements, and hereditaments by otherwise injuriously affecting the same by the execution by the Board of their works and by the exercise of the powers of the Act."

B The respondents having refused to pay the compensation, this action was brought against them by the duke to recover £8,325 awarded. To the declaration upon the award the respondents pleaded several pleas, only one of which in this stage of the case was necessary to be considered. By their seventh plea the respondents pleaded that the sum of £8,325 awarded was one entire and indivisible, unseparated and inseparable, sum, and that it included damages and compensation for matters and things in respect of which neither the arbitrators nor the umpire had any power or right to award or assess damages or compensation, and over and in respect of which neither the arbitrators nor the umpire had any jurisdiction whatever. At the trial before KELLY, C.B., the respondents, in support of this plea, put forward Mr. Pollock, the umpire, as a witness, and the learned Chief Baron rejected a submission by counsel for the plaintiff (the present appellant) that the evidence of an umpire in such circumstances was inadmissible, and allowed the umpire to give evidence. In the course of doing so the umpire stated that among other items he had awarded £5,000 for diminution in value of the house, and that in fixing the amount he had taken into consideration the loss of privacy and other "amenities" by reason of the respondents' works.

E The following judges were present at the hearing: MARTIN, B., BYLES, BLACKBURN, MONTAGUE SMITH and HANNEN, JJ., and CLEASBY, B.

F The following questions were proposed to the judges: First, whether the evidence given by the umpire was admissible; and if so, to what extent, and for what purpose? Secondly, whether, upon the facts, admissions, and evidence set forth in the Case (so far as such evidence was admissible), the appellant was entitled to a verdict on the issue raised on the seventh plea? All the judges answered the first question in the affirmative, the extent of admissibility being that stated in the headnote, and all except BLACKBURN, J., answered the second question in the affirmative.

G CLEASBY, B., in the course of his opinion, said: I answer the first question by giving it as my humble opinion, first, that the umpire was a competent witness, like any other person, to prove matters material to the issues; secondly, that questions might be properly put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed, and he was about to make his award; thirdly, that as regards the effect of the award no questions could properly be put to the umpire for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it.

H First, with regard to the competency of the umpire as a witness, I am not aware of any real objection to it. With respect to those who fill the office of judge it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the courts of law discountenance, and I think I may say prevent, their being examined. But those objections do not apply at all to a person selected as arbitrator for the particular occasion by the parties, and he comes within the general obligation of being bound to give evidence. The practice entirely agrees with this; for it is every day's practice for the arbitrator to make an affidavit where a question arises as to what took place before him, and I have known him to be examined

as a witness without objection: secondly, being competent generally, it follows that he may be questioned as to what took place before him, so as to show over what subject-matter he was exercising jurisdiction. He might, therefore, prove that a claim was made for compensation in respect of one matter, A., and also in respect of another matter, B., and that both were entertained without objection; or he might prove that claim B. was objected to and rejected, or that it was after objection received. A
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He might, in short, give any evidence for the purpose of showing what was the subject-matter into which he was inquiring, and upon which his judgment, therefore, was to be founded. This would enable us to judge whether he was acting within his jurisdiction or not, for a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction, quite independent of the judgment eventually given. And it deserves notice, that as to this evidence the umpire would be no better witness than any other person, and would not have it in his power afterwards, by his own evidence, to sustain or destroy the award. He could be corrected by any other person present at the proceedings, including the shorthand writer, if there was one; thirdly, as soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it. C
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There appear to me to be the strongest objections against allowing the umpire to be examined for the purpose of showing that he intended to be included in the award. In the first place it is (and, indeed, must be) a written instrument, and the general rule is applicable, that its effect must be collected from the instrument itself. The subject-matter to which it is applicable is ascertained by proof of the subject-matter of the inquiry. I cannot think that if the umpire admitted upon the inquiry claims A. and B., and made a general award of one sum for compensation, he could be allowed to prove that in arriving at that sum he had rejected claim B. from the computation, or vice versa, if he had rejected claim B. upon the inquiry could he be allowed to prove that he had included it in the computation. The award taken by itself is something certain and fixed, and settles the rights of the parties; but if evidence be admitted of the intention and state of mind of the umpire when he made it its certainty is destroyed, and its effect depends upon his memory, clearness of intellect, and perhaps upon his views and wishes taken up afterwards. Surely it would be a most dangerous thing, after an award has been made which becomes of itself the foundation of a right, to allow anyone to retain the power of explaining it away, or even of defeating it. We can properly investigate the acts of a judge or arbitrator in prosecuting a particular inquiry, and his judgment founded upon it; but how can we investigate his secret thoughts or intentions? He is the only master of them, and what he says must be conclusive, as there is nothing which can contradict or explain it. E
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The objection to such evidence would be more striking if, instead of the umpire being appealed to, two arbitrators had joined in an award. Could each have been questioned as to the composition of the award? Although they had agreed as to the result and amount of the award, it would not at all follow that they agreed in the steps by which it was arrived at. Indeed, we know that agreement in such a result is often only arrived at by some concession and compromise, and in case of a difference in the evidence of what was intended, which is to govern and influence the award? Or it may be further illustrated by supposing the case, instead of going to arbitration, to go to a jury. There is an assessor who presides, and he directs the jury to reject certain heads of claim and to compensate for others. The jury give a general verdict. Could the twelve jurymen be called as witnesses to show to what extent they had severally acted upon the direction given, or against it, so as to vitiate I

A the verdict by showing that some of the jury included in it matters they could not properly include? I submit not, and that the verdict must speak for itself and be applied to the proper subject-matter, viz., so much of the claim put forward as had been entertained. . . . The acts of the arbitrators, and not the hidden operations of their minds, are the proper subjects of inquiry.

B *Sir Roundell Palmer, Q.C.*, and *Kemplay* for the appellant.
Hawkins, Q.C., and *Philbrick* for the respondent Board.

Their Lordships took time for consideration.

April 30, 1872. The following opinions were read.

C **LORD CHELMSFORD, L.C.**—In this case the four judges in the Court of Exchequer were unanimous in favour of the appellant, but in the Court of Exchequer Chamber their judgment was reversed by a majority of four judges to three, the opinions of seven judges having been thus overruled by a minority of four. Of the six judges whose assistance your Lordships had upon the hearing of the appeal, all of them, with the exception of **BLACKBURN, J.**, concurred in the judgment of the Court of Exchequer. The case upon the appeal may conveniently be considered under the heads of the two questions put by your Lordships to the learned judges—(i) whether the evidence given by the umpire was admissible, and, if so, to what extent and to what purpose? (ii) whether, upon the facts, admissions, and evidence (so far as such evidence was admissible), the appellant is entitled to a verdict on the issue raised on the seventh plea.

E His LORDSHIP stated the facts, and continued:] I do not quite understand whether an objection was made in limine to the admissibility of the umpire as a witness, or merely to certain parts of his evidence; but I rather collect that the latter must have been the case, because at the close of his examination there follows the statement:

F “The evidence of the umpire was objected to by the plaintiff and admitted by the judge, subject to such objection, and on the terms that such parts as the court should think inadmissible should be deemed to be struck out.”

G But if the umpire was not a competent witness the whole of his evidence ought to be struck out. That the umpire was admissible as a witness was without a single exception the opinion of all the judges who have considered the question in this case.

H The umpire being a competent witness, the only question is to what extent the respondents were entitled to examine him as to the particulars of his award. They had an undoubted right to know from him whether in his estimate of the compensation he took into consideration any matters not included in the reference, and, therefore, not within his jurisdiction. To prevent the respondents from questioning so far would have been to deprive them of information to which they were entitled, by shutting them off from the only source of it in the breast of the umpire. He alone could tell what subjects he included under the general terms of his award. But, this having been ascertained, the respondents were not at liberty to go further and to ask the umpire what were the elements which entered into his consideration in determining the quantum of compensation. Within the limits of the reference the amount to be awarded was entirely in the discretion and judgment of the umpire. His opinion as to the extent of the damage done to Montague House by the execution of the works of the respondents was necessarily of a speculative character, and founded upon a general view of the annoyance and inconvenience which would result from the new state of things after the embankment was made and publicly used. To ask the umpire, as the counsel for the respondents did, what led him to the conclusion as to

the proper sum to be awarded, was really to inquire what passed through his mind before he formed his judgment. It would be, in my opinion, contrary to all principle so to scrutinise the exercise by an arbitrator of a discretionary power to award compensation; and I think that all the questions put with this object were objectionable, and the evidence given upon them ought to be struck out.

Before proceeding to the next question, I must observe that, even if the evidence of the umpire had been admissible as to his reasons for thinking that Montague House would be depreciated by the construction and use of the embankment because "there would be traffic, and dust, and dirt, and commotion, and noise, which seemed to alter the character of the house entirely," I do not think it would prove that his award was invalid. In *Hammersmith and City Rail. Co. v. Brand* (1), it was held that a person, whose land had not been taken for the purposes of the railway, was not entitled to compensation from the railway company for damage arising from vibration, occasioned (without negligence) by the passing of trains after the railway had been brought into use. And in *City of Glasgow Union Rail. Co. v. Hunter* (2), it was held that compensation could not be claimed by reason of the noise or smoke of trains by a person no part of whose property had been injured by anything done on the land over which the railway ran. In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use, and not by the construction of the railway. But if, in each of the cases lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise occasioned by passing trains. In the present case (as I shall presently show) land of the appellant was taken, which would have given a foundation for a claim to compensation for other lands injuriously affected. In addition to this in the two cases cited, there were distinct claims made in the one on account of vibration, and in the other on account of smoke and noise occasioned by the passing trains, whereas here the umpire did not say: "I gave so much for dust and noise, etc., but it occurred to my mind that these would be the consequences of the public use of the embankment, and would altogether alter the character of the house."

I now proceed to consider whether the umpire has included in his award any head of damage not properly the subject of compensation. It appears to me that the notice of claim is rather imperfectly framed, as it does not point distinctly to the injury to Montague House arising from the construction and use of the embankment. It requires the Metropolitan Board of Works to pay the Duke of Buccleuch compensation, as well for the entering upon and taking of the causeway, pier, or jetty, as for the removal and obstruction of the use and enjoyment of the said landing place, and for all the other damage sustained and to be sustained by him by such injurious affecting of his said messuage and dwelling house, the word "such" referring to the taking of the causeway and removing of the landing place. It has never been questioned that the umpire had authority to take into his consideration the injury to Montague House arising from the construction and use of the embankment.

There can be no doubt, and none has been entertained, that the appellant is entitled to compensation in respect of the taking away the causeway and landing place, and the injury arising to his house and premises by depriving him of access to the river. The only question upon which there has been a difference of opinion among the judges is whether the umpire was authorised to give compensation in respect of the depreciation of Montague House, by the conversion of the land between it and the river into a highway, and the consequent public use of it. This question partly depends upon s. 63 of the

A Lands Clauses Consolidation Act, 1845, which is incorporated with the Thames Embankment Act, and enacts that in estimating the purchase money or compensation to be paid by the promoters of an undertaking

B "regard shall be had not only to the value of the land to be purchased or taken, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of such power."

C The appellant was the owner of lands within the meaning of this clause, in respect of the causeway which was taken away from him. It is quite immaterial whether the soil of the causeway belonged to him or he had merely an easement over it; for, by s. 4 of the Thames Embankment Act, the word "land" is to include easements, interests, rights, and privileges in, over, or affecting lands, and s. 27 of the same Act empowers the Metropolitan Board of Works to appropriate, by grant or demise, any reclaimed land, etc., to any owner of lands now situated on the present left bank and river frontage of the river Thames, in front whereof the said intended embankment shall pass as aforesaid, in consideration of and in lieu, in whole or in part, of the compensation which such owner or person may be entitled to claim for the damage, if any, to be sustained by him by loss of river frontage or otherwise by reason of such embankment or roadway or other the exercise of any of the powers of the Act.

E This section contemplates two descriptions of damage likely to be sustained by the owners of lands on the river frontage of the Thames—one, by loss of the river frontage, the other, in any other manner by reason of the embankment or other the exercise of any of the powers of the Act. It seems to me to be quite clear that the umpire was entitled to consider, not only the damage which the appellant sustained by being deprived of the causeway, but also whether he was entitled to compensation in respect of damage otherwise sustained by reason of the embankment. If he was of opinion that Montague House was depreciated in value as a residence by reason of the proximity of the embankment, and of the consequences of its use as a public highway, he was bound to give the appellant some compensation, and the amount proper to be awarded was entirely for him to determine. It can hardly be doubted that, in addition to the damage sustained by the loss of the river frontage, the house must have been "injuriously affected," i.e., depreciated in value, by the interposition between it and the river of an embankment to be used as a public highway; and this seems to bring the right to compensation within the very words of s. 27 of the special Act, because it is a damage, otherwise than by loss of the river frontage, by reason of the embankment or roadway.

H It is unnecessary to consider *Hammersmith and City Rail. Co. v. Brand* (1) and *City of Glasgow Union Rail. Co. v. Hunter* (2), and other cases which were cited in argument, because their applicability to the present case depended upon that part of the evidence of the umpire which I think ought to be struck out as inadmissible. The only question then arises upon the award itself—whether the umpire had any power to give compensation for the damage by the depreciation of the mansion house, lands, tenements, and hereditaments by the otherwise injuriously affecting the same by the execution by the respondents of the said works, and by the exercise of the powers of the Act. He was authorised both by the special Act and by the Lands Clauses Consolidation Act, 1845, to give compensation if the premises were injuriously affected, a fact which it was the duty of the umpire to ascertain and determine. He has determined it, and awarded compensation in respect of the damage thereby sustained by the appellant, and I see nothing in the case to impeach the correctness of his award. I think that the judgment of the Court of Exchequer Chamber must be reversed.

LORD WESTBURY.—I concur entirely with the majority of the judges on the point relating to the admissibility of the evidence of the umpire, and also with respect to the limit to which the right of examining the umpire ought to be carried. On the other point I must confess, that on this occasion, as on some others, I do not concur in the principles which have been established. But it would be useless to enter into that discussion, as I understand that the majority of your Lordships is on that point in harmony with the opinion which has been expressed by my noble and learned friend who has just addressed the House, and, therefore, I concur in the judgment proposed to be pronounced. A B

LORD COLONSAY.—I entirely concur in the judgment proposed to be delivered on both grounds. First, as to the competency of examining the umpire, I think the distinction had been well drawn and the opinions of the majority of the judges are right. In regard to the other part of the case, I think that my noble and learned friend now on the Woolsack (LORD CHELMSFORD) has stated the most conclusive reasons for the judgment he had proposed to pronounce. I, therefore, do not think it necessary to take up your Lordships' time by stating particularly the grounds on which I have arrived at the same conclusion. C D

LORD CAIRNS.—I must express my own sense of the obligation, and I am sure there is the same feeling on the part of your Lordships to the learned judges who have favoured us with their opinions upon this very important case. I own that, speaking for myself, both as regards the extent to which the evidence has been challenged as receivable, and as regards the other points in the case I should have felt great hesitation in coming to the conclusion at which I have arrived had I not had the advantage of the concurrence of so large a majority of the learned judges. E

As regards the reception of the evidence, in my opinion, the line has been most properly and accurately drawn by CLEASBY, B. [ante p. 657]. It appears to me that on every point which may be considered to be a matter of fact with reference to the making of the award the evidence of the arbitrator or umpire was properly admissible. He was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted—so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument. F G

On the other part of the case I own I have had less doubt than I had with regard to the extent to which the evidence was receivable. It has appeared to me throughout that the property of the appellant was what is commonly called riparian property. The meaning of that is that it had a water frontage. The result of its having a water frontage was that it had a right to the undisturbed flow of the river which passed along the whole frontage of the property in the manner in which it had formerly been accustomed to pass. That being the state of things, this water frontage, with these rights which the appellant possessed, were taken for the purposes of the Act. Beyond all doubt the water right was a property belonging to the appellant, for which compensation was to be made, and it was for the arbitrator to assess the compensation to which the appellant was entitled upon that footing. It is quite true that some difficulty might have arisen in consequence of the wording of the claim put forward by the appellant. In that claim undue weight, as it seems to me, is laid upon the possession of the causeway, that is to say, upon the one H I

A point in the whole frontage by means of which, for the time being, he enjoyed access to the water in a particular and convenient way. But it seems to me that his claim is quite large enough to cover the damage to the whole of his interest, whatever that interest might be, and that interest, it appears to me, was a claim to a water right along the whole of the frontage.

B That being so, when the arbitrator came to consider that claim it seems to me that it was entirely open to the arbitrator to say what was the value of it. It was impossible for the arbitrator in estimating that value to reject from his mind the consideration of the entire depreciation of value which the property would be subject to by reason of its being deprived of that water right. If we are to look at the whole of the evidence, it appears to me that that is nothing more than what the arbitrator says. Upon these grounds it appears to me that the motion which has been submitted to your Lordships is entirely correct, and that judgment should be given for the appellant.

Appeal allowed.

HARRISON v. GRADY

[COURT OF COMMON PLEAS (Erle, C.J., Willes, Byles and Keating, JJ.), November 14, 1865]

[Reported 13 L.T. 369; 12 Jur.N.S. 140; 14 W.R. 139]

Husband and Wife—"Necessaries"—Right to pledge husband's credit—Presumption—Cohabitation of parties—Wife subsequently turned out of house.

The plaintiff claimed payment for medical attention to the defendant's wife, first in respect of a period when the defendant and his wife were living together, and, secondly, in respect of a period when the defendant had turned the wife out of the house. The defendant denied that he had authorised his wife to employ the plaintiff.

Held: (i) while the parties were living together there was a general presumption that the wife had authority to pledge the husband's credit for necessities suitable to her estate and degree; (ii) it was a question for the husband, and not for the jury, to determine what should be the state and position in which his family should live; (iii) it was a question for the jury whether the presumption arising from the cohabitation of the parties had been rebutted; (iv) when the wife was turned out of the house without means of obtaining necessities suitable to her station, it was a presumption of law, incapable of being rebutted by evidence, that she could pledge the husband's credit for necessities.

Notes. Followed: *Forristall v. Lawson*, *Connelly v. Lawson* (1876), 34 L.T. 903.

As to a husband's liability to provide necessities for his wife, see 19 HALSBURY'S LAWS (3rd Edn.) 859 et seq.; and for cases see 27 DIGEST (Repl.) 181 et seq. As to a husband's liability in respect of his wife's contract for necessities, see 19 HALSBURY'S LAWS (3rd Edn.) 855; and for cases see 27 DIGEST (Repl.) 190.

Case referred to:

- (1) *Jolly v. Rees* (1864), 15 C.B.N.S. 628; 3 New Rep. 473; 33 L.J.C.P. 177; 10 L.T. 298; 28 J.P. 534; 10 Jur.N.S. 319; 12 W.R. 473; 143 E.R. 931; 27 Digest (Repl.) 184, 1390.

Also referred to in argument :

Manby v. Scot (1863), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E.R. 1065, Ex. Ch.; 27 Digest (Repl.) 173, 1273.

Johnston v. Sumner (1858), 3 H. & N. 261; 27 L.J.Ex. 341; 31 L.T.O.S. 166; 4 Jur.N.S. 462; 6 W.R. 574; 157 E.R. 469; 27 Digest (Repl.) 189, 1457.

Reid v. Teakle (1853), 13 C.B. 627; 22 L.J.C.P. 161; 17 Jur. 841; 138 E.R. 1346; sub nom. *Read v. Teakle*, 1 C.L.R. 200; 27 Digest (Repl.) 181, 1360.

Rule Nisi obtained by the defendant calling on the plaintiff to show cause why the verdict should not be set aside and a verdict entered for him, or a new trial, on the ground of misdirection by the trial judge and also that the verdict was against the weight of evidence in an action tried by BYLES, J., in which the plaintiff claimed to recover the sum of £64 5s. for medical attendance on the defendant's wife. The defendant denied liability.

At the trial before BYLES, J., it appeared that Mrs. Grady was entitled under the will of her sister to property, the annual income of which was about £110, for her separate use. Before and during the year 1856, Mr. and Mrs. Grady were living apart under articles of separation, and during that time the plaintiff had been in the habit of attending Mrs. Grady professionally. Towards the close of that year a reconciliation took place, and in January, 1857, Mrs. Grady returned to live with the defendant. Early in 1856 the plaintiff applied to the defendant for payment of his bill, which the defendant refused unless he had an order from Mrs. Grady, whose rents he was then receiving. On Feb. 4 in that year the plaintiff wrote to the defendant enclosing an order from Mrs. Grady, and asking for a cheque. The order, which was signed by Mrs. Grady, was in the following terms :

"Mr. Grady, pay Mr. Harrison £12 8s. out of any funds of mine in your hands.

L. S. GRADY."

The defendant thereupon sent the plaintiff a cheque for the amount, and received the following receipt :

"Received of Mrs. Grady, per payment of Mr. Grady (by cheque), the sum of £12 8s. per account delivered.

C. H. R. HARRISON."

During the years 1857 and 1858, Mrs. Grady was occasionally attended by the plaintiff. In the years 1859, 1860, and 1861 respectively, the plaintiff left his bills for attendance with Mrs. Grady, who handed them to the defendant, who gave her cheques which she handed to the plaintiff. The defendant swore that he made these payments out of Mrs. Grady's separate estate. In 1861 Mrs. Grady filed a bill in Chancery against her trustees and the defendant for an account of her rents and profits, and after this the defendant and Mrs. Grady lived in the same house, but occupied separate apartments and did not speak to each other.

In May, 1862, Mrs. Grady sent a message to the defendant to the effect that the plaintiff's bill for 1861 was unpaid, and that she wished it to be paid as before, and on May 29 the plaintiff and the defendant and Mrs. Grady met in the defendant's house, and he drew a cheque payable to Mrs. Grady's order, which she endorsed and handed over to the plaintiff.

In July, 1862 the plaintiff was appointed by the Court of Chancery receiver of the rents and profits of Mrs. Grady's separate estate, and has since then continued to receive them. On Sept. 14, 1864, the plaintiff applied to the defendant for payment of his bills for attendance on Mrs. Grady in 1862 and 1863, which the defendant, through his attorneys, refused, stating that he did not employ the plaintiff, and that his wife had a separate estate quite sufficient

A to supply her with all necessaries, and that as he, the plaintiff, was receiver of the rents he could pay himself. On Sept. 24 the defendant sold all his furniture and went to live in lodgings, leaving Mrs. Grady to look for lodgings for herself, and since then they had not lived in the same house. Early in February, 1865, the defendant received another bill from the plaintiff, payment of which he also refused; and this and the two preceding ones form the subject of the present action. The defendant swore that he had given his wife no authority to employ the plaintiff, and that he had never employed him himself.

B BYLES, J., put the following questions to the jury, all of which they answered in the negative: (i) Did the plaintiff agree to look to the wife's funds, and not to the husband, the plaintiff knowing all the facts? (ii) Had she sufficient income to maintain herself, and to pay a doctor before September, 1864, that is, while she was living with her husband? (iii) Had she this after September, 1864?

C The counsel for the defendant desired that the jury should be asked the following question: "Had the wife the authority of the defendant in fact to pledge his credit and employ the plaintiff?" BYLES, J., declined to put this question, as he did not think it material, but reserved to the defendant leave to move to enter the verdict for him, if the court should be of opinion that the answer to the question was material, and that it ought to have been asked; the court to have power to draw inferences of fact. A verdict was thereupon entered for the plaintiff for the amount claimed. The defendant obtained a rule calling on the plaintiff to show cause why the verdict should not be set aside and a verdict entered for the defendant.

E *G. Denman, Q.C.*, and *C. Pollock* showed cause against the rule.
D. Seymour, Q.C., and *J. A. Russell* supported the rule.

F **ERLE, C.J.**—I think that this rule should be discharged. The action was brought by the plaintiff, a medical man, against the defendant, who is the husband of Mrs. Grady to whom the medical attendance was given, and the question is whether Mrs. Grady had the authority of her husband, as agent of her husband, to make him liable for such attendance. The authority of the wife may be a *presumptio juris* that is incapable of being rebutted by evidence, as where a wife is turned out of her home without the means of obtaining necessaries; then a presumption of law arises that she was turned out with the authority of her husband to pledge his credit for necessaries. Here it is clear that Mrs. G Grady, being in a state of ill-health, medical attendance was a necessary, and as the husband turned her out in September, 1864, while in ill-health, and the plaintiff supplied her with medical attendance after that time, I am clearly of opinion that the verdict must stand for the amount of that attendance.

H As to the rest, there is no evidence that the husband turned her out, and the question whether the wife had authority between 1862 and 1864, as the agent of her husband to make him liable for medical attendance supplied to her during that time, depends on questions of fact. The plaintiff's case was, that the defendant's wife was cohabiting with her husband, and that it was a presumption of fact from cohabitation that the wife was agent of her husband to obtain supplies for carrying on their domestic establishment. I consider the question of necessaries is a question tending to confusion. The jury are to consider whether the thing supplied is suitable to the station which the husband has authorised his wife to assume.

I While the wife is living with her husband, there is a presumption of fact that what she ordered she had authority to order; but if she ordered what was clearly unsuited to her station, that would raise a presumption the other way that she was not her husband's agent to pledge his credit for such goods; as if a labouring man's wife were to go to a jeweller's shop and order a diamond necklace, the presumption would be that her husband never gave her authority to order what

was unsuitable to her state and degree; it is a question for the jury if the plaintiff knew that the husband never intended that she should have authority to pledge his credit. A

The general presumption is, that a wife has authority to order necessities sent to their establishment, and suitable to her estate and degree. I attach extreme importance to the judgment in *Jolly v. Rees* (1), on the ground that it maintains the principle that the husband shall determine what shall be the state and position that his family shall live in. The husband has a right to fix the standard of living for his family, and no tradesman supplying goods ought to be able to go to a jury and ask if that is a proper standard. That standard of living set up by the husband is the standard which the jury should consider when the question comes before them. If that were not so, it would leave every demand of this kind a question of degree, and would transfer from the husband to the jury the power of fixing the standard of living of the family. B C

We have also in view the cases in which tradesmen send round hawkers to the wives of poor men compelled by their avocations to be away from home during the day, who lead the wife to be imposed upon in the sale of goods which the husband would have to pay for. Here, if the point is to be considered, it is perfectly clear that medical attendance is one of the most primary necessities; but I do not think there is any question as to that at all. D

It is a presumption from cohabitation that the wife is the agent of her husband. Then the defendant says, "You knew that my wife had not authority to pledge my credit," and he relied on two conversations with the plaintiff as to that fact. I think as a jurymen (and I think that the question ought to have been left to the jury) that those conversations do not rebut the presumption arising from cohabitation. If the husband was not liable, the plaintiff was supplying the skill and attendance without anyone being liable for it. It is supplied to Mrs. Grady with the knowledge of the husband, who never interfered, and the bill is sent to him. It is like the case of saying to a tradesman, "My wife has funds, and you can compel her to pay you." I, therefore, come to the conclusion as to both parts of the claim that the verdict ought to stand. E F

WILLES, BYLES and **KEATING, JJ.**, concurred.

Rule discharged.

Re RICHES AND MARSHALL'S TRUST DEED. Ex parte
DARLINGTON DISTRICT JOINT STOCK BANKING CO.

[COURT OF APPEAL IN CHANCERY (Lord Westbury, L.C.), November 9, 1864,
January 18, 1865]

[Reported 4 De G.J. & Sm. 581; 5 New Rep. 287; 34 L.J.Bey. 10;
11 L.T. 651; 11 Jur.N.S. 122; 13 W.R. 353; 46 E.R. 1044]

Partnership—Authority of one partner to bind firm—Bills drawn and endorsed by one partner—Discounted by bank not having partnership account—Negligence of bank.

A partner drew bills in the name of the partnership firm, and, by fraudulent representation of the purpose for which they were required, obtained acceptances from persons with whom the firm did business. He endorsed the bills after acceptance in the name of the firm and then endorsed them over to himself. All the signatures other than the acceptances were in the partner's handwriting. The bills were discounted by the bank where the partner had his private account, but which did not have the firm's account. The other partners, who were wholly ignorant of these matters until after the death of the first-named partner, executed a trust deed for the benefit of their creditors, and the trustee of the deed resisted the bank's claim to prove for the amount of the bills.

Held: it was plain on the face of the transaction that a partnership security was being converted by the deceased partner into personal property to be used for his private purposes, and the bank received the bills and discounted them knowing full well that the firm had a bank of its own; the bank had been guilty of great negligence; and their claim failed.

Notes. Followed: *Re Croudace* (1866), 15 L.T. 19.

As to the authority of one partner to draw, accept and endorse bills of exchange on behalf of his firm, see 28 HALSBURY'S LAWS (3rd Edn.), 506; and for cases see 36 DIGEST (Repl.) 465.

Cases referred to:

- (1) *Ex parte Peele* (1802), 6 Ves. 602; 31 E.R. 1216, L.C.; 36 Digest (Repl.) 484, 544.
- (2) *Ex parte Bonbonus* (1803), 8 Ves. 540; 32 E.R. 465, L.C.; 36 Digest (Repl.) 506, 717.
- (3) *Re O'Neill, Ex parte Goulding* (1826), 2 Gl. & J. 118; on appeal (1829), 8 L.J.O.S.Ch. 19, L.C.; 6 Digest (Repl.) 93, 739.
- (4) *Leveson v. Lane* (1862), 13 C.B.N.S. 278; 1 New Rep. 27; 7 L.T. 326; 11 W.R. 74; 143 E.R. 111; sub nom. *Levieson v. Lane*, 32 L.J.C.P. 10; 9 Jur.N.S. 670; 6 Digest (Repl.) 93, 737.

Also referred to in argument:

Shirreff v. Wilks (1800), 1 East, 48; 102 E.R. 19; 36 Digest (Repl.) 485, 557.

Ridley v. Taylor (1810), 13 East, 175; 104 E.R. 336; 36 Digest (Repl.) 505, 710.

Re Acraman, Ex parte Bushell (1844), 3 Mont. D. & De G. 615; 3 L.T.O.S. 264; 8 Jur. 937, Ct. of R.; 36 Digest (Repl.) 506, 715.

Appeal by the Darlington District Joint Stock Banking Co. from a decision of Mr. Commissioner ABRAHAM, of the Newcastle District Court of Bankruptcy, dated June 9, 1864, whereby he rejected an application on the part of the bank to be allowed to prove in the matter for a debt of £1,460 4s. 9d.

The claim of the bank was in respect of bills discounted by them at their Stockton branch for one Kay, now deceased, and a late member of the firm of Riches, Marshall & Co., shipbrokers, shipowners and coal fitters at Sunderland.

Shortly after the death of Kay, Riches and Marshall, the surviving partners, executed a trust deed under s. 192 of the Bankruptcy Act, 1861, for the benefit of their creditors. The trustee of the deed opposed the claim. A

The banking account of the partnership was kept with Woods & Co., the Union Bank at Sunderland, Kay managing the partnership business with them. Upon Kay's death, it was found that there were about £900 worth of spurious bills which the bank had discounted for the firm, and for which the bank held the firm liable. The mode in which this fraud was carried out by Kay and the facts relevant to the conduct of the partnership business are set out in the judgment (*infra*). It further appeared that Kay, besides the above partnership account, had a private account with the Darlington District Joint Stock Banking Co., at the Stockton branch, into which the bills upon which the present proof was tendered were paid. They purported to be drawn by Riches, Kay and Marshall upon various acceptors, to be endorsed by Riches, Kay and Marshall, and then, the account being with Kay only, endorsed also by Kay in his individual capacity. It was stated that they had been discounted in the ordinary course of business, were dishonoured, and, being in the hands of the bank as holders, were now produced by the manager. B

The Commissioner rejected the proof, on the grounds that the bank knew that the partnership account was not with their house; that they failed to exercise due vigilance in obtaining the assent of Kay's partners, who had no knowledge of the transactions and had never acquiesced in them. The bank could not recover against the partnership. C

Bacon, Q.C. (*De Gex* with him) for the bank. D

Greene, Q.C., and *Roxburgh* for the trustee under the trust deed. E

Cur. adv. vult.

Jan. 18, 1865. **LORD WESTBURY, L.C.**—This is an application made by alleged creditors of the debtors, who have not been declared bankrupts, but have executed a trust deed under the statute of 1861. The application is to have a proof admitted for a sum of £1,460 on bills of exchange, expressed to have been drawn in the name of the late firm, of which the debtors are the surviving partners. The Commissioner, receiving the application as if it had been made in bankruptcy under the statute, has thought right to reject the proof, of which it was the object of the statute to afford the opportunity of doing. The circumstances are peculiar. The debtors are the surviving partners of a firm of Riches, Kay and Marshall. They carried on the business of shipbrokers, and also of coal fitters; but their business in this latter respect appears to have been confined to transactions with the person who is the trustee under the trust deed. F

The partnership of Riches, Kay and Marshall began in July, 1862. Kay, who died in January, 1864, was the eldest and most experienced of the partners. He exercised great influence over his other partners; to him the management of the whole of the business was given, and the financial concerns of the partnership were entirely under his control. G

The firm had a banking account with the Union Bank at Sunderland. Kay kept a separate kind of banking account with a branch of the Darlington District Bank at Stockton. The Darlington Bank were well aware that the Union Bank had kept an account with the partnership. Since the death of Kay a fraud of a very singular description is found to have been committed by him. The partnership, in the capacity of shipbrokers, were in the habit of advancing small sums of money to the masters of vessels and to the captains of vessels, which they were employed to charter and fit out. Kay adopted the following contrivance: he appears to have taken stamped slips of paper, on which bills of exchange were usually drawn, and doubling down either end of the slip, and presenting only the middle part, he wrote upon this, in pencil, the figures of small sums of H

A money, which, as shipbrokers, they paid to the masters or captains; and he received or took from each master or captain his signature at the foot of the pencil figures, intending thereby to denote that the individual signing had received those sums of money. He then rubbed out or expunged the pencil figures, and thereby acquired and had a slip of paper fit for writing a bill upon, stamped, and with a genuine signature across its face, over which he wrote the ordinary words of acceptance, and he converted that bill into a bill of exchange, to which he appended the name of the partnership firm, namely, the words "Riches, Kay and Marshall."

C He carried on this species of forgery or fraudulent manufacture of bills of exchange to a very large amount, and all those bills, so created, were carried by Kay to his own private bankers at Stockton, and were there, at his instance, discounted by those bankers. At the back of the bills Kay wrote the name or style of the partnership firm as endorers, and beneath that he wrote his own individual name. Each bill, therefore, purported on the face of it to have been drawn by the partnership and accepted across by an individual. There were a considerable number of bills on which signatures across the face of them had been acquired in the manner which I have described. Each bill purported on the face of it to have been drawn by the partnership, and to have been accepted by an individual. The bills also appear to have been endorsed by the partnership to the individual partner Kay, and in that capacity were carried by him to his bankers and negotiated by them.

E It is on bills thus created that the present proof is tendered for the sum of £1,460. The firm name of the partnership, the drawer, the endorsement of Kay, and the name of Kay, are all in the handwriting of Kay. The bills, therefore, appear on the face of them to be securities belonging to the partnership. They appear to be the property of the partnership, and any person looking at the endorsement would immediately presume that Kay had endorsed over the partnership security to himself; and if that individual were the private creditor of Kay, to whom the bill was tendered, he would also know that Kay was using this partnership security which he had thus appropriated for his own private purposes.

G The law on the subject is perfectly clear and well established. Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partnership be such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept and endorse bills of exchange in the name of the partner, for partnership purposes. All persons may give credit to his acts, and his authority, unless they have notice or reason to believe, that the thing done in the partnership name is done for the private purposes, or on the separate account, of the partner. In that case, authority by virtue of the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority; otherwise he must depend on the right and title of the partner, or must rely on circumstances sufficient to repel the presumption of fraud.

I These principles have been established by a long series of decisions, if indeed decisions were at all required to show the proper application of the rule of law, which is so plain and obvious as that which results from the ordinary law of agency, as applied to partnership. I may, however, refer to *Ex parte Peele* (1); *Ex parte Bonbonus* (2); and *Ex parte Goulding* (3), which was first before SIR JOHN LEACH, V.-C., and afterwards before LORD LYNTHURST, L.C.; and to the other cases which were cited in the course of the argument. I may also adopt the passage I find in a book of considerable merit, viz. MR. SMITH'S MERCANTILE LAW, and which was cited by the judges in a recent case of *Leverson v. Lane* (4) with great approbation. The words are these (SMITH'S MERCANTILE LAW (6th Edn.), p. 46):

"It would seem that the unexplained fact that a partnership security had been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who takes the security to remove, by showing either that the party from whom he received it acted under the authority of the rest of his partners, or that he himself had good reason to believe that that was the fact."

It is immaterial whether the partnership security is applied in discharge of an existing debt, or whether it is used by the individual partner for the purpose of obtaining money from his own banker to be applied for his own personal purposes. There has been some attempt here, on the part of the bank, to allege that the moneys advanced by them to Kay were used by him for partnership purposes. Even if that can be shown, the result would be merely this, that the form of proof would be a proof by the persons now applying in respect of that debt, if any, which was due from the partnership to Kay in respect of the money so applied. That would avail the bank little, even if the case could be substantiated, for there is no doubt of the fact that Kay had greatly defrauded his co-partners. Some attempt was made to show that the partners ought to have been cognisant of a transaction of this description. But there is nothing to justify any such inference or conclusion.

It is quite clear that this gross forgery and fraud of Kay was a scheme resorted to by him simply for his own purposes, and which he carried on with the view to his own private advantage, through the agency of these separate people. The bankers themselves were undoubtedly guilty of great negligence. They must have seen on the face of the bills, that they had been called into being by the individual partner who wrote the name originally at the foot of the bills; that the same hand wrote also the endorsement; and that the same hand added the individual name of Kay. It was plain on the face of the transaction that the partnership security was converted by the individual partner into his own private personal property in order to be used for his own private purposes, and the bank received such bills and discounted them at the instance of the individual partner with whom they had an account, knowing full well that the firm itself had a bank of its own with which the ordinary account was kept.

I cannot put the case higher than the right of an individual partner with whom they dealt, and they can have no claim to be compensated by the partnership, unless that be the right of the individual with whom they have so dealt. I, therefore, concur with the commissioner in the conclusion at which he has arrived. The proof cannot be admitted. I, therefore, dismiss this motion of appeal, and direct the bank to pay the costs.

Appeal dismissed.

WESTERN v. MACDERMOTT

[COURT OF APPEAL IN CHANCERY (Lord Chelmsford, L.C.), November 21, 22, December 4, 1866]

[Reported 2 Ch.App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265]

Sale of Land—Restrictive covenant—Purchaser with notice—Acquiescence—Parties to action for injunction.

The plaintiff and the defendant owned houses which were subject to a covenant restricting building in the gardens at the back of the houses. The defendant, who had knowledge of the covenant, erected a building in breach of the covenant. The plaintiff had acquiesced in one breach of the covenant which did not affect the enjoyment of his land.

Held: (i) whether or not the covenant ran with the land, the defendant, having purchased his house with notice of it, was bound by it, and the plaintiff's acquiescence in a breach on one occasion did not constitute a waiver by him of his right to enforce the covenant; (ii) there was no need to join other persons entitled to the benefit of the covenant in respect of other land who were unaffected by the breach.

Notes. Considered: *Keates v. Lyon* (1869), 4 Ch.App. 218; *Leech v. Schweder* (1874), 9 Ch.App. 465, n.; *Manners v. Johnson* (1875), 1 Ch.D. 673. Applied: *Fairclough v. Marshall*, [1874-80] All E.R. Rep. 1261. Considered: *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 54 L.T. 444; *Meredith v. Wilson* (1893), 69 L.T. 336. Applied: *Hooper v. Bromet* (1903), 89 L.T. 37. Referred to: *Re Drew, Ex parte Mason* (1866), 35 Beav. 443; *Tulk v. Metropolitan Board of Works* (1868), L.R. 3 Q.B. 682; *Master v. Hansard* (1876), 46 L.J.Ch. 505; *Renals v. Cowlshaw*, [1874-80] All E.R. Rep. 359; *Chitty v. Bray* (1883), 48 L.T. 860; *Brown v. Inskip* (1884), Cab. & El. 231; *Austerberry v. Oldham Corpn.* (1885), 29 Ch.D. 750; *Martin v. Spicer* (1886), 55 L.T. 821; *Sheppard v. Gilmore*, [1886-90] All E.R. Rep. 1049; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Formby v. Baker*, [1903] 2 Ch. 539; *Lawrence v. South County Freeholds, Ltd.*, [1939] 2 All E.R. 503.

As to the enforcement and discharge of restrictive covenants see 14 HALSBURY'S LAWS (3rd Edn.) 568, 569; and for cases see 40 DIGEST (Repl.) 360.

Cases referred to:

- (1) *Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.
- (2) *Coles v. Sims* (1853), Kay, 56; 23 L.J.Ch. 37; 22 L.T.O.S. 132; 2 W.R. 48; 69 E.R. 25; affirmed (1854), 5 De G.M. & G. 1; 2 Eq. Rep. 951; 23 L.J.Ch. 258; 22 L.T.O.S. 277; 18 Jur. 683; 2 W.R. 151; 43 E.R. 768, L.J.J.; 40 Digest (Repl.) 345, 2794.
- (3) *Duke of Bedford v. British Museum Trustees* (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, 2887.

Also referred to in argument:

Johnstone v. Hall (1856), 2 K. & J. 414; 25 L.J.Ch. 462; 27 L.T.O.S. 230; 20 J.P. 579; 2 Jur.N.S. 780; 4 W.R. 417; 69 E.R. 844; 31 Digest (Repl.) 174, 3079.
Tipping v. Eckersley (1855), 2 K. & J. 264; 69 E.R. 779; 28 Digest (Repl.) 816, 627.
Wilson v. Hart (1866), 1 Ch.App. 463; 35 L.J.Ch. 569; 14 L.T. 499; 30 J.P. 582; 12 Jur.N.S. 460; 14 W.R. 748, L.J.J.; 40 Digest (Repl.) 355, 2845.

- Child v. Douglas* (1854), Kay, 560; 23 L.T.O.S. 140; 2 W.R. 461; 69 E.R. 237; on appeal, 5 De G.M. & G. 739; 23 L.T.O.S. 283; 2 W.R. 701, L.J.J.; 40 Digest (Repl.) 339, 2766. **A**
- Kemp v. Sober* (1851), 1 Sim. N.S. 517; 20 L.J.Ch. 602; 17 L.T.O.S. 117; 15 Jur. 458; 61 E.R. 200; affirmed (1852), 19 L.T.O.S. 308, L.C.; 40 Digest (Repl.) 352, 2835.
- Eastwood v. Lever* (1863), 4 De G.J. & Sm. 114; 3 New Rep. 232; 33 L.J.Ch. 355; 9 L.T. 615; 28 J.P. 212; 12 W.R. 195; 46 E.R. 859, L.J.J.; 40 Digest (Repl.) 343, 2779. **B**
- Thompson v. Hakewill* (1865), 19 C.B.N.S. 713; 35 L.J.C.P. 18; 13 L.T. 289; 11 Jur.N.S. 732; 14 W.R. 11; 144 E.R. 966; 31 Digest (Repl.) 367, 4983.
- Roper v. Williams* (1822), Turn. & R. 18; 37 E.R. 999, L.C.; 31 Digest (Repl.) 188, 3196. **C**
- Weale v. West Middlesex Waterworks Co.* (1820), 1 Jac. & W. 358; 37 E.R. 412, L.C.; 43 Digest 1084, 179.
- Clarke v. Clark* (1865), 1 Ch.App. 16; 35 L.J.Ch. 151; 13 L.T. 482; 30 J.P. 20; 11 Jur.N.S. 914; 14 W.R. 115, L.C.; 19 Digest (Repl.) 149, 966.
- A.-G. v. Sheffield Gas Consumers Co.* (1853), 3 De G.M. & G. 304; 22 L.J.Ch. 811; 21 L.T.O.S. 49; 17 Jur. 677; 1 W.R. 185; 43 E.R. 119; sub nom. *Sheffield United Gas Co. v. Sheffield Gas Consumers Co.*, *A.-G. v. Sheffield Gas Consumers Co.*, 7 Ry. & Can. Cas. 650, L.C. & L.J.J.; 28 Digest (Repl.) 851, 835. **D**

Appeal from a decree of LORD ROMILLY, M.R., reported L.R. 1 Eq. 499.

In consideration of a perpetual rentcharge, Sir Benet Garrard, in 1766, conveyed to John Wood an estate in fee in certain land at Bath, it being covenanted that Wood, his heirs and assigns, should pay the rentcharge, and within ten years build houses upon the land, according to a certain plan, and keep the same in repair. Sir Benet Garrard covenanted that neither he nor his heirs and assigns, nor any person claiming under him or them, would at any time thereafter build, or permit to be built, any houses or buildings whatever, upon certain other lands belonging to him, known as King's Mead Furlong, part of the Hayes Lower Furlong, and part of the Hayes, nor would he ever plant, or allow to be planted, any trees on King's Mead Furlong, or the Hayes, so as to grow above eight feet in height, and as often as the above should be done it should be lawful for Wood, his heirs and assigns, to pull down every such house or building. The indenture further provided that in case Wood should convey any part of the premises for building purposes, and make Sir Benet Garrard, his heirs or assigns, parties to the conveyance, and should reserve a certain rentcharge on the land so conveyed, and have a counterpart of the indenture executed and delivered to Sir Benet Garrard; then Wood, his heirs and assigns, should be released from all liability in respect of so much of the rentcharge as should be so reserved, and in respect of his covenants as to the land so conveyed. **E**

Houses, forming part of Brock Street, Bath, were subsequently built upon the land so conveyed. By indentures of lease and release, dated respectively May 22 and 23, 1767, Sir Benet Garrard being a party to the latter, Wood conveyed in fee to one Rodburn the house known as No. 10, Brock Street, with a garden at the back, reserving the stipulated rentcharge and powers, Rodburn covenanted that there should be no trees in the said garden above eight feet in height, and Sir Benet Garrard covenanted with Rodburn not to build or allow trees on the King's Mead Furlong, etc., precisely in the terms of the deed of 1766. By indentures of lease and release, in exactly the same form, the house No. 9, Brock Street, with a garden at the back, was conveyed to J. Freeman. **F**

The title of the plaintiff was derived under the conveyance to Rodburn, and that of the defendant under that to J. Freeman. In July, 1864, the **G** **H** **I**

defendant commenced building at the back of No. 9 a bow eight feet deep and of the same height as the house. The plaintiff thereupon served him with a notice to desist, and afterwards filed the present bill, praying an injunction to restrain the defendant from building such bow. In August, 1864, it was arranged upon an interlocutory application, that the defendant should be at liberty to complete his building on undertaking to pull it down if the court should be of opinion at the hearing that he had no right to erect it.

LORD ROMILLY, M.R., held that the suit could not have been maintained on the ground of obstruction to ancient lights; but he believed that the covenant was one by which the defendant was bound, and which the plaintiff could now enforce; and on this ground he decreed that the erection must be removed. The defendant appealed.

Baily, Q.C., and *Haddan* for the plaintiff.

Selwyn, Q.C., and *C. Hall* for the defendant.

LORD CHELMSFORD, L.C., after stating the facts: Various objections were made to the plaintiff's right to interfere with the defendant's building. Before LORD ROMILLY, M.R., the question appears to have been raised whether the covenant against building beyond a certain height, in the original conveyance of the defendant's house, was a covenant which ran with the land. But I am relieved from the necessity of considering the question, because it was admitted on the part of the defendant, that as he had purchased his house with the notice of the restrictive obligation attached to it, a court of equity would interfere to prevent his violation of it. This, indeed, could not be disputed after *Tulk v. Moxhay* (1) and *Coles v. Sims* (2). The defendant admits that he is bound by the covenant, but denies that he has been guilty of any violation of it, because the prohibition against building is confined in terms to the garden, and he alleges that he has not built upon the garden.

[After considering the evidence, and coming to the conclusion that the bow was upon the garden within the meaning of the covenant, his Lordship proceeded:] But the defendant contends that even if the covenant would have been originally applicable to the proposed addition to the back of the house, it has long since ceased to be so, inasmuch as it has been generally disregarded by the owners of the other houses on the south side of Brock Street; and buildings have been erected, and trees have been planted in violation of the covenant without any attempt to enforce it. Assuming that the plaintiff and his predecessors have suffered these things to pass without notice when they suffered no particular injury, how can that deprive the plaintiff of his equity to use the covenant for his protection where the breach of it immediately affects the enjoyment of his house?

It is not like *Duke of Bedford v. British Museum Trustees* (3), where a covenant not to use the land conveyed in a particular manner with a view to the more ample enjoyment of the adjoining lands of the feoffor was sought to be enforced by the plaintiff, in whom the adjoining lands were vested, after the whole of the property had been altered by his consent. The court, without expressing any opinion whether an action at law could be sustained, refused the injunction upon the ground that the party seeking to enforce the obligation, which applied to the property in its former state, had himself created the alteration out of which a new set of interests and rights had arisen.

I cannot, however, understand how a passive acquiescence in one breach of covenant can be considered to be a waiver for all future time of the right to complain of any other breach. But the defendant alleges that the plaintiff not only acquiesced in breaches of the covenant by others, but that he has been guilty of a breach of it himself in permitting trees above the prescribed height to remain upon the ground at the back of his house. The only tree to which

this observation applies is a mulberry-tree, which, though it has been periodically trimmed and cut, was at the time of filing this bill above the limited height. This appears to me to be a frivolous objection. No complaint has ever been made as to this tree, nor has it produced the slightest injury to anyone. If the plaintiff had been requested to reduce its height, and had refused, and had proceeded to complain of the defendant's building, there would have been something to have urged against him, but, under the circumstances, there is not the shadow of an answer to the plaintiff's bill upon this ground.

The defendant, in the next place, says that, admitting the addition to his house to be a violation of the covenant, yet that equity will not interfere, as the plaintiff has not sustained, nor is likely to sustain, any actual damage thereby. Whether this ground of non-interference by equity can be applicable to a case of this peculiar description may be a matter deserving of some consideration. The object of the covenant was to prevent, for all future time, any obstruction to the view from the backs of the houses on the south side of Brock Street by buildings or trees above a certain height. Any building erected or any tree permitted to grow above this height would be a breach of the covenant; and yet the damage to any one of the owners of the houses might be scarcely appreciable. If, then, it were necessary to wait until "substantial injury" (to use the words of LORD ROMILLY, M.R.) were sustained, that period might never arrive, although violations of the covenant might occur continually, and the owners of the houses would never be in a situation to invoke the interposition of this court to prevent the breach of a covenant intended solely for their benefit. It is unnecessary to determine this question, because there is evidence, upon which the court may fairly act, that actual damage will be produced by the defendant's building diminishing the value of the plaintiff's house.

The defendant says, in the last place, that even if his proposed building entitles those who are interested in the covenant to apply for the protection of the court, yet that the plaintiff cannot sue alone, but all the owners of the houses who are the assigns of the original covenantee ought to be parties to the suit. It may be observed that this objection is a little at variance with the former one—that no person who does not sustain actual damage can apply to the court for an injunction. The owners of the houses remote from the defendant's may possibly not sustain the slightest injury, and it would be rather strange that they who, according to the former argument, could not have sued at all in their own rights, should yet be necessary parties to a suit by the only sufferer from the violation of the covenant. I think that the owner of a house, who is injuriously affected by acts which are contrary to the covenant, may proceed against the party who commits them, without requiring the other owners, to whom they are not in the smallest degree prejudicial, to join him in the suit. The defendant's grounds of resistance to the injunction altogether failing, the decree of LORD ROMILLY, M.R., must be affirmed, and the petition of appeal dismissed with costs.

Appeal dismissed.

HOARE v. OSBORNE

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), February 16, 17, 1866]

[Reported L.R. 1 Eq. 585; 35 L.J.Ch. 345; 14 L.T. 9; 30 J.P. 309;
12 Jur.N.S. 243; 14 W.R. 383]*Charity—Religion—Monument in church—Vault—Church window—Chancel—
Bequest of income to keep in good repair "for ever."**Perpetuities—Church—Gift of income for repair "for ever" of monument, vault,
church window, chancel.*

A testatrix, after stating that she desired her trustees to place an ornamental window in H. church, directed them to invest £600 upon trust that the minister and church wardens of H. should apply the dividends to keep "in good repair . . . for ever" the monument to her mother in H. church, the vault in H. where her mother was buried, the aforesaid ornamental window, and the surplus (if any) towards the keeping in repair and ornamenting the chancel of H. church. The trustees erected the window. The vault was assumed, in the absence of evidence, to be in the churchyard and not in the church.

Held: (i) the gift to repair the vault was not a charitable gift, and, accordingly, was void as being in perpetuity; (ii) the gifts to repair the monument and the window were both valid charitable gifts, the former on the ground that it was for the benefit of the church and the parish that the ornaments of the church should be kept in a decent condition, and the latter on the ground that the window formed part of the fabric of the church; (iii) the fund should be divided into three equal parts—one third, being in respect of the gift to repair the vault which was void, would fall into residue, and the income from the other two thirds was to be paid to the minister and churchwardens to be applied by them towards keeping in repair the window and monument in the church, and as to any surplus in keeping in repair and ornamenting the chancel notwithstanding that the rector was bound to repair it.

Notes. Followed: *Re Rigley's Trusts* (1866), 36 L.J.Ch. 147. Considered: *Wilkinson v. Barber* (1872), L.R. 14 Eq. 96; *Champney v. Davy* (1879), 11 Ch.D. 949. Applied: *Re Vaughan, Vaughan v. Thomas* (1886), 33 Ch.D. 187. Distinguished: *Re Tyler, Tyler v. Tyler*, [1891] 3 Ch. 252. Considered: *Re Clarke (Deceased)*, *Bracey v. Royal National Lifeboat Institution*, [1923] All E.R. Rep. 607; *Re King, Kerr v. Bradley*, [1923] All E.R. Rep. 688. Referred to: *Choa Cheow Neo v. Spottiswoode* (1869), Wood's Oriental Cases, App. 1.

As to the validity of bequests for the repair of church monuments and the fabric of the church, etc., see 4 HALSBURY'S LAWS (3rd Edn.) 225, 226, 234, 235; and for cases see 8 DIGEST (Repl.) 332, 333, 353, 354, 401, 403. As to the lapse and falling into residue of part of a gift, see 39 HALSBURY'S LAWS (3rd Edn.) 946; and for cases see 44 DIGEST 510, 511. As to the invalidity of perpetual trusts which are not charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 300; and for cases see 8 DIGEST (Repl.) 437.

Cases referred to in argument:

Re Rickard, Rickard v. Robson (1862), 31 Beav. 244; 31 L.J.Ch. 897; 7 L.T. 87; 26 J.P. 709; 8 Jur.N.S. 665; 10 W.R. 657; 54 E.R. 1132; 8 Digest (Repl.) 353, 318.

Fowler v. Fowler (1864), 33 Beav. 616; 33 L.J.Ch. 674; 10 L.T. 682; 28 J.P. 707; 10 Jur.N.S. 648; 12 W.R. 972; 55 E.R. 507; 8 Digest (Repl.) 353, 320.

Lloyd v. Lloyd (1852), 2 Sim. N.S. 255; 21 L.J.Ch. 596; 19 L.T.O.S. 84; 16 Jur. 306; 61 E.R. 338; 8 Digest (Repl.) 353, 326.

Turner v. Ogden (1787), 1 Cox, Eq. Cas. 316; 29 E.R. 1183; 8 Digest (Repl.) 335, A 158.

A.-G. v. Oakaver (1736), cited in 1 Ves. Sen. 536; 27 E.R. 1189, L.C.; 8 Digest (Repl.) 334, 144.

Adnam v. Cole (1843), 6 Beav. 353; 49 E.R. 862; 8 Digest (Repl.) 403, 945.

A.-G. v. Ruper (1722), 2 P.Wms. 125; 2 Eq. Cas. Abr. 293, pl. 18; 24 E.R. 667; 8 Digest (Repl.) 380, 721.

Doe d. Thompson v. Pitcher (1815), 3 M. & S. 407; 105 E.R. 663; 8 Digest (Repl.) 375, 636.

Thomson v. Shakespear (1860), 1 De G.F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur.N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.J.J.; 8 Digest (Repl.) 358, 364.

Doyley v. Doyley, A.-G. v. Doyley (1735), 7 Ves. 58, n.; 2 Eq. Cas. Abr. 194; 32 E.R. 35; 8 Digest (Repl.) 404, 952.

Petition to determine the validity of a bequest in the will of Mrs. Amelia Freeman. The relevant bequest was in the following terms :

"I desire that an ornamental painted window may be placed in Hungarton church, the design and cost at the discretion of the trustees. And also I direct that my said trustees or trustee for the time being shall invest the sum of £600 in three per cent. consolidated bank annuities, in their or his names or name, upon trust to authorise and empower the minister and churchwardens for the time being of the parish of Hungarton aforesaid, to receive the dividends thereon from time to time, and apply the same in keeping in good repair, order, and condition for ever, the monument of my dear mother in Hungarton church, the vault in Hungarton aforesaid, in which she is interred, and the ornamental painted window; and if any surplus of such dividends should at any time remain, to apply the same towards the keeping in repair and ornamenting the chancel of the said church."

The trustees had erected the window in compliance with the directions in the will, but the validity of the bequest of the £600 being in doubt, they presented this petition for the determination of the court.

There was no evidence whether the vault above referred to was in the church or in the churchyard; and KINDERSLEY, V.-C., intimated that he would assume that it was in the churchyard unless the contrary were proved.

Toller, Q.C., and *C. C. Barber* for the petitioners.

Schomberg for the residuary legatees.

Basalgette, Q.C., and *C. Hall* for the husband of the testatrix.

W. Pearson for the lay impropriator of Hungarton church.

KINDERSLEY, V.-C.—I have no doubt that in this case there was no charitable motive; that is, no intention to constitute a charity. This is a peculiar case, although there is no difficulty as to the general principles of law on the subject. The question is whether the bequest of £600, the trusts of which are trusts which would require it to be kept in perpetuity for the perpetual reparation of three things, is valid. The objects are three: the monument in the church; the vault, which is assumed to be in the churchyard; and the ornamental window which has been erected; and the question is whether the gift is valid as to any and which of these purposes. The question would then follow, that, supposing it invalid as to all or any of them, what is the effect of the gift over of the surplus to be applied in ornamenting the chancel of the church. It has been clearly decided (and I do not mean to deviate from those decisions) that a gift of a sum of money for the perpetual repair of tombs or gravestones, without reference as to whether they are in the church or not, is

void, as not being a charity, and that there could not be such a perpetual dedication.

The first question is, Are these gifts for charitable purposes? If so, they are good; if not, they cannot be, because they are in perpetuity. With respect to the question as to what is a charity, a great many questions have been raised at different periods, and the ground on which they have been decided is, that whatever fairly comes within the terms of the statute of Elizabeth (43 Eliz. 1, c. 4) is a charity. I must consider it as decided that a gift to repair in perpetuity tombs or gravestones, not being in the church, is not a charitable gift, and is, therefore, void. There is no case, as far as I know, exactly like the present, but I consider the gift for the reparation of the vault to be void. Then, as to the monument and window, counsel for the lay impropriator of Hungarton church has ably and forcibly argued the question, and has made a very great impression on my mind. He said that, according to the technical view of the law, the window was a part of the fabric of the church, and that that being so, inasmuch as a gift in perpetuity for the repair of a church is a good charitable gift, this must be likewise good; it is impossible to avoid that conclusion. If there had been authorities deciding the other way, I must have followed them; but in the absence of such authority, this is a good charitable gift. It was truly said that the testatrix could have had no idea of making a charitable bequest, but the court cannot look into her mind, and can only construe what she has done. The gift as to the window, therefore, is good.

As to a monument in a church, there is no clear decision one way or the other, but in the absence of authority, the court is bound to hold such a gift good as a charity, on the ground that whatever comes within the meaning of the terms of the statute of Elizabeth, or analogous thereto, is a charity. It is clearly for the benefit of the parish, not only that the church itself, but that its ornaments, whether mural or otherwise, should be kept in a decent condition, and that they should not be allowed to get into a state of dilapidation and decay. Therefore, the gift as to the monument is good. Take the instance of the monuments of Westminster Abbey. A gift of a sum of money to keep them in perpetual repair would be a public benefit and good, and to the advantage of the frequenters of that building for public worship. Such a gift as to an organ or bells is good; why not one as to a monument?

With regard to the division of the fund, if I could have seen any probability of ascertaining upon any inquiry what portion of it ought to be attributed to each object, I would have directed an inquiry; but as I see no such probability, the fund must be divided into three equal parts. The one-third, in respect to the gift for the repair of the vault which is void, will fall into the residue, and the dividends of the other two-thirds must be paid as they accrue to the minister and churchwardens, to be applied by them towards keeping in repair the window and monument in the church, and as to any surplus, towards keeping in repair and ornamenting the chancel. With respect to the chancel, no doubt at first sight there is the difficulty that the rector, impropriate or ecclesiastical, is bound to repair it; but still it is a charitable object, and stands much on the same footing as the window and the monument. Being for the public benefit, it is, therefore, charitable. Costs of all parties out of the fund as between party and party. The trustees' costs as between solicitor and client.

Order accordingly.

Re TEAPE'S TRUSTS

[ROLLS COURT (Lord Selborne, L.C.), June 2, 1873]

[Reported L.R. 16 Eq. 442; 43 L.J.Ch. 87; 28 L.T. 799;
21 W.R. 780]

Power of Appointment—Exercise—Limited power—General bequest to object of power.

A testator, having a limited power to appoint the income of £5,000 consols to his wife for her life and having no other power, by his will, which contained no reference to the power, after first directing payment of his debts and funeral expenses, devised and bequeathed the residue of his estate belonging to him at the time of his death, or over which he might have any power of disposition or control, to his wife, her heirs, assigns, and legal representatives in full property for ever.

Held: the power was validly executed and the testator's wife was entitled to the whole of the income of the £5,000 consols during her life.

Clogstoun v. Walcott (1) (1843), 13 Sim. 523, not followed.

Notes. Considered: *Thornton v. Thornton* (1875), L.R. 20 Eq. 599. Distinguished: *Re Cotton, Wood v. Cotton* (1888), 40 Ch.D. 41; *Re Williams, Foulkes v. Williams* (1889), 58 L.J.Ch. 451. Referred to: *Re Denton, Bannerman v. Toosey* (1890), 63 L.T. 105; *Re Milner, Bray v. Milner*, [1895-9] All E.R. Rep. 593; *Re Mayhew, Spencer v. Cutbush*, [1900-3] All E.R. Rep. 148; *Re Lane, Belli v. Lane*, [1908] 2 Ch. 581; *Re Ackerley, Chapman v. Andrew*, [1911-13] All E.R. Rep. 183; *Re Welford's Will Trusts, Davidson v. Davidson*, [1946] 1 All E.R. 23; *Re Latta's Settlement, Public Trustee v. Latta*, [1949] 1 All E.R. 665; *Re Knight, Re Wynn, Midland Bank Executor and Trustee Co. v. Parker*, [1957] 2 All E.R. 252.

As to the exercise by will of special powers, see 30 HALSBURY'S LAWS (3rd Edn.) 255-262; and for cases see 37 DIGEST (Repl.) 309-315.

Cases referred to:

- (1) *Clogstoun v. Walcott* (1843), 13 Sim. 523; 7 Jur. 616; 60 E.R. 203; 37 Digest (Repl.) 311, 609.
- (2) *Elliott v. Elliott* (1846), 15 Sim. 321; 15 L.J.Ch. 393; 10 Jur. 730; 60 E.R. 642; 37 Digest (Repl.) 311, 610.
- (3) *Cowze v. Foster* (1860), 1 John. & H. 30; 29 L.J.Ch. 886; 2 L.T. 797; 6 Jur.N.S. 1051; 70 E.R. 649; 37 Digest (Repl.) 311, 611.
- (4) *Ferrier v. Jay* (1870), L.R. 10 Eq. 550; 39 L.J.Ch. 686; 23 L.T. 302; 18 W.R. 1130; 37 Digest (Repl.) 311, 612.
- (5) *Hope v. Hope* (1854), 5 Giff. 13; 23 L.T.O.S. 343; 18 Jur. 823; 2 W.R. 674; 66 E.R. 902; 37 Digest (Repl.) 315, 630.

Also referred to in argument:

- Bailey v. Lloyd* (1829), 5 Russ. 330; 7 L.J.O.S.Ch. 98; 38 E.R. 1051; 37 Digest (Repl.) 307, 570.
- Pidgely v. Pidgely* (1844), 1 Coll. 255; 3 L.T.O.S. 200; 8 Jur. 529; 63 E.R. 408; 37 Digest (Repl.) 313, 622.
- Cooke v. Cunliffe* (1851), 17 Q.B. 245; 21 L.J.Q.B. 30; 15 Jur. 1076; 117 E.R. 1274; 37 Digest (Repl.) 310, 606.

Petition to determine whether or not a residuary bequest in the testator's will was a valid exercise of a power of appointment.

Hannaniah Teape by his will, dated Mar. 25, 1865, gave a sum of £8,500 Three per Cent. Consolidated Bank Annuities to trustees upon trust to pay the income thereof to his son, Theodore Teape, for his life, and after his death upon

trust to pay to any wife with whom his said son Theodore Teape might intermarry who should survive him, so much of the income of £5,000 Three per Cent. Consolidated Bank Annuities, part of the sum of £8,500 like annuities for her life as Theodore Teape should by any deed or by his last will and testament, legally executed, direct or appoint, and subject to such appointment (if any); or, in case no such appointment should be made, upon certain trusts as therein declared. The testator died in 1868, leaving his son, Theodore Teape, surviving him.

Theodore Teape, by his will, dated Nov. 14, 1871, ordered and directed that as soon as possible after his decease his just debts, funeral and testamentary expenses, should be first fully paid. The will then proceeded as follows :

"After the payment of my just debts, funeral and testamentary expenses, I give, devise, and bequeath the rest, residue and remainder of my real and personal, moveable and immoveable properties and estate, of what kind, nature, and description soever the same may be, and to whatsoever the same may amount, and wheresoever situate, lying, and being the same may be found, to me belonging at the time of my decease, or to which I may be in anywise entitled, or over which I may have any power of disposition or control, unto my wife, and to her heirs, assigns, and legal representatives in full property for ever. To have and to hold the same, and every part thereof, unto my said wife, and to her heirs, assigns, and legal representatives, from the day of my decease thenceforth for ever, in full property, the same to be by her or them received, recovered, used, enjoyed, and disposed of as she or they may deem best, I, the said testator thereby making my said wife my sole and universal devisee and legatee."

The will contained no reference to the power of appointment given to Theodore Teape by his father's will. After the death of Theodore Teape, the £5,000 consols was paid into court, and his widow now presented a petition for payment of the income arising therefrom to her during her life. The question to be decided was whether the will of Theodore Teape was a valid execution of the power. It appeared from the evidence that Theodore Teape was not possessed of any property upon which the words "over which I have any power of disposition or control" could operate, except the property given him by his father's will.

Waller for the petitioner.

Southgate, Q.C., and *Leonard Field* for persons claiming in default of appointment.

Chamier for the trustees.

LORD SELBORNE, L.C.—I think the petitioner is entitled to the income of the fund. In this case the direction in the will for payment of the testator's debts and funeral expenses is separate from the rest of the will and imports an intention that the debts and funeral expenses should be first paid out of the testator's own property before anything else is done. The question is whether there is sufficient evidence of an intention to exercise the power. There is nothing on which the words "over which I may have any power of disposition or control" can operate, except the life interest in this sum of £5,000 consols; and the court cannot reject these words, when the widow, the object of the power, is the person intended to take. The testator first makes use of the words, "the rest, residue, and remainder of my real and personal, moveable and immoveable properties and estate," which were large enough to include everything that was his own; and he adds, "or over which I may have any power of disposition or control"—words applicable to any power of appointment he might possess, but which I am asked not to apply to the only power he actually had. The only difficulty is that the testator's only power was to appoint a life interest, whereas the words he used, "To my wife, her heirs and assigns and legal representatives,

in full property for ever," seem at first sight applicable only to the entire interest. But, after all, the reasonable view to take of the words is, that he meant to give his wife the largest interest he could give in everything he had to dispose of; and, if that was a terminable interest, she will take it to the full extent of his disposing power, which, in this case, was for her own life.

I think all the authorities are consistent with this view of the case except *Clogstoun v. Walcott* (1). But I do not think that case can be reconciled with *Elliott v. Elliott* (2), or with *Cowze v. Foster* (3), to say nothing of *Ferrier v. Jay* (4); so that case creates no difficulty. There is still less difficulty from *Hope v. Hope* (5), for, though there were some words in the judgment which went beyond what was needed for the decision of that case, yet there were sufficient grounds for the decision there arrived at, without affecting the principle on which the present case is to be decided. I, therefore, hold that the petitioner is entitled to the income of the £5,000 consols during her life.

GUARDHOUSE AND OTHERS v. BLACKBURN AND ANOTHER

[COURT OF PROBATE (Wilde, J.), November 4, February 13, 1866]

[Reported L.R. 1 P. & D. 109; 35 L.J.P. & M. 116; 14 L.T. 69;
12 Jur.N.S. 278; 14 W.R. 463]

Will—Evidence—Error in codicil—Evidence that error made through inadvertence.

By virtue of the wording of s. 9 of the Wills Act, 1837, unexecuted testamentary instructions cannot be treated by the Court of Probate as part of the will and that court cannot admit to probate any document which is not executed in the manner therein mentioned.

By her will the testatrix charged legacies to the amount of £1,300 on her real estate. Subsequently, she desired to bequeath an additional legacy of £600 which was to be charged on her personal estate, and a codicil was prepared by her solicitor to effect this. The draft was carefully read over to her and she approved it. A fair copy was then prepared for execution and was read over to her, but not with the same care as the draft, and she executed it without remark. The codicil contained a clause referring to the will, but while the draft charged only the additional legacy on the personal estate, the executed copy, by the addition of the words "therein and," charged the legacies in the will on the personal estate.

Held: in the absence of fraud or suspicion attaching to the document, execution by the testatrix was sufficient proof that she knew of and approved the contents at the time she signed; parol evidence was inadmissible to show that the words had been inserted through inadvertence; and the court had no power to expunge them.

Notes. Section 9 of the Wills Act, 1837, provides that no will shall be valid unless in writing and executed in the manner therein mentioned (26 HALSBURY'S STATUTES (2nd Edn.) 1332).

Applied: *Harter v. Harter* (1873), L.R. 3 P. & D. 11. Considered: *Fulton v. Andrew*, [1874-80] All E.R. Rep. 1240; *Collins v. Elstone*, [1893] P. 1; *Garnett-Botfield v. Garnett-Botfield*, [1901] P. 335; *Gregson v. Taylor*, [1917] P. 256. Applied: *In the Estate of Lavinia Musgrove*, *Davis v. Mayhew*, [1927] P. 264.

Referred to: *Reffell v. Reffell* (1866), L.R. 1 P. & D. 139; *In the Goods of Boehm*, [1891] P. 247; *Smith v. Thompson*, [1931] 146 L.T. 14; *In the Estate of Musgrave*, *Tidy v. Musgrave*, [1934] Ch. 402, n.; *Re Hawksley's Settlement*, *Black v. Tidy* (1934), 151 L.T. 299; *Re R.*, [1950] 2 All E.R. 117.

As to admission of extrinsic evidence to vary or add to a document, see 11 HALSBURY'S LAWS (3rd Edn.) 396 et seq.; and for cases see 17 DIGEST (Repl.) 341 et seq. As to admissibility of evidence for construction of a will, see 39 HALSBURY'S LAWS (3rd Edn.) 955 et seq.; and for cases see 44 DIGEST 624 et seq.

Cases referred to:

- (1) *Fawcett v. Jones, Codrington and Pulteney* (1810), 3 Phillim. 494; 161 E.R. 1375; on appeal, 3 Phillim. 490; 44 Digest 341, 1711.
- (2) *Blackwood v. Damer* (1810), 3 Add. 239, n.; 3 Phillim. 458, n.; 161 E.R. 1884; 44 Digest 235, 599.
- (3) *Pym v. Campbell* (1856), 6 E. & B. 370; 25 L.J.Q.B. 277; 2 Jur.N.S. 641; 4 W.R. 528; 119 E.R. 903; sub nom. *Pim v. Campbell*, 27 L.T.O.S. 122; 17 Digest (Repl.) 222, 222.
- (4) *Wake v. Harrop* (1861), 6 H. & N. 768; 30 L.J.Ex. 273; 4 L.T. 555; 7 Jur.N.S. 710; 9 W.R. 788; 1 Mar. L.C. 81; 158 E.R. 317; affirmed (1862), 1 H. & C. 202, Ex. Ch.; 17 Digest (Repl.) 314, 1208.
- (5) *Barry v. Butlin* (1838), 2 Moo. P.C.C. 480; 1 Curt. 637; 12 E.R. 1089, P.C.; 23 Digest (Repl.) 131, 1357.
- (6) *Allen v. M'Pherson* (1847), 1 H.L.Cas. 191; 11 Jur. 785; 9 E.R. 727, H.L.; 23 Digest (Repl.) 79, 740.

Also referred to in argument:

- Langston v. Langston* (1834), 8 Bli. N.S. 167; 2 Cl. & Fin. 194; 5 E.R. 908, H.L.; 17 Digest (Repl.) 297, 1014.
- Newburgh v. Newburgh* (1712), 3 Bro. Parl. Cas. 553; 1 E.R. 994; 22 Digest (Repl.) 353, 3794.
- Hippisley v. Homer* (circa. 1804), 2 Turn. & Russ. 48.
- In the Goods of Duane* (1862), 2 Sw. & Tr. 590; 31 L.J.P.M. & A. 173; 6 L.T. 788; 26 J.P. 663; 8 Jur.N.S. 752; 164 E.R. 1127; 44 Digest 229, 540.
- Bayldon v. Bayldon* (1826), 3 Add. 232; 162 E.R. 464; 44 Digest 625, 4556.
- Barton v. Robins* (1769), 3 Phillim. 455, n.; 161 E.R. 1382; 23 Digest (Repl.) 133, 1371.
- In the Goods of Chapman* (1844), 1 Rob. Eccl. 1; 3 Notes of Cases, 198; 8 Jur. 902; 163 E.R. 944; 44 Digest 341, 1713.
- Birks v. Birks* (1865), 4 Sw. & Tr. 23; 34 L.J.P.M. & A. 90; 13 L.T. 193; 29 J.P. 360; 13 W.R. 638; 164 E.R. 1423; 44 Digest 322, 1543.

Probate Action for the revocation of the probate of the will and codicil of the testatrix. The question at issue which arose was whether the court had power to expunge from the codicil the words "therein and" which had been inserted by the solicitor, who prepared the codicil, inadvertently and without instructions.

By her will dated May 30, 1851, the testatrix, Hannah Jameson, of Hayton in the county of Cumberland, disposed of three estates, Folds, Scales and Stainton, in the following manner. Folds was devised on trust to her executors; Scales and Stainton were charged with legacies of £500 and £800, respectively. On April 13, 1852, the testatrix desired to make a codicil bequeathing an additional legacy of £600 to be charged on her personal estate and gave instructions to her solicitor to that effect. The solicitor reduced the instructions to writing and prepared a draft in which only the additional legacy of £600 was charged on the personal estate. The draft was carefully read over to the testatrix who approved it. The solicitor then proceeded to make a fair copy for execution but in doing so inserted by mistake the words "therein and." The completed copy was read

over to the testatrix but not with the same care as the draft and she executed it without remark. The material portion of the codicil as executed was as follows.

"This is a codicil to the will of . . . and I direct all the legacies therein and herein given . . . to be paid out of my personal estate. In all other respects I ratify my will."

The effect of the inadvertent insertion of the words "therein and" was to discharge the estates of Scales and Stainton of the legacies of £500 and £800, respectively, and to charge them on the personal estate so that the residuary personal estate was reduced by £1,300.

The testatrix died on Aug. 29, 1863, and probate of the will and codicil was granted to the defendants, the executors, on Oct. 13, 1863, out of the Carlisle District Registry. The executors proceeded to administer the estate in due course and heard of no opposition to the codicil until fifteen months after the death of the testatrix, when they were cited by the plaintiffs, three residuary legatees, to bring in the probate. The defendants brought in the probate and asserted that both will and codicil had been executed in the usual form. The plaintiffs sought to introduce extrinsic evidence to prove the inadvertent insertion of the words "therein and" and also to have such words expunged from the codicil.

Dr. Deane, Q.C. (with him *Dr. Tristram*) for the defendants.

Dr. Spinks (*Mounsey* with him) for the plaintiffs.

Cur. adv. vult.

Feb. 13, 1866. **WILDE, J.**, read the following judgment.—The plaintiffs have cited the defendants to bring in the probate of the will and codicil of Mrs. Hannah Jameson that it may be cancelled. The defendants have propounded these papers for probate, and the plaintiffs contend that the words "therein and" ought to be expunged from the codicil before probate is granted thereof. The effect of these words, which undoubtedly appear in the codicil, and were there, it is admitted, when it was executed, is to discharge certain portions of the real estates from pecuniary legacies of considerable amount, with which they were charged by the will. The ground upon which the court is asked to expunge them is, that they were inserted by the solicitor who drew the codicil, by mistake and without instructions. This is proved to be the fact (if the evidence is admissible and can be relied upon) by the oath of the solicitor and by a paper which he owns to have been the rough draft of the codicil made by him in the presence of the testatrix, and from her verbal directions. It is not, however, denied that the codicil, as it stands, was read to the testatrix, and duly executed by her. Questions of vital importance to the integrity of the present testamentary system are here raised. It devolves on the court to endeavour to disentangle the line of demarcation between what the law allows, and what it refuses, to the natural desire of giving effect to what are supposed to be the testator's wishes, and to set clear the limits within which any script duly executed can be shorn of its full testamentary effect by reference to any other source of information.

I must premise that the Wills Act, 1837, has worked a great change in the old testamentary law as administered by the ecclesiastical courts on this head. Under that law a testamentary paper needed not to have been signed, provided it was in the testator's writing, and all papers of a testamentary purport, if in his writing, commanded the equal attention of the court, save so far as one from its date or form might manifestly be intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former. Hence the class of cases in which those courts have gone furthest in violating the integrity of an executed paper. They will be found collected in the argument of *Dr. Addams* in *Fawcett v. Jones, Codrington and Pulteney* (1), a case remarkable

for the evident hesitation and reluctance with which SIR JOHN NICHOLL accepted the full results of the principle involved in the previous decisions. His judicial foresight enabled him to turn aside from the brink to which these decisions were urging him, and he refused to pass over a line which, once passed, would have set all wills at the mercy of parol evidence, and "introduced," as he said, "a most alarming insecurity into the testamentary dispositions of all personal property." The most prominent of these cases was *Blackwood v. Damer* (2). It was appealed to the delegates, who affirmed the decision of the court below, and permitted a will, which had been duly signed with full knowledge of its contents, and which contained no residuary clause, to be supplemented by instructions in the testator's own writing, giving the residue to his daughter, granting probate of the will, and that part of the instructions as together constituting the will, and this, on the ground of mistake, proved by the solicitor and corroborated by the written paper of instructions. This case was much relied on in argument here; but the words of the Wills Act, 1837, s. 9, "no will shall be valid," unless executed in a certain manner, obviously exclude the probate of unexecuted instructions altogether, and have rendered it no longer possible to the Court of Probate to treat them as part of a will. It is conceded ground in the argument that this court cannot any longer admit to probate any paper, whatever its form, which is not executed according to that Act. This class of cases is, therefore, of no authority in reference to wills made since 1838, and, in deciding the present case, may be laid aside.

But then comes the question, if the court cannot now, as it could before the Wills Act, 1837, give effect to any provision omitted by mistake from the will—does it still retain the power to strike out any portion of the contents of a duly executed paper on the ground that, although such portion formed part of the paper when executed by the testator, it was inserted or retained by mistake or inadvertence? This is what is asked on the present occasion. Against this being done it was strongly argued that the court has no such power. The argument was put on several grounds, and among others upon the ground that parol evidence was inadmissible upon the question. Nothing is less satisfactory than a perusal of the cases decided in the Prerogative Court under this head. In some cases parol evidence was excluded, and in some admitted, without any sufficient difference in principle to sustain the distinction. I venture to think that the ecclesiastical courts created a difficulty (perpetually recurring) for themselves, when they attempted to adapt the well-known rules as to parol evidence, and patent and latent ambiguities, existing in the courts of law and equity, to cases of probate, to which such rules were not properly applicable. For the question in such cases is not what intention ought to be assigned to the words of a given written paper, but to what extent does a given written paper express the testamentary intentions of the deceased; and the function of the court is not to construe a written paper, the validity of which is admitted, but to gather the necessary facts and to pronounce on the validity of the paper. Although it be right to adhere to the writing, and exclude all parol testimony in the former case, it is clearly impossible to do so in the latter. Indeed, the Court of Probate, setting about to ascertain the will of the deceased, could not stir a step in the inquiry without some proof beyond the mere writing.

In the attempt to escape these rules, while keeping up the semblance of adhering to them, SIR JOHN NICHOLL, in *Fawcett v. Jones, Codrington and Pulteney* (1), speaks of "an ambiguity in the factum" of the instrument, and makes that the ground of admitting parol evidence. But what, it may be asked, are all controversies as to the instrument which should be pronounced to contain the testamentary intentions of the deceased, and to be his will, but cases in which some ambiguity exists as to the factum of such instrument as a complete will? The truth is, that the rules excluding parol evidence have no place in any inquiry in which the court has not got before it some ascertained paper beyond question

binding and of full effect. Nor, indeed, are these rules pressed in the courts, either of law or equity, beyond this mark. For if the written document is alleged to have been signed under condition that it should not operate except in certain events, parol evidence has been admitted at law to prove such condition, and the breach of it: see *Pym v. Campbell* (3); or if, going further still, some plain and palpable error has crept into the written document, equity formerly, and the courts of common law now, sanction the admission of evidence to expose the error: see *Wake v. Harrop* (4) (6 H. & N. at p. 772), and the passage there cited from STORY'S EQUITY JURISPRUDENCE (6th Edn.), s. 115, p. 133. On this head, then, the court may safely adopt the language of WILLIAMS, J., ON EXECUTORS (5th Edn.), vol. 1, p. 313 [see now 14th Edn. (1960), vol. 1, at p. 54]:

"In a court of construction, when the factum of the instrument has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited; for there the intentions of the deceased as to what shall operate as and compose his will are to be collected from all the circumstances of the case taken together. They must, however, be circumstances existing at the time the will is made."

I may quit this branch of the subject with the observation that the foregoing remarks have a wider application to wills made before the Wills Act, 1837, than since, for the Act has much narrowed the field of inquiry; the principle, however, is the same.

It is hardly necessary to add that, where the Court of Probate has, as is often the case, to construe one admitted testamentary paper for the purpose of ascertaining another, it acts as a court of construction, and is guided by the same rules. Supposing, then, parol evidence to be admissible in such a case as the present, the question recurs, to what extent is it still open to the court since the Wills Act, 1837, to act upon such evidence for the purpose of rejecting the whole, or expunging any portion, of the written testament to which the testator had duly affixed his name? A more important inquiry could hardly arise; for you may as effectually incline the balance by taking out of one scale as by adding to the other, and it is quite as easy to vary the effect of a will in any given direction by leaving words out as by putting them in. After much consideration the following propositions commend themselves to the court as rules which, since the Wills Act, 1837, ought to govern its action in respect of a duly executed paper: First, that before a paper so executed is entitled to probate, the court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that, except in certain cases where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that, although the testator knew and approved the contents, the paper may still be rejected on proof, establishing beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that, although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised upon the testator in obtaining his execution thereof. Fifthly, that, subject to the last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole.

The first and second of these propositions are amply established by *Barry v. Butlin* (5) and other cases of that class in the Privy Council. The third was also well-approved law in the ecclesiastical courts, for there must be an *animus*

testandi to constitute a paper testamentary. The fourth requires no comment, and the last is justified by *Allen v. M'Pherson* (6). It remains to say a few words on the fifth. It is here that the right to derogate from the force of an executed paper approaches and receives its limit. And it is obvious enough that, if the court should allow itself to pass beyond proof that the contents of any such paper were read or otherwise made known to the testator, and suffer an inquiry by the oath of the attorney or others as to what the testator really wished or intended, the authenticity of a will would no longer repose on the ceremony of execution exacted by the Wills Act, 1837, but would be set at large in the wide field of parol conflict and confided to the mercies of memory. The security intended by the Act would thus perish at the hands of the court. I have thus endeavoured to place the use of parol evidence in these matters on its true ground.

The general rule for excluding it in our courts is based upon the proposition that written testimony is of a higher grade, more certain, more reliable than parol, and that resort should be had to the highest evidence of which a subject is capable, to the exclusion of the inferior class. But it is one thing to admit evidence, and another to give effect to it. If an Act requires that a thing should be in writing and signed in order to its validity, it precludes the court from giving effect to parol testimony of that which is required to be so written and signed. If it be said, "Why then admit parol evidence on the subject at all?" the answer is, that, if the scope of such evidence can be clearly known before it is heard, it should be excluded, but then only on the ground of immateriality, not because it is secondary. In actual practice a large number of cases are so presented that it is impracticable to reject evidence as immaterial before the details of it are known. Little need be said as to the operation of these principles upon the present case. The codicil was proved to have been read over to the testatrix before the execution thereof; she duly executed the same, and the court conceives it to be beyond its functions or powers to substitute the oath of the attorney who prepared it, fortified by his notes of the testatrix's instructions, for the written provisions contained in a paper so executed. The probate will, therefore, be delivered out to the plaintiffs in its present form.

Judgment for plaintiffs.

GARNETT v. McKEWAN

[COURT OF EXCHEQUER (Kelly, C.B., Martin, Bramwell and Pigott, BB.),
November 8, 1872]

[Reported L.R. 8 Exch. 10; 42 L.J.Ex. 1; 27 L.T. 560;
21 W.R. 57]

Bank—Current account—Balance to credit of customer—Right of bank to debit customer with amount of overdraft at another branch—Need of notice.

A banking company which has branches at various places is entitled, in the absence of an express contract to the contrary or proof of some custom of the business of banking, and without being liable to an action at a customer's suit for so doing, to refuse to honour the cheque of a customer at branch A. where he has a balance in his favour, if it appears that at branch B., where he also has an account, there is then a balance against him of such a sum as, when deducted from the balance standing to his credit at branch A., leaves a balance at branch A. which is too small to meet the cheque presented. In such circumstances the company may debit the customer's account at A. with the balance against him at B., without giving him notice of their intention so to do.

So **held**, by KELLY, C.B., MARTIN, B., and PIGOTT, B., BRAMWELL, B., dubitante.

Notes. Considered: *Prince v. Oriental Bank Corpn.*, [1874-80] All E.R. Rep. 769; *Maude v. I.R. Comrs.*, [1940] 1 All E.R. 464; *Re Morel (1934), Ltd.*, [1961] 1 All E.R. 796.

As to the right of a banker to combine different accounts of his customers, see 2 HALSBURY'S LAWS (3rd Edn.) 172, 173, and cases there cited.

Cases referred to:

- (1) *Hill v. Smith* (1844), 12 M. & W. 618; 13 L.J.Ex. 243; 2 L.T.O.S. 424; 8 Jur. 179; 152 E.R. 1346; 3 Digest (Repl.) 278, 828.
- (2) *Cumming v. Shand* (1860), 5 H. & N. 95; 29 L.J.Ex. 129; 1 L.T. 300; 8 W.R. 182; 157 E.R. 1114; 3 Digest (Repl.) 296, 911.
- (3) *Foley v. Hill* (1848), 2 H.L.Cas. 28; 9 E.R. 1002, H.L.; 3 Digest (Repl.) 177, 289.

Motion by the plaintiff for a rule nisi directing that the verdict should be entered for him in an action brought by him against the defendant, one of the registered public officers of the London and County Banking Co., for damages in respect of the dishonouring of certain cheques drawn by the plaintiff, who was a customer of the bank.

The plaintiff was an auctioneer and cattle salesman, residing and carrying on business at Wolverton, in Buckinghamshire, and the defendant was one of the registered public officers of the London and County Banking Co. Prior to the month of August, 1868, the plaintiff was a customer of, and had a banking account with, the company at their branch bank at Buckingham, and in that month, his account being overdrawn to the extent of £42 15s. 11d., disputes arose between him and the bank there as to whether a certain sum of £20, which the plaintiff alleged he had paid in to the Buckingham branch to his credit had or not been received by the bank. From that time the plaintiff's account at the Buckingham branch of the bank was virtually closed, but no balance was ever struck, nor was the plaintiff's pass book ever finally made up. In 1869 the plaintiff opened an account with the Buckinghamshire and Oxfordshire Joint Stock Bank at Stony Stratford and carried on a considerable business up to 1871, during all which time no application on the part of the banking company was ever made to him with respect to any sum of money alleged

to be due from him to the Buckingham branch of the bank. In December, 1871, the plaintiff, having established a business in Bedfordshire, opened a banking account with the London and County Bank at their branch at Leighton Buzzard. Nothing was said by either party about the balance due from the plaintiff at the Buckingham branch, nor was any notice given to the plaintiff that moneys paid in by him to the Leighton Buzzard branch would be applied by the banking company to the payment of such balance. During the month of January, 1872, he paid in about £600 to the Leighton Buzzard branch. Occasionally he had a balance in his favour of £100 or so, and at times he had more. On Jan. 17, 1872, his pass book at the Leighton Buzzard branch was made up, and showed a balance in his favour of some £48 odd, which had been reduced to a sum of £42 18s. 10d. at the time of the dishonouring of his cheques presently mentioned.

It appeared, from the evidence of the manager of the Leighton Buzzard branch that he was not aware, when the plaintiff opened his account at that branch, that he owed money at the Buckingham branch, but, on Jan. 31, the manager received orders from the head office to debit the plaintiff's Leighton Buzzard account with the amount of his overdraft at the Buckingham branch. Accordingly, on that day, a sum of £42 15s. 11d. out of the balance of £42 18s. 10d. then standing to the plaintiff's credit at the Leighton Buzzard branch, was transferred by the manager to the liquidation of the overdraft to that amount due from the plaintiff on his Buckingham account, and a letter in the following terms was written by the manager to the plaintiff:

"Sir,—I have to inform you that we have this day charged to your account £42 15s. 11d., being the amount due to our Buckingham bank on your current account for some few years.—I am, Sir, &c."

This letter was received by the plaintiff on Feb. 1, and was the first intimation which he had that his money in the Leighton Buzzard branch was to be devoted to the payment of the overdraft at Buckingham. In the course of that day (Feb. 1) cheques of the plaintiff amounting to £23 3s., and drawn by him upon the Leighton Buzzard branch on the faith of his balance there of £42 18s. 10d., were presented at that branch and dishonoured. Thereupon this action was brought.

At the trial the jury found that the balance due from the plaintiff to the Buckingham branch at the time the cheques were dishonoured was £42 15s. 11d. BRAMWELL, B., before whom the case came, was of the opinion that on the evidence the defendant was entitled to the verdict, and the verdict was by his direction so entered, leave being reserved to the plaintiff to move to enter it for himself for 40s. damages, or for that sum together with £23 3s., the amount of the cheques.

W. Graham (with him Waddy) moved, on behalf of the plaintiff, for a rule to that effect.

KELLY, C.B.—I am clearly of opinion that there ought to be no rule in this case, and that the verdict, which was directed by my brother BRAMWELL at the trial to be entered for the defendant, was a perfectly right verdict, and should stand.

This is an action brought by the plaintiff, as a customer of the London and County Banking Co., against the company in the person of the defendant, their registered public officer, to recover damages for the injury done to his credit by the dishonouring by the company of certain cheques drawn by the plaintiff upon a branch of the company's establishment. The declaration contains four special counts, each charging a duty upon the banker to pay the plaintiff's cheques upon their being presented by the holders of them for that purpose at

the branch bank on which they were drawn, and there are also the ordinary money counts, for money lent, money received, and upon accounts stated. I think, however, that the question at issue here is the same upon both sets of counts. That question appears to me to be whether the banking company were bound by law to honour these cheques of the plaintiff, and that again depends upon whether or not they had, at the time the cheques were presented for payment, any money belonging to the plaintiff in their hands, in any shape or form, which they were bound to hand over to him or to apply in honouring the cheques in question. It is clear, I think, that the banking company had, as a matter of fact, not sufficient money belonging to the plaintiff in their hands at that time. There was no debt, sufficiently large, then due or owing from them to the plaintiff. If, therefore, the company are liable to the plaintiff in this action upon either of the counts in the declaration, it can only be by virtue either of an express contract to that effect between them and their customer, the plaintiff, or of the usual course of dealing between them founded upon some custom in the business of a banker which would render them liable, as upon an implied undertaking to disburse, in the honouring of these cheques, a sum of money which they did not owe to the plaintiff.

Clearly there was here no express contract of the kind that I have mentioned. Was there then any custom of bankers, or anything in the usual course of dealing between the parties, from which such a contract must or could be implied? The case is the same, and must be looked at in the same light, as if, instead of being a joint-stock company consisting of a numerous body of shareholders, with branch banks at various places, the defendant had been an individual banker carrying on his own private business at one place only. In that case there would have been a clear right of set-off. But it has been urged that the company have no right to set-off or to appropriate the balance to the plaintiff's credit or due to him on his account at one of their branches against, or in satisfaction of, the balance to his debit or due from him on his account at another branch, because, it is said, a balance in his favour at one of such branches would not have been recognised by them at another of their branches as a fund available for him to draw cheques upon at such other branch. But if, although there might be a balance in the plaintiff's favour at the Leighton Buzzard branch, it should turn out, as indeed the fact was, that there was a large or an equally large balance against him at the Buckingham branch, then, so far from there being any money in the bankers' hands owing to him, or applicable to the honouring of his cheques, the bankers, in point of law and common sense and justice, would have no money in their hands belonging to the plaintiff at all, and he would, on the contrary, be indebted to them in the amount of the balance of the general account. It cannot be doubted that at any time when there might have been a balance in the plaintiff's favour at one branch and a balance against him at another branch, it was competent to him to have transferred the balance in his favour at the one branch to the credit of his overdrawn account at the other branch, and so to balance the accounts. If that be so, there must surely be a correlative right on the part of the bankers to do the same thing. The opening by the plaintiff of a fresh account at another branch of the company's bank was obviously for the benefit and convenience of the customer rather than that of the bank.

The facts of the case utterly fail to support the very improbable contract which we have been asked to infer from them, and how the plaintiff, knowing as he must have done the existence of his old liability to the banking company at their Buckingham branch, can have drawn the cheques in question in the expectation that they would be honoured, I cannot conceive, unless, indeed, upon the assumption that the bank meant to advance him the money.

A good deal has been said upon the subject of notice, and it has been contended that, before bankers dishonour the cheque of a customer at a

A branch where he has a balance in his favour on the ground that the balance of his account at another branch is against him, notice of their intention so to deal with his two accounts and his cheques should be given to him. Doubtless, it would have been both convenient and courteous on the part of the banking company here if they had given the plaintiff notice of their intention before dishonouring his cheques, but there was no legal obligation upon them to give it in the absence of any express contract that they would do so, and here there was no such contract at all. I am at a loss to know why a customer should, because he happens to have a banking account at two different branches of the same banking establishment, have a right to draw cheques upon one of the branches when he knows that, upon the whole account at the two branches, the balance is against him and that he is already indebted to the bankers. I think that, if he chooses to draw cheques in such circumstances, he must take the consequences.

Two cases have been cited in favour of this application, but they are very distinguishable. In one of them, *Hill v. Smith* (1), there was a special and express contract between the banker and the customer, and the money was paid in for the specific purpose of its being applied in payment of the bill of exchange, which had been drawn by the customer on the bank; the bank was held liable in a special action of assumpsit for the full amount of the bill which they had failed to accept. In the other case, *Cumming v. Shand* (2), a course of dealing was shown to have existed between the banker and his customer by virtue of which a contract was established under which the latter was held entitled to draw cheques upon a cash credit, which had been allowed to him, until he had had notice of the discontinuance of the accommodation. The question here is simply whether, when a banker has no money in his hands belonging to a customer, he is bound to honour the customer's cheques. I am of opinion that, neither by virtue of an express contract, nor of any custom, usage, or course of dealing between the parties in the present case, has the liability of the banking company in this action been established, and this rule, therefore, must be refused.

MARTIN, B.—I am quite of the same opinion; but, in my judgment, the present question is entirely a question of fact. The true rule on the subject is that laid down by the House of Lords in *Foley v. Hill* (3), namely, that the relation between a banker and a customer who pays money into the bank is not that of principal and agent, but of debtor and creditor, with a superadded obligation to this relation, arising out of the custom of bankers, that the bankers will honour the customer's cheques to the extent of the money of the customer in the banker's hands. Nor need a banker, in the event of an action being brought against him by a customer, plead the payment of the cheque as a set-off, because such payment annihilates the debt. In the present case, there was apparently a debt due from the banking company to the plaintiff. I say apparently, looking only at the plaintiff's account at the Leighton Buzzard branch; and the question is whether that was really the case, or only apparently so, and whether, although there was a sum due to the plaintiff on his account at the branch at Leighton Buzzard, that debt was or not overridden by the fact of there being a debt due from him to the banking company on his old account at the Buckingham branch? I think it was. I think the plaintiff's rule should be refused.

PIGOTT, B.—I am of the same opinion. I think that it would be against right and justice that the plaintiff should succeed in the present case, as he has failed entirely to show that there was any duty upon the bankers here or any contract binding on them to honour these cheques, which duty he ought to have shown in order to entitle him to a verdict.

The question which has arisen here would not have arisen, but for the existence of these joint stock banks with branches at various places. This case, I think, is settled by the case to which my brother MARTIN has referred, deciding that the relation between a banker and a customer is that of debtor and creditor, with a superadded obligation on the part of the banker to pay the customer's cheques, but subject to this, that there shall be a balance or debt due to the customer from the banker at the time the cheque is presented for payment. Here there was a balance in the plaintiff's favour at one branch, and an overdrawn account with a balance against him at the other branch. Was there then anything in the course of dealing which obliged the bankers to keep these accounts separate? I can see nothing of the sort; nor do I think that the mere facts that the plaintiff had a banking account at two separate branches of the company's bank, and that cheques drawn by him upon one branch would not be honoured at the other branch, are sufficient to make it obligatory on the company to keep the two accounts separate. It is quite different from the case which has been suggested of a banker who may happen to be also a brewer, in which case the accounts of a customer of the bank and of the brewery would be kept entirely distinct and separate. So also, if a man opens an account at a bank in two distinct and different characters, as, for instance, one in his own private character, and another as a trustee.

But there is nothing in principle, or in the nature, or reason, or common sense of the thing, that should make it necessary that the accounts of a customer at two different branches of the same banking establishment should be kept so separate and distinct that the banking company should not be allowed to set-off their debt to the customer at one branch against the customer's debt to them at the other branch. It would be unreasonable, indeed, if it were so. It cannot be said that the customer has been misled in any way, and he had no right to suppose that the accounts would be kept separate.

BRAMWELL, B.—I thought at the trial, and I think so still, that the defendant was entitled to the verdict, but I cannot say that I entertain the confident opinion upon the point which my Lord and my learned brothers have expressed. Had the value of the stake in the action been greater, I should have thought that the plaintiff might have been entitled to have a rule. As it is, however, the parties are only fighting for a question of costs. There is no question here as to the statute of set-off.

My doubt arose from the consideration that, where a customer opens an account and pays in money at one branch, say branch A, of a banking company, and has a balance to his credit there, he cannot call on the banking company to cash his cheques at any of their branches except at A, where the balance in his favour appears. Are not the rights of the parties correlative, and if the bankers are not liable to be called on to honour the customer's cheque at branch B, although he may have a balance to his credit at branch A, are they to be able to debit his account at branch A, where he has a balance, with the balance due from him to the bank at branch B? I think the question should not be treated with reference to the facts of the present case only, but also with reference to the case of a customer having, let us suppose, a large banking account with the London and County Bank at York and another large account with the same bank at Brighton. My opinion at present is that the duty is not correlative, and I think so for this reason, and upon the distinction which I am about to draw. Supposing a banker were bound to cash the cheques of a customer at every branch of his bank which he might have scattered in various places all over the country, it would be an utter impossibility for him to carry on his business, as by no possibility could the state of the customer's account be communicated to the clerks at all the various and distant branches contemporaneously with the presentation of the cheques, so that the clerks at these branches would

A not know whether there was a balance in the customer's favour or not. But the case of the customer is different, and there would be no hardship on him in treating any number of accounts that he may have as one account inasmuch as he knows, or at any rate ought to know, the precise state of his whole account and the exact position in which he stands with respect to the bank generally.

B It is said that this blending of the several accounts would operate to the inconvenience of customers; but I very much question if, in point of fact, it would not be a considerable inconvenience to customers generally if the banking company were to keep each account strictly separate. For instance, bankers, knowing that the customer has a balance in his favour at one branch, may permit him to overdraw his account at another branch, but, if the accounts are to be treated as entirely distinct and separate, they could not do that.

C Although it would, I think, have been right and proper on the part of the company to have given notice to the plaintiff of their intention to debit the balance in his favour at the Leighton Buzzard branch with the amount of his overdrawn account at Buckingham, before they did it, there was not, in my opinion, any legal obligation on them to give such notice. Moreover, the plaintiff might, upon their telling him what they were going to do, have said: "I will not allow you to do it; I have a balance to my credit at Leighton Buzzard, and I shall draw cheques to the amount of such balance." It would have been an entirely different matter if there had been an express agreement come to when the plaintiff paid this money in at the Leighton Buzzard branch, or if he had then stipulated that it was to be drawn upon exclusively at that branch. There would then have been a contract to that effect, but there was nothing of the kind said, and I do not think that any such contract can be implied.

E I think, whether looking at it as a legal conclusion from the facts, or as a matter of fact, that there is no obligation on a banking company to pay the cheques of a customer at any one branch if there is a balance against him at another branch, and that the mere fact of the customer having accounts at two different branches creates no such obligation. Another point was urged, namely, that the bankers ought to have entered this debit of the plaintiff's old account in his pass book, in order that he might have seen how the account stood and not have drawn the cheques which were dishonoured. The argument raised upon that point fails altogether when the facts come to be looked at, for it appears that the manager of the Leighton Buzzard branch, before the transfer of the overdraft took place, was not aware of the debt due from the plaintiff to the company at the Buckingham branch, and there was no time after the manager knew of the plaintiff's debt when the plaintiff's pass book was shown to have been returned to him with the account undebited. So there was no laches on the part of the banking company. I think, therefore, that the rule should be refused, although I had at the trial, and have even now, the doubt which I have above alluded to.

Rule refused.

DANCER v. CRABB AND ANOTHER

[COURT OF PROBATE (Hannen, J.), May 23, June 24, 1873]

[Reported L.R. 3 P. & D. 98; 42 L.J.P. & M. 53; 28 L.T. 914;
37 J.P. 663]*Will—Revocation—Dependent relative revocation—Effect of partial destruction.*

The testatrix, by her will made in 1865, appointed A. and B. her executors, and A. one of her residuary legatees. Some time later, wishing to exclude A. from any benefit under her will, she dictated a document, using the old will as a copy, and tore off the upper part of the will, leaving remaining only the residuary clause, the attestation clause, and the signatures of herself and the witnesses. She put away the papers, saying that she would leave them as her will; and although she declared her intention of consulting her solicitor as to whether what she had done was correct, she never did so.

Held: the revocation of that part of the will which was torn was not absolute, but was intended to be dependent on the validity of the new disposition; as that was invalid, there was no cancellation; and probate would be granted of that portion of the will which was preserved, and of a draft of that which had been destroyed.

Notes. Considered: *In the Estate of Botting, Botting v. Botting*, [1951] 2 All E.R. 997. Referred to: *In the Estate of Brown*, [1942] 2 All E.R. 176.

As to the doctrine of dependent relative revocation, see 39 HALSBURY'S LAWS (3rd Edn.) 899-900; and for cases see 44 DIGEST 361-365.

Cases referred to:

- (1) *Onions v. Tyrer* (1716), 1 P.Wms. 343; 2 Vern. 741; 24 E.R. 418; sub nom *Onyons v. Tryers*, Prec. Ch. 459; Gilb. Ch. 130; 44 Digest 354, 1852.
- (2) *Hyde v. Hyde* (1708), 3 Rep. Ch. 155; 1 Eq. Cas. Abr. 409; 21 E.R. 755; 44 Digest 353, 1851.
- (3) *Ex parte Earl of Ilchester* (1803), 7 Ves. 348; 32 E.R. 142; 44 Digest 361, 1947.
- (4) *Limbery v. Mason* (1734), 2 Com. 451; 92 E.R. 1155; 44 Digest 361, 1946.
- (5) *Clarke v. Scripps* (1852), 2 Rob. Eccl. 563; 20 L.T.O.S. 83; 16 Jur. 783; 163 E.R. 1414; 44 Digest 316, 1485.
- (6) *Eckersley v. Platt* (1866), L.R. 1 P. & D. 281; 36 L.J.P. & M. 7; 15 W.R. 232; sub nom. *Ekersley v. Platt*, 15 L.T. 327; 44 Digest 362, 1950.

Motion for probate of a will.

The testatrix, Mary Thompson, late of Fulham, died on Sept. 14, 1872. She executed a will on June 28, 1865, by which she divided her property between the six daughters of Mr. Dancer, an old friend, and a Mr. Upward, and she appointed Mr. Upward one of her executors. Some years afterwards she became on bad terms with Mr. Upward, and determined to exclude him from her will. In July, 1872, she tore off the upper part of her will, containing the appointment of executors, and burnt it, leaving the residuary clause and the attestation, and the signature of herself and of the attesting witnesses. She drew her pen through the name of Mr. Upward in the residuary clause, and she put away the paper containing that clause, together with some instructions which she dictated to Miss Dancer, in her desk, where they were found after her death.

Upon this state of facts, three questions arose. First, whether there was a partial revocation of the will, as in that event the residuary clause, excluding Mr. Upward, was entitled to probate; secondly, whether there was a total

A revocation, and, therefore, an intestacy; thirdly, whether there was a conditional revocation of the whole or a part of the will; the condition being that the instructions which were dictated to Miss Dancer, together with the original residuary clause, should take effect as a valid will.

M. Williams, Q.C. (*Dr. Tristram* with him) for the plaintiffs.

B *Dr. Swabey* for defendants.

Inderwick for Edward Upward, the executor.

Cur. adv. vult.

C June 24, 1873. **HANNEN, J.**—In this case the plaintiff, Maria Dancer, propounds the will of Maria Thompson, deceased, dated June 28, 1865, and alleges that after the execution of the said will, the testatrix revoked a portion, by tearing off and burning it, with the intention of revoking such portion, preserving the remainder, which contained her residuary bequests, together with her signature, and the subscription of the attesting witnesses, and claims probate of the portion so reserved. The defendants traverse the due execution of the will, and plead that the deceased revoked the whole of the said will, and not a part only, and deny that the portion preserved is entitled to probate. The deceased, on June 28, 1865, duly executed a will which had been prepared for her by her solicitor, Mr. Dawes. By this will, after giving directions as to her funeral, she appointed her friends Henry Pratt and Alfred Upward, executors. She left a legacy of £100 to George Robertson, the then manager of her ironworks, if he should be employed by her at the said works at the time of her decease, but not otherwise. She then gave her jewellery, plate, trinkets, and ornaments of person, unto and between the six daughters of her friend Alexander Dancer, in equal shares, for their sole and separate use; and as to the residue of her estate and effects, whatsoever and wheresoever, she gave the same unto such of the said six daughters of Alexander Dancer and Alfred Upward as should be living at her decease, in equal shares as tenants in common.

F In the early part of 1872 the deceased sent for the plaintiff, one of the daughters of Alexander Dancer, and having produced her will and read it, informed her that she wished Mr. Upward's name struck out, and required plaintiff to write something for her. She thereupon dictated some minutes of alterations which she desired to make in her will. These minutes are rough and incomplete, and were described by the plaintiff as "only a trial, or kind of scribble," but, as far as they are intelligible, they were afterwards embodied in the draft to be next mentioned. They do not contain any mention of executors, or of Mr. Upward. In March, 1872, the deceased again sent for the plaintiff, and produced the will, together with the rough minutes which had been drawn up on the former occasion, and having torn off the blank sheet of the will, requested the plaintiff to write upon it, to her dictation. Then, holding the will in her hand, and, having the rough minutes which the plaintiff had written on the former occasion before her, she dictated what appears to have been intended as a formal will, beginning, "This is the last will and testament of me, Mary Thompson, etc." It repeats the directions as to her funeral, contained in her will of June 28, 1865, and appoints her friend Henry Pratt sole executor and trustee. She then gives certain money, invested in Bombay and Baroda shares, to be equally divided between the six daughters of Alexander Dancer, for their sole and separate use, and bequeathed the rents due to her from the unexpired lease of certain houses, to her godson, F. T. Pratt, son of the said Henry Pratt, and her plate to be sold and the money equally divided between the said six daughters of Alexander Dancer. The legacy to George Robertson was omitted, because he had ceased to be in the employment of testatrix. The plaintiff having written thus far, the deceased desired her to leave off as she felt very ill. The plaintiff, in her evidence, says, that the deceased then "tore off the part I had

copied from, and burned it." That is, she tore off all but the residuary clause A
and those words which preceded that clause in the same line with it, beginning
"in equal shares, for their sole and separate use."

The witness, in continuation of her narrative, stated that the deceased then

"put the remaining portion away with what I had written, having first struck B
out Mr. Upward's name, and the few words at the top. She put them
away in a case in a desk, and locked them up: She said she would roll them
both up, and leave them there with her signature, as her will."

Not very long after this interview, the deceased sent for the plaintiff a third
time, and asked her to write some more to her dictation. This the plaintiff did,
substituting for the legacy to the deceased's godson, an expression of a wish C
that the bequest to his mother, Jane Pratt, one of the six daughters of Alexander
Dancer, should be left, at her death, to her godson. The bequest of the rents
was struck out by the plaintiff, by direction of the deceased. This alteration was
made because the lease of the house had fallen in. Then followed bequests of
all the jewellery to her friend Mrs. Gordon, her personal apparel to Alice Hazel,
and her piano to the plaintiff. The deceased then said that she felt too ill to D
continue. She said she would send for Mr. Dawes, to see that what she had
done was correct and right. This interview was in March, 1872. The deceased
did not send for Mr. Dawes until Aug. 30, about a fortnight before her death.
She then spoke of the lease of the houses, and her plate at her bankers, but did
not mention her will. Mr. Dawes asked her if she had any other business to
transact. She said she had not. E

The conclusions of fact which I draw from this evidence are these: First, that
the deceased did not intend, by tearing and burning a portion of her will, to
cancel it in toto; secondly, that she believed that, by preserving the residuary
clause, with her signature and the subscription of the witnesses, and placing this
portion with the paper written at her dictation, she was constituting a new will; F
thirdly, that, but for this belief, she would not have torn off the portion which
she destroyed, seeing that the substituted dispositions did not substantially alter
her distribution of the bulk of her property among the Dancer family, and that
she could not have thought that the tearing was necessary in order to get rid
of Upward as executor, because, from the manner in which she dealt with the
more important residuary clause, she showed that she considered striking his G
name out sufficient; fourthly, that she did not preserve the portion of the will,
and the paper written by the plaintiff as instructions for a new will, her statement
to the plaintiff, together with her conduct with Mr. Dawes, showing that she
considered she had already made a new and valid will.

Upon these findings the question arises whether the destruction of the first
portion of the will was an absolute cancellation, or only a dependent relative H
cancellation of the part torn off and burnt. The leading cases on this subject
are collected in WILLIAMS ON EXECUTORS (6th Edn.), vol 1, p. 142, and the
doctrine of dependent relative revocation is there fully explained and illustrated.
The result is thus stated:

"Where the act of cancelling is done with reference to another act, meant I
to be an effectual disposition, it will be a revocation or not, according as the
relative act is efficacious or not."

In the well-known cases of *Onions v. Tyrer* (1) and *Hyde v. Hyde* (2), the
alterations in the substituted instrument were of slight importance, but the effect
of the intended alterations makes no difference in the application of the doctrine,
if the testator destroys the first will only because he supposes he has completed
another: This is laid down by SIR WILLIAM GRANT, M.R., in *Ex parte Earl of*
Ilchester (3) (7 Ves. at p. 380):

A "The rule of the civil law is, tunc prius testamentum rumpitur, cum
posterius perfectum est. In *Limbery v. Mason* (4), that is laid down as the
rule of our law. There is no doubt but the testator, by any writing, etc.,
or by any cancelling designed merely to disavow the former will, might have
revoked it without more, but he designed to do it by a new will, and unless
B such writing be effectual to operate as a will, it shall not amount to a
revocation."

The decisions cited from *Clarke v. Scripps* (5) down to *Eckersley v. Platt* (6),
do not affect the application to the present case of the earlier authorities I have
referred to. They enforce, under varying circumstances, the principle that
although the testator does an act which, unexplained, would be one of revocation,
C yet if it appear that he did it only as a part of the means of setting up another
will, if that could not be accomplished, the former will is not revoked: or, to
state the proposition in different language, the principle can be interpreted thus:
"Whatever else I may do, I intend to cancel this as my will, from this time
forth," the will is revoked, but if his meaning is, "As I have made a fresh will,
my old one may now be destroyed," the old will is not revoked if the new one
D be not in fact made. I think that the latter form of words correctly expresses
the state of the testatrix's mind at the time when she tore her will of June, 1865.
I may add, that I have no doubt that the testatrix attached special importance
to the striking out of Mr. Upward's name from her will, but it cannot be supposed
that she intended to annul the appointment of Upward and Pratt as her executors,
except on the assumption that she had effectually appointed Pratt by himself,
E and, as I have already pointed out, the more important alteration of depriving
Upward of the benefit of the residuary clause was attempted to be made, by
striking the pen through his name in a portion of the will, which, beyond all
doubt, was intended to remain subsisting.

I am of opinion, therefore, that the original will was not revoked, and that
probate must be decreed of the portion which remains, together with the draft
F of the part destroyed. Mr. Upward's name must of course be restored, as it
was struck out after execution. The costs of all parties to be paid out of the
estate.

HILL v. TUPPER

[COURT OF EXCHEQUER (Pollock, C.B., Martin and Bramwell, BB.), April 30, May 1, 1863]

[Reported 2 H. & C. 121; 2 New Rep. 201; 32 L.J.Ex. 217;
8 L.T. 792; 9 Jur.N.S. 725; 11 W.R. 784; 159 E.R. 51]

Easement—Grant by lessor to lessee—Interference by third party—Right of grantee to sue third party under grant.

The owner of land cannot, at his pleasure, create new rights or incidents of property and annex them to the land, or render it subject to a new species of burden, so as to bind it in the hands of an assignee.

The B. Canal Co. having, in consideration of an annual rent, demised land adjoining the canal to the plaintiff for a term of years, "together with the sole and exclusive right to put or use boats on the said canal, and let the same for hire for the purposes of pleasure only," the defendant infringed that right by letting out a boat for hire on the same canal. In an action against him by the plaintiff for such infringement,

Held: the grant of the right, although valid as between the company and the plaintiff, their lessee, passed no such estate or property to him as would enable him to maintain an action against a third party for its infringement.

Keppell v. Bailey (1) (1834), 2 My. & K. 517, and *Ackroyd v. Smith* (2) (1850), 10 C.B. 164, applied.

Notes. Considered: *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300; *Nuttall v. Bracewell* (1866), L.R. 2 Exch. 1; *Copeland v. Greenhalf*, [1952] 1 All E.R. 809; *Re Ellenborough Park*, *Re Davies*, *Power v. Maddison*, [1955] 3 All E.R. 667. Referred to: *Richards v. Harper* (1865), 4 H. & C. 55; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Newcastle-under-Lyme Corp'n. v. Wolstanton, Ltd.*, [1946] 2 All E.R. 447.

As to the distinction between an easement and a licence, see 12 HALSBURY'S LAWS (3rd Edn.) 524; and for cases see 19 DIGEST (Repl.) 21.

Cases referred to :

- (1) *Keppell v. Bailey* (1834), 2 My. & K. 517; Coop. Temp. Brough. 298; 39 E.R. 1042; 19 Digest (Repl.) 22, 89.
- (2) *Ackroyd v. Smith* (1850), 10 C.B. 164; 19 L.J.C.P. 315; 15 L.T.O.S. 395; 14 Jur. 1047; 138 E.R. 68; 19 Digest (Repl.) 12, 20.

Also referred to in argument :

- Bostock v. North Staffordshire Rail. Co.* (1855), 4 E. & B. 798; 3 C.L.R. 1027; 24 L.J.Q.B. 225; 1 Jur.N.S. 921.
- Wickham v. Hawker* (1840), 7 M. & W. 63; 10 L.J.Ex. 153; 151 E.R. 679; 19 Digest (Repl.) 214, 1574.
- Wood v. Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 19 Digest (Repl.) 26, 115.
- Weekly v. Wildman* (1698), 1 Ld. Raym. 405; 91 E.R. 1169; 19 Digest (Repl.) 159, 1048.
- Bailey v. Stephens* (1862), 12 C.B.N.S. 91; 31 L.J.C.P. 226; 6 L.T. 356; 8 Jur.N.S. 1063; 10 W.R. 868; 142 E.R. 1077; 19 Digest (Repl.) 218, 1604.
- Whaley v. Laing* (1857), 2 H. & N. 476; 26 L.J.Ex. 327; 5 W.R. 834; 157 E.R. 196; on appeal sub nom. *Laing v. Whaley* (1858), 3 H. & N. 675; 27 L.J.Ex. 422, Ex. Ch.; 44 Digest 49, 349.

Rule Nisi obtained by the defendant to enter a nonsuit in or for a verdict for him in an action in which the plaintiff claimed damages for the infringe-

A ment by the defendant of plaintiff's exclusive right to let pleasure boats for hire on a canal.

The plaintiff, a boatman at Aldershot, and lessee, under the Basingstoke Canal Co., of a piece of land adjoining the canal wharf at Aldershot, had the exclusive right of letting pleasure-boats for hire on the canal. The defendant, a publican in the neighbourhood, had boats on the same canal, which, it was alleged by B the plaintiff, but denied by the defendant at the trial, the latter had let for hire, and so infringed the plaintiff's right. The plaintiff put in evidence the indenture of lease, dated Dec. 29, 1860, from the company of proprietors of the canal navigation to himself, whereby, for a valuable consideration, the company demised and leased to the plaintiff, his executors and administrators,

C "all that piece or parcel of land [setting out the parcels], together with the appurtenances, etc., and also the sole and exclusive right or liberty to put or use boats on the said canal, and let the same for hire for the purposes of pleasure only,"

for a term of seven years from June 24, 1860, at the yearly rent of £25, payable D quarterly. By the Act of Parliament (18 Geo. 3, c. 75) under which the canal was made, the navigation, subject to the right (under s. 100) of riparian owners and occupiers to use boats of a certain draught on the canal for purposes of pleasure exclusively, and not for carrying goods or persons for hire, was vested in the said canal company.

The cause was tried at the Guildhall in London, before BRAMWELL, B., E when a verdict was found for the plaintiff, damages one farthing. The defendant subsequently obtained a rule, pursuant to leave reserved, to set aside the plaintiff's verdict and enter a nonsuit or a verdict for the defendant, on the grounds, first, that the commissioners of the Basingstoke Canal had no power to grant the exclusive right claimed; secondly, that if the grant was good the action would not lie by the plaintiff against the defendant for the alleged infringement of the F right; or for a new trial on the ground of misdirection, the learned judge having directed the jury that if the defendant obtained any pecuniary advantage from the boats he had upon the canal, the defendant was liable.

Garth, Holl and M. Williams showed cause against the rule.

Barnard (with him *M. Chambers, Q.C., and Hance*) supported the rule.

G POLLOCK, C.B.—We are all of opinion that this rule should be discharged, and that our judgment should be for the defendant on the second plea. I do not think it is necessary, after the very full argument which has taken place, to assign any other reason for our decision than that *Ackroyd v. Smith* (2) in the Common Pleas distinctly lays it down, that easements or rights of this nature H cannot be granted so as to create a property in the grantee. The grant here operates simply as a licence or covenant on the part of the lessors, the canal company, and is binding on them as between themselves and their lessee, but gives no right of action to the lessee, in his own name, against a stranger for an I infringement of the alleged exclusive right. He can only sue a stranger by using the name of his lessors, the canal company. The proposition of counsel showing cause against the rule is inadmissible. He asks why the owner of an estate should not be able to grant such a right as that now claimed by the plaintiff. The answer is, because the law does not recognise such rights. It is an old and well-established principle of our law that new estates cannot be created. Counsel says he sees no reason, if a man may grant a right to cut turves, or to fish, or to hunt, etc., why such a right as that here claimed, or why an exclusive right to cut cabbages in a garden, or to collect the manure and droppings from cattle, which no doubt is of some value, may not also be granted. The answer is, that the law will not allow it. So the law will not permit a man to leave

land alternately to a male heir and a female heir. New rights or incidents of property cannot be created, nor can a new species of burden be imposed upon land at the pleasure of the owners. There are no instances of such new creations. It would be a new species of incorporeal hereditament. It has been contended that this is a sort of estate, but the owner of an estate must be content to take it with the rights and incidents known to and allowed by the law. A grantor may bind himself by covenant to allow what rights he pleases over his property, but the law will not permit him to carve out his property so as to enable the grantee of such a limited right to sue a stranger in the way here contended for. For these reasons, therefore, our judgment will be for the defendant.

MARTIN, B.—I am entirely of the same opinion. This grant is no doubt a valid grant between the canal company and their tenant, the plaintiff in this action; but in order to enable the plaintiff to maintain his action against the defendant he must establish that, by the grant, an estate vested in him so as to enable him to maintain an action on the case against a stranger for an infringement of his alleged rights, which he has failed to do. No case has been cited to show that such a right as this can be created, or that an owner can carve out his property into an indefinite number of hitherto unknown estates. To admit the right here claimed would be to open a door to the creation of such a variety of pieces and parcels of interests in land, and to such an indefinite increase of possible estates, that we ought not to do it. The plaintiff is entitled to the benefit of his covenant as against his lessors, the canal company; but if strangers infringe or molest him in the enjoyment of his rights, he must use the company's name to bring an action against such wrongdoers, and in this there is no hardship. The judgments of LORD BROUGHAM in *Keppell v. Bailey* (1), and of CRESSWELL, J., in *Ackroyd v. Smith* (2), which have been referred to, are, in the absence of any case to the contrary, ample authority for our present decision.

BRAMWELL, B.—I am of the same opinion.

Judgment for defendant on second point, plaintiff electing not to be nonsuited.

ROBINSON v. DAVISON AND WIFE

[COURT OF EXCHEQUER (Kelly, C.B., Bramwell, Channell and Cleasby, BB.), May 26, 1871]

[Reported L.R. 6 Exch. 269; 40 L.J.Ex. 172; 24 L.T. 755;
19 W.R. 1036]

Contract—Frustration—Personal services—Implication of continued good health—Engagement of concert pianist—Failure to perform owing to illness.

Where a contract is for personal services which are to be rendered at a particular time a party who is prevented by illness from rendering them as stipulated will be discharged from liability under the contract.

The defendant's wife, a concert pianist, agreed to perform at a concert arranged by the plaintiff to take place on Dec. 17, 1869, later changed to Jan. 14, 1870. On the morning of that day she wrote to the plaintiff to say that she was ill and unable to appear as arranged, and, as a result, the plaintiff was obliged to postpone the concert.

Held: the contract was subject to the implied condition that the wife's health should continue; she had been prevented from performing by reason of illness; and, therefore, the defendant was discharged from liability under the contract.

Notes. Referred to: *Howell v. Coupland* (1876), 1 Q.B.D. 258; *Nickoll and Knight v. Ashton*, [1900-3] All E.R. Rep. 928; *Blackburn Bobbin Co. v. Allen* (1918), 87 L.J.K.B. 1085; *The Penelope*, [1928] P. 180; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corpn., Ltd., The Kingswood*, [1941] 2 All E.R. 165.

As to application of frustration on particular contracts and effect of illness or disability of a party, see 8 HALSBURY'S LAWS (3rd Edn.) 188-191; and for cases see 12 DIGEST (Repl.) 425-427, 697.

Cases referred to:

- (1) *Hall v. Wright* (1859), E.B. & E. 765; 29 L.J.Q.B. 43; 1 L.T. 230; 6 Jur.N.S. 193; 8 W.R. 160; 120 E.R. 695, Ex. Ch.; 12 Digest (Repl.) 426, 3281.
- (2) *Taylor v. Caldwell* (1863), ante p. 24; 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, 3242.
- (3) *Boast v. Firth* (1868), L.R. 4 C.P. 1; 38 L.J.C.P. 1; 19 L.T. 264; 17 W.R. 29; 12 Digest (Repl.) 425, 3271.

Also referred to in argument:

- Paradine v. Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236.
- Stubbs v. Holywell Rail. Co.* (1867), L.R. 2 Exch. 311; 36 L.J.Ex. 166; 16 L.T. 631; 15 W.R. 769; 12 Digest (Repl.) 666, 5154.
- Farrow v. Wilson* (1869), L.R. 4 C.P. 744; 38 L.J.C.P. 326; 20 L.T. 810; 18 W.R. 43; 12 Digest (Repl.) 666, 5155.
- Lord Clifford v. Watts* (1870), L.R. 5 C.P. 577; 40 L.J.C.P. 36; 22 L.T. 717; 18 W.R. 925; 12 Digest (Repl.) 429, 3302.

Rule Nisi for the new trial of an action to recover damages for breach of a contract to perform at a concert arranged by the plaintiff. The wife of the defendant was unable to perform as arranged owing to illness.

The plaintiff, a professor of music, made an offer to Mrs. Davison, a celebrated concert pianist, to perform at a concert which the plaintiff had arranged to take place on Dec. 17, 1869. Mrs. Davison accepted the offer in the following letter written by her secretary:

"Dear Mr. Robinson,

Many thanks for your kind note, I am happy to say that Mrs. Davison can accept for Brigg on Friday, Dec. 17.

Annie Edmonds."

Subsequently, Mrs. Davison was taken ill and she telegraphed to the plaintiff that she would be unable to perform at the concert as arranged. The plaintiff, by agreement with Mrs. Davison, accordingly changed the date of the concert to Jan. 14, 1870. On the morning of Jan. 14, Mrs. Davison wrote to the plaintiff to say that on account of illness she could not be present at the concert and enclosed a certificate from her doctor to this effect. As a result of this letter the plaintiff sent messengers and telegraphic despatches to different parts of the country so as to prevent ticket holders from coming to the concert, and caused placards to be printed announcing its postponement. The plaintiff brought this action against the husband of Mrs. Davison to recover damages for breach of contract to perform.

The action was tried before BRETT, J., at the Lincoln assizes. The learned judge allowed an amendment at the trial, and a count to be added alleging that the contract required Mrs. Davison, in case of disability to perform through illness, to give notice thereof to the plaintiff within a reasonable time after she knew that she would be unable to go.

The judge directed the jury that the contract was subject to the implied condition that the defendant should be excused from performance if Mrs. Davison was so ill as to make it unreasonable on the ground of illness that she should perform her engagement. The jury in the result found a verdict for the plaintiff for £2 13s. 9d. upon the added count. It was conceded by the plaintiff that Mrs. Davison was too ill to perform.

A rule nisi was obtained to show cause why the verdict entered for the plaintiff should not be set aside, and a new trial had on the ground of misdirection, and also for a new trial on the ground that the damages were inadequate, and why the defendant should not pay the costs.

Serjeant O'Brien (with him *A. Wills*) showed cause against the rule.

Digby Seymour, Q.C. (*Cave* with him) supported the rule.

KELLY, C.B.—There is no doubt but that a highly important question is raised in this case. The defendant's wife, Mrs. Davison, having contracted to perform at a musical concert, was prevented from appearing in consequence of illness and the question arises: Is her illness and consequent incapacity to perform a lawful and sufficient excuse for non-performance of the contract? I am of opinion that it is. The rule of law is laid down by POLLOCK, C.B., in his dissenting judgment in *Hall v. Wright* (1), and although he was in the minority it is a most accurate statement of the law. He says (E.B. & E. at p. 793):

"All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them: and, should he die, his executor is not liable to an action for a breach of contract occasioned by his death. So, a contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would in my judgment be deemed subject to the condition that, if the author became insane or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death."

So the law applies to a case like this of an artiste who contracts to perform: if by illness or incapacity he or she is unable to perform, they are excused from such performance.

A In *Taylor v. Caldwell* (2), which was the case of an agreement to let a music hall for a series of concerts, and before the day arrived the music hall was burnt down, BLACKBURN, J., says (ante p. 27):

B "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible."

He then goes on to say:

C "But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

E The term illness has been criticised, but the true meaning of the word in the plea is that if the party by reason of illness, and illness alone, cannot perform, that absolutely excuses the party. I am of opinion, therefore, on the main question, that Mrs. Davison was excused, and that the plaintiff was not entitled to bring this action.

F Then comes the question whether Mrs. Davison ought to have given notice to the plaintiff at an earlier time. It is not necessary now to enter into the question whether notice was necessary. If the illness had been one of some duration, it is unreasonable to say she ought not to have given some notice; and I think she ought to have telegraphed to the plaintiff instead of writing by post. The judge was right in giving leave to amend, and, that being so and the jury having found a verdict for plaintiff for £2 13s. 9d., for the amount of loss sustained by the notice having been received in the morning instead of the previous day by telegraph, we think the verdict should not be disturbed. We do not grant the rule as to costs, as the plaintiff has failed on the substantial grounds, and succeeded only on a trifling claim.

G CHANNELL, B., acquiesces in this judgment.

H

I BRAMWELL, B.—I am of the same opinion. It is admitted that the lady was unable to play. That means to play efficiently in such a style as such a well-known performer is expected to play. It must be in such a case either a bargain that she shall be or shall not be excused. If she had insisted on playing, she might have disgusted her audience. The plaintiff might well say, "I will not allow you to play; I would rather let the audience have their money back." It is said that this promise is grounded on an express condition to play at all events. The opinion of the majority of the judges is that there is a qualification in the contract of marriage. I maintain the opinion I expressed in *Hall v. Wright* (1), that as, when the contract is for personal services which, if you died, your executors could not do for you, the contract is at an end, so it is in case of incapacity of body or mind, an excuse by virtue of the original terms. A person may say: "I will undertake expressly to play on a certain day, and not die or be ill," and have this agreement specially drawn up so as to

make himself liable under such circumstances; but where the only things named are the day, hour, and price which is to be paid for the performance of the contract, the idea of any such express condition is precluded. I consider it would be most unjust for us to make an order for the purpose of granting a certificate of costs to the plaintiff. It amounts to this: because I brought an action and was wrong, but luckily mixed up another cause of action with it, in which I am entitled to some damages, give me costs in the whole cause, I take this opportunity of expressing my opinion that the reason for bringing an action in the superior court is the amount at stake, or because some right or title is in issue. The plaintiff might perfectly well have recovered the costs of his telegrams and messengers in the county court.

CLEASBY, B.—I wish to say only a few words on the main question. This was a contract to perform as a pianist at a concert, in truth, to be the sole performer, and to do what requires the most exquisite taste and the greatest artistic skill, and which, unless well done, would disgust the audience, who naturally expect a great deal from so celebrated a performer. That being so, the question arises: Can this be done by the person engaged unless well and in good health? The whole contract is based on the assumption of the continuance of life, and of the conditions which existed at the time. That assumption is made by both; it is really the foundation of the contract. It does not require close reasoning to prove that if the foundation fails, the whole contract must fail. Here the foundation was wanting for there was on Mrs. Davison's part an entire and total incapacity to do the thing contracted for. The law which governs the case is well stated in the judgment of **BRETT, J.**, in *Boast v. Firth* (3). His observations apply here, and I entirely concur in them.

Rule discharged.

HAMMACK v. WHITE

[COURT OF COMMON PLEAS (Erle, C.J., Williams, Willes and Keating, JJ.), January 14, 1862]

[Reported 11 C.B.N.S. 588; 31 L.J.C.P. 129; 5 L.T. 676;
8 Jur.N.S. 796; 10 W.R. 230; 142 E.R. 926]

Fatal Accident—Evidence—Defendant's negligence—Ridden horse bolting on to pavement—Tendency of horses to become restive.

Animal—Horse—Bolting horse—Liability of owner for damage—Ridden horse bolting on to pavement—Tendency of horses to become restive.

The defendant was riding on the highway in London a horse which he had bought on the previous day at an auction when, owing to no fault of his and in spite of all efforts to restrain it, the horse suddenly became restive and bolted on to the pavement knocking down a man who died a few days later. In an action brought by the widow and administratrix under the Fatal Accidents Act, 1846,

Held: the plaintiff must prove some act of negligence on the part of the defendant, and, as the evidence did not show any negligence on his part, the plaintiff had no right to have the case left to the jury.

Notes. The classes of dependants under the Fatal Accidents Act, 1846 (17 HALSBURY'S STATUTES (2nd Edn.) 4) has been extended by the Fatal Accidents Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 941).

Applied: *Scott v. London Dock Co.* (1864), 5 New Rep. 59. Considered: *Rylands v. Fletcher*, ante p. 1. Distinguished: *Smith v. Great Eastern Rail. Co.* (1866), L.R. 2 C.P. 4. Considered: *Fowler v. Lock* (1872), L.R. 7 C.P. 272. Followed: *Mazoni v. Douglas* (1880), 6 Q.B.D. 145. Considered: *Gayler and Pope, Ltd. v. B. Davies & Son, Ltd.*, [1924] All E.R. Rep. 94; *Ellor v. Selfridge & Co.* (1930), 46 T.L.R. 236; *McGowan v. Stott* (1923), 99 L.J.K.B. 357, n. Referred to: *Byrne v. Boadle* (1863), 2 H. & C. 722; *R. v. Dant* (1865), Le. & Ca. 567; *Giblan v. McMullen* (1868), L.R. 2 P.C. 317; *The Maid of the Mist* (1873), 21 W.R. 310; *Holmes v. Mather* (1875), 44 L.J.Ex. 176; *Lilly v. Tilling and L.C.C. (No. 1)* (1912), 57 Sol. Jo. 59; *Manton v. Brocklebank*, [1923] 2 K.B. 212; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; *Read v. J. Lyons & Co.*, [1945] K.B. 216.

As to the liability of owners for injuries caused by harmless and domestic animals, see 1 HALSBURY'S LAWS (3rd Edn.) 663 et seq.; and for cases see 2 DIGEST (Repl.) 316 et seq. As to the burden of proof in actions for damages for negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 73 et seq.; and for cases see 26 DIGEST (Repl.) 143 et seq.

Cases referred to in argument:

Gibbons (Gibbon) v. Pepper (1695), 1 Ld. Raym. 38; 2 Salk. 637; 4 Mod. Rep. 404; 91 E.R. 922; 2 Digest (Repl.) 317, 168.

Michael v. Alestree (1676), 2 Keb. 650; 2 Lev. 172; sub nom. *Mitchil v. Alestree*, 1 Vent. 295; 84 E.R. 932; 2 Digest (Repl.) 316, 166.

Wakeman v. Robinson (1823), 1 Bing. 213; 8 Moore, C.P. 63; 1 L.J.O.S.C.P. 70; 130 E.R. 86; 2 Digest (Repl.) 318, 182.

Leame v. Bray (1803), 3 East, 593; 102 E.R. 724; 43 Digest 420, 429.

Templeman v. Haydon (1852), 12 C.B. 507; 19 L.T.O.S. 218; 16 J.P. 537; 138 E.R. 1005; 36 Digest (Repl.) 107, 534.

May v. Burdett (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 36 Digest (Repl.) 189, 1002.

Vaughan v. Taff Vale Rail. Co. (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 36 Digest (Repl.) 6, 8.

Christie v. Griggs (1809), 2 Camp. 79, N.P.; 8 Digest (Repl.) 79, 531.

Carpue v. London and Brighton Rail. Co. (1844), 5 Q.B. 747; 1 Dav. & Mer. 608; 3 Ry. & Can. Cas. 692; 13 L.J.Q.B. 133; 2 L.T.O.S. 401; 8 Jur. 464; 114 E.R. 1431; 8 Digest (Repl.) 100, 661.

Skinner v. London, Brighton and South Coast Rail. Co. (1850), 5 Exch. 787; 15 Jur. 299; 155 E.R. 345; 8 Digest (Repl.) 103, 673.

Crofts v. Waterhouse (1825), 3 Bing. 319; 11 Moore, C.P. 133; 4 L.J.O.S.C.P. 75; 130 E.R. 536; 8 Digest (Repl.) 76, 501.

Rule Nisi obtained by the plaintiff to set aside a nonsuit in and for a new trial of an action by the plaintiff, the widow and administratrix of the deceased, William Hammack, for damages for negligence under the Fatal Accidents Act, 1846 (Lord Campbell's Act), on the ground of misdirection.

The defendant had bought a horse at Tattersalls and on the following day he tried out the horse in the stables' yard and in the afternoon he rode it in Bishopsgate Street, where it went perfectly quietly but when ridden in Finsbury Circus it suddenly became restive, ran away on to the pavement and knocked down the plaintiff's husband who died a few days later. In the action under the Fatal Accidents Act, 1846, the plaintiff, as widow and administratrix of the deceased, alleged that the deceased had died as a result of the careless, negligent and improper conduct of the defendant in riding the horse, and claimed £1,000

damages. There was no proof of negligence on the part of the defendant but the evidence showed that the defendant had done all he could to restrain the horse but without effect. A

The action was tried in the Lord Mayor's Court before the Recorder, who nonsuited the plaintiff on the ground that there was no evidence of negligence to go to the jury. Subsequently the plaintiff obtained a rule nisi to set aside the nonsuit and for a new trial on the ground that there was evidence of negligence to go to the jury. B

Henry James showed cause against the rule.

Patchett supported the rule.

ERLE, C.J.—I am of opinion that this rule ought to be discharged. The question as to the right of bringing the action is really founded upon the negligence of the defendant. The question we have had to consider is whether, upon the evidence, the defendant has been guilty of negligence. I am of opinion that in such an action the plaintiff has no right to have his case left to the jury unless he shows some negligence on the part of the defendant. The form of negligence here is, either that the defendant was unskilful in his management of the horse, or that he was negligent in taking a wilful horse into a crowded neighbourhood, and so causing the action. From the evidence it appears that the horse was seen to become restive, and that the defendant endeavoured to restrain him; but there was no evidence that the defendant was unskilful or negligent in the management of the horse; in fact, the contrary was proved, as one witness said that the defendant used every means in his power to stop the horse. All horses are liable at times to be affected in different ways, and to become restive, and the evidence does not show to my satisfaction that the defendant was not capable of managing the horse and bringing it into the streets of London. C D E

That being so, was he wrong in riding the horse where he did? The evidence shows that he had bought the horse the day before, and was using it in the way he intended to do, in order to try whether it would suit him. I see no want of caution in his riding the horse the first day after he had purchased it, without knowing the animal's temper. Cases must occur every day in London of horses being ridden without the riders knowing their disposition. A horse may have gone quietly for some time, and suddenly take fright and run away. In support of the plaintiff's case it has been contended that a *prima facie* case of negligence has been made out; but I do not think that the mere fact of a horse turning restive and running away, or the fact of riding it in the streets the day after it has been bought, is *prima facie* evidence of negligence on the part of the rider. F G

WILLIAMS, J.—I am of the same opinion. The question here is the same as if the defendant had been indicted for manslaughter, when the question would have been, whether the defendant had shown ordinary skill and care in the management of the horse; and I think there is no evidence to support such an indictment. Then it has been said that there is *prima facie* evidence of negligence; but I do not think that the mere fact of the defendant being on the foot pavement at the time of the accident is sufficient to establish such negligence. I agree with counsel for the defendant, that the declaration is not framed in such a manner as to support the present case, as it is one which requires a *scienter* to support it, and of such no evidence has been given. H I

WILLES, J.—I am of the same opinion. I feel, from the discussion that has taken place, that I ought to concur in the judgment of this court. The circumstance of a person on horseback being on the pavement where he had no right weighed with me so much that I was at first inclined to think that it was *prima*

facie evidence of his being in the wrong; but it must be borne in mind that the same person who proved that fact also proved that the defendant was there against his will, that the horse was running away, and the defendant doing his best to stop him, and that he could not have done more than he did to prevent the accident from occurring. That being so, the fact of his being on the footpath is not evidence of negligence, unless it is also proved that he was there wilfully and of his own accord, which was not the case.

As to the horse being unmanageable, in consequence of which he got on the footpath, the fact of a man riding a horse which he knew to be unmanageable would not be sufficient to make him liable for damage accruing from that fact; but, even if that were so, there is no such knowledge proved in the present case. The defendant had only bought the horse the day before, and therefore he could not have had time to find out the disposition of the animal. If the horse was not ridden with proper skill, it was for the plaintiff to prove that fact, which he did not succeed in doing; but, on the contrary, it was proved that the defendant used all the means in his power to restrain the horse. It has also been said that, as the horse had only been bought the day before, he ought to have tried it in some quiet place, and his not doing so was evidence of negligence. But to impose such a restriction upon owners of horses would not be reasonable. I think, therefore, there is no evidence of any negligence on the part of the defendant either in the management of the horse or in any other act.

There is one point upon which I must remark. I do not agree with WILLIAMS, J., when he says that the same maxim of law would apply to evidence of negligence in the case of manslaughter as in civil actions. In this case I agree that the question is the same. In EAST'S PLEAS OF THE CROWN, vol. 1, at p. 264, it is said :

"Whoever seeks to excuse himself, for having unfortunately occasioned by any act of his own the death of another, ought at least to show that he took that care to avoid it which persons in similar situations are most accustomed to do."

There has been a great deal of discussion in modern cases, whether, when a crime has been committed and the same facts arise in a civil case, the jury ought to be told to take the same view of them as if it was a criminal case; and I make these remarks in order that I may not be understood entirely to agree with the remarks which have been made on this point.

KEATING, J.—If the horse had been going quietly along, and the defendant had ridden on the foot pavement, I think that there would have been *prima facie* evidence of negligence; but it has been proved that the horse was restive and unmanageable, and that the accident was not occasioned by the defendant's negligence. I think, therefore, that this rule ought to be discharged.

Rule discharged.

BAMFORD v. TURNLEY

[COURT OF EXCHEQUER CHAMBER (Erle, C.J., Pollock, C.B., Williams and Keating, J.J., Bramwell and Wilde, BB.), May 14, July 12, 1862]

[Reported 3 B. & S. 66; 31 L.J.Q.B. 286; 6 L.T. 721;
9 Jur.N.S. 377; 10 W.R. 803; 122 E.R. 27]

Nuisance—Defence—Reasonable use by defendant of own land—Fumes caused by burning bricks.

The defendant erected a brick-clamp upon his land which was near the plaintiff's premises. He burned a large quantity of bricks there and caused fumes to arise therefrom, which resulted in a sensible diminution of the comfortable enjoyment of the plaintiff's habitation. It was proved that the erection and use of the clamp by the defendant was temporary and for the sole purpose of making bricks on his land from the clay found there with a view to the erection of houses, and also that the clamp was placed upon that part of defendant's land which was most distant from the plaintiff's house so as to create no further annoyance than necessary. The trial judge directed the jury that, if they should be of opinion that the place where the bricks were burnt was proper and convenient and the burning of the bricks under the circumstances a reasonable use by the defendant of his land, the defendant was entitled to a verdict, notwithstanding that they were also of opinion that the burning interfered with the plaintiff's comfort.

Held (POLLOCK, C.B., dissenting): the true doctrine was that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance caused by those acts was sufficiently great to amount to a nuisance according to the ordinary rule of law an action would lie wherever the locality of the nuisance might be, and, therefore, the direction of the learned judge was wrong.

Notes. Followed: *Cavey v. Ledbitter* (1863), 13 C.B.N.S. 470; *Tipping v. St. Helen's Smelting Co.* (1864), 4 B. & S. 616. Considered: *Brand v. Hammersmith and City Rail. Co.* (1867), L.R. 2 Q.B. 223. Explained: *Luscombe v. Steer* (1867), 17 L.T. 229. Approved: *Shotts Iron Co. v. Inglis* (1882), 7 App. Cas. 518; *Fleming v. Hislop* (1886), 11 App. Cas. 686. Considered: *Reinhardt v. Mentasi* (1889), 42 Ch.D. 685. Applied: *A.-G. v. Cole*, [1901] 1 Ch. 205. Considered: *Colwell v. St. Pancras Borough Council*, [1904] 1 Ch. 707; *Heath v. Brighton Corp.* (1908), 98 L.T. 718; *West v. Bristol Tramways Co.*, [1908-10] All E.R. Rep. 215; *Bedford v. Leeds Corp.* (1913), 77 J.P. 430; *Andrea v. Selfridge & Co.*, [1936] 2 All E.R. 1413. Referred to: *Wanstead Local Board of Health v. Hill* (1863), 13 C.B.N.S. 479; *Grosvenor Hotel Co. v. Hamilton*, [1891-4] All E.R. Rep. 1188; *Lyons v. Wilkins*, [1899] 1 Ch. 255; *Knight v. Isle of Wight Electric Light and Power Co.* (1904), 73 L.J.Ch. 299; *Clark v. Lloyds Bank* (1910), 79 L.J.Ch. 645; *Mudge v. Penge U.D.C.* (1916), 86 L.J.Ch. 126; *Matania v. National Provincial Bank, Ltd.*, [1935] All E.R. Rep. 923; *Read v. J. Lyons & Co., Ltd.*, [1945] 1 All E.R. 106; *Trevett v. Lee*, [1955] 1 All E.R. 406.

As to nuisances between neighbouring properties, see 28 HALSBURY'S LAWS (3rd Edn.) 131 et seq.; and for cases see 36 DIGEST (Repl.) 262-264.

Cases referred to:

- (1) *Hole v. Barlow* (1858), 4 C.B.N.S. 334; 27 L.J.C.P. 207; 22 J.P. 530; 4 Jur.N.S. 1019; 6 W.R. 619; 140 E.R. 1113; sub nom. *Holl v. Barlow*, 31 L.T.O.S. 134; 36 Digest (Repl.) 262, 122.
- (2) *Jones v. Powell* (1628), Hut. 135; Palm. 536; 123 E.R. 1155; 36 Digest (Repl.) 262, 116.

(3) *Walter v. Selfe* (1851), 4 De G. & Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; on appeal (1852), 19 L.T.O.S. 308, L.C.; 36 Digest (Repl.) 247, 1.

Also referred to in argument :

Aldred's Case (1610), 9 Co. Rep. 57 b.; 77 E.R. 816; 36 Digest (Repl.) 267, 183.

Bliss v. Hall (1838), 4 Bing. N.C. 183; 1 Arn. 19; 5 Scott, 500; 7 L.J.C.P. 122; 132 E.R. 758; sub nom. *Bliss v. Hay*, 6 Dowl. 442; 2 Jur. 110; 36 Digest (Repl.) 251, 27.

Stockport Waterworks Co. v. Potter (1861), 7 H. & N. 160; 31 L.J.Ex. 9; 26 J.P. 56; 7 Jur.N.S. 880; 158 E.R. 433; 36 Digest (Repl.) 263, 124.

Rich v. Basterfield (1847), 4 C.B. 783; 16 L.J.C.P. 273; 9 L.T.O.S. 77, 356; 11 Jur. 696; 136 E.R. 715; 36 Digest (Repl.) 318, 643.

Appeal by the plaintiff from a decision of the Court of Queen's Bench in an action in which the plaintiff claimed that the burning of bricks by the defendant constituted an actionable nuisance; a verdict at the trial was obtained by the defendant, and the Court of Queen's Bench refused to grant the plaintiff a rule to show cause why this verdict should not be set aside.

In the first count of the declaration the plaintiff complained that the defendant had erected certain brick-kilns upon his own land near to the plaintiff's house and premises, and had wrongfully burned a large quantity of bricks there, and caused noxious fumes and stenches to arise therefrom, to the great nuisance and annoyance of the plaintiff and his family. The second count of the declaration complained of a similar nuisance caused by the defendant placing a quantity of decomposed ashes and bones in the immediate neighbourhood of the plaintiff's house. The only material plea to both counts was Not Guilty, upon which issue was joined.

The cause was tried at the Surrey Summer Assizes, 1860, before SIR ALEXANDER COCKBURN, C.J., when it appeared that, in June, 1857 some land at Norwood (part of the Beulah Spa Estate) was offered for sale, in lots, by public auction, in accordance with certain printed particulars and conditions of sale. Capt. Edward Strode, the brother-in-law of the above-named plaintiff, in the year 1857, purchased lot 11 of this property, containing 2a. 1r. 33p., and built a residence thereon. The house was finished in the year 1858, and shortly afterwards the above-named plaintiff became the tenant of the house and property. The defendant was a solicitor in London, and in the year 1858 the defendant bought some other lots of the same property under the same particulars and conditions. It was proved that building was going on in the neighbourhood, the plaintiff's house being within ten minutes' walk of the new railway-station at Norwood. It also appeared that during the preceding year bricks had been burnt in the neighbourhood. It further appeared that during the last seventeen or eighteen years bricks had from time to time been burnt at various parts of the fields of which the site of the clamp in question then formed part; that field having been divided at the time of the sale into various lots. It also appeared that bricks had previously been made on the spot where the plaintiff's house stood. In June, 1860, the defendant (with the view of burning bricks made out of the brick-earth found upon the land, and thereby obtaining bricks to build upon his land) erected a clamp of bricks on lot 14, at a distance of 180 yards from the plaintiff's house.

At the trial it was proved that there was an annoyance to the plaintiff arising from the erection and use of the brick-clamp as complained of in the first count, sufficient prima facie to constitute a cause of action, but it was also proved that the erection and use of the clamp by the defendant as complained of was temporary only, and for the sole purpose of making bricks on his own land and from the clay found there, with a view to the erection of dwelling-houses on his own land, and that the clamp for burning the bricks was placed

on that part of the defendant's land most distant from the plaintiff's house, and so as to create no further annoyance than necessarily results from the burning of bricks; and the single question was, whether under the circumstances so proved an action could be maintained in respect of such annoyance. Upon this state of facts the Lord Chief Justice intimated that the case came within the principle laid down in *Hole v. Barlow* (1), and directed the jury, upon the authority of that case, that if they should be of opinion that the spot was a proper and convenient spot, and the burning of the bricks under the circumstances aforesaid was a reasonable use by the defendant of his own land, the defendant was so entitled to use his land, and would be entitled to a verdict upon the first count, independent of whether there was an interference with the plaintiff's comfort or whether there was not. Upon this ruling of his Lordship a verdict was by arrangement entered for the defendant on the first count, leave being reserved to the plaintiff to move to set aside that verdict if the court should be of opinion that the ruling of the Lord Chief Justice, founded upon the authority of *Hole v. Barlow* (1), was erroneous. Upon the second count a verdict was by arrangement entered for the plaintiff with 1s. damages, but no question arose on that count. In the following Michaelmas Term the court was accordingly moved, on the part of the plaintiff, to show cause why the verdict found for the defendant should not be set aside, and a verdict entered for the plaintiff for 40s. damages; but the court refused to grant a rule.

Mellish, Q.C., Serjeant Petersdorff and Garth for the plaintiff.

Lush, Q.C. (Honyman with him) for the defendant.

Cur. adv. vult.

July 12, 1862. **WILLIAMS, J.**, read the following judgment of **ERLE, C.J., KEATING, J., WILDE, B.**, and himself.—On the argument of this case there was some contest as to what the true question was which the court had to consider. On the part of the plaintiff it was said to have been proved at the trial beyond dispute, that the burning of bricks in the kilns of the defendant was a nuisance, and that the point reserved was whether it was legalised by the other facts which the jury must be taken to have found to exist. On the part of the defendant it was said, that the true point was, whether, under all the circumstances of the case, the burning of the bricks amounted to an actionable nuisance. It is not, perhaps, material which of these contentions is correct, for the Lord Chief Justice at the trial directed the jury, on the authority of *Hole v. Barlow* (1), to find for the defendant, notwithstanding his burning the bricks had interfered with the plaintiff's comfort, if they were of opinion that the spot where the bricks were burnt was a proper and convenient spot, and the burning of them was, under the circumstances, a reasonable use by the defendant of his own land. The jury, consequently, if they were of that opinion, would have been bound to find their verdict for the defendant, notwithstanding they were also of opinion that the brick-kilns of the defendant, by emitting corrupted air upon the plaintiff's house, had rendered it unfit for healthy or comfortable occupation. It was, therefore, treated as a doctrine of law, that if the spot should be found by the jury to be proper or convenient, and the burning of the bricks a reasonable use of the land, these circumstances would constitute a bar to the action, and if there is in truth no such doctrine, there was a misdirection. It is the same thing as if there had been a plea averring the existence of the circumstances and a demurrer to the plea. Such a plea, although it would admit all the allegations in the declaration, would be a good plea by way of avoidance, if the direction of the Chief Justice was right. It is not material to inquire whether it would be good as averring facts which amount to a legislation of the nuisance stated in the declaration, or as superadding facts which, taken together with those stated in the declaration, show that the alleged annoyance was an actionable nuisance.

In either point of view, the question for our consideration appears to be whether *Hole v. Barlow* (1) was well decided, and we are of opinion that it was not. That decision was plainly founded on a passage in COMYNS' DIGEST, tit. "Action on the Case" (letter C) which is in the following words:

"So an action does not lie for a reasonable use of my right, though it be to the annoyance of another, as if a butcher, brewer, etc., use his trade in a convenient place, though it be to the annoyance of his neighbour."

It may be observed that, in the language of this dictum, for which no authority is cited by COMYNS, there is a want of precision, especially in the words "reasonable" and "convenient," which renders its meaning by no means clear; and it may be doubted whether the court, in *Hole v. Barlow* (1), did not misunderstand it. What is a "convenient" place? Does the expression mean, as the court understood it in that case, that the place is proper and convenient for the purpose of carrying on the trade? Or does it mean that it is a place where a nuisance will not be caused to another? It has been pointed out by MR. H. W. WILLES, in his valuable edition of GALE ON EASEMENTS, that this latter sense of the word "convenient" is the one adopted by HYDE, C.J., in *Jones v. Powell* (2), where he says:

"A tan-house is necessary, for all men wear shoes; and, nevertheless, it may be pulled down if it be erected to the nuisance of another; in like manner of a glass-house; and they ought to be erected in places convenient for them."

The term appears to be used in the same sense when applied to questions as to the public nuisances. Thus, it is said in HAWKINS'S PLEAS OF THE CROWN, book 1, c. 75:

"It seems to be agreed that a brewhouse erected in such an inconvenient place, wherein the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance."

It would seem, therefore, that, just as the use of an offensive trade will be indictable as a public nuisance, if it be carried on in an inconvenient place, that is to say, a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an inconvenient place, that is to say, a place where it greatly incommodes an individual. If this be the true construction of the expression "convenient," in the passage from COMYNS' DIGEST, the doctrine contained in it amounts to no more than what has been settled law, namely, that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher, brewer, or the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighbouring house.

In *Hole v. Barlow* (1), however, the court appear to have read the passage as containing a doctrine that a place may be "proper and convenient" for the carrying on of a trade, notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbour. This is a doctrine which has certainly never been judicially adopted in any case before that of *Hole v. Barlow* (1), and moreover, the adoption of it would be inconsistent with the judgment pronounced in some cases cited at the bar during the argument, and more especially in *Walter v. Selfe* (3); and the introduction of such a doctrine into our law would, I think, lead to great inconvenience and hardship, because, as was forcibly argued by counsel for the plaintiff, if the doctrine is to be maintained at all, it must be maintained to the extent that however ruinous may be the amount of nuisance caused to a neighbour's property by carrying on an

offensive trade, he is without redress if the jury shall deem it right to find that the place where the trade is carried on is a proper and convenient place for the purpose.

It should be observed that the direction of the judge to the jury in *Hole v. Barlow* (1), which was upheld by the Court of Common Pleas, was simply that the verdict should be for the defendant if the place where the bricks were burnt was a proper and convenient place for the purpose. But in the present case the Lord Chief Justice's direction to the jury pointed out a further condition, namely, "if the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land." It remains, therefore, to consider whether the doctrine adopted in *Hole v. Barlow* (1), if accompanied by this condition, is maintainable.

If it be good law that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land; but if it is not good law, and if the true doctrine is, that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie whatever the locality may be, then surely the jury cannot properly be asked whether the causing of the annoyance was a reasonable use of the land. If such a question is proper for their consideration in an action such as the present for a nuisance by emitting corrupted air into the plaintiff's house, we can see no reason why a similar question may not be submitted to the jury in actions for other violations of the ordinary rights of property, that is to say, the transmission by a neighbour of water in a polluted condition. But certainly it would be difficult to maintain, as the law now stands, that the jury in such an action ought to be told to find for the defendant if they thought that the manufactory which caused the impurity was built on a proper and convenient site, and that the working of it was a reasonable use by the defendant of his own land. Again, where an easement has been gained in addition to the ordinary right of property (that is to say, where a right has been gained to the liberal passage of light and air), no one has ever suggested that the jury might be told, in an action for obstructing the free passage of light and air, to find for the defendant if they were of opinion that the building which caused the obstruction was erected in a proper and convenient place, and in the reasonable enjoyment by the defendant of his own land. Yet on principle it is difficult to see why such a question should not be left to the jury if *Hole v. Barlow* (1) was well decided. We are, however, of opinion that the decision was wrong, and, consequently, that the direction of the Lord Chief Justice, which was founded on it, was erroneous, and that the verdict for the defendant ought to be set aside, and a verdict entered for the plaintiff.

POLLOCK, C.B.—The question in this case is, whether the direction of the Lord Chief Justice, professing to be founded on the decision of the Court of Common Pleas in *Hole v. Barlow* (1), was right, and, in my judgment, substantially it was right, taking it to have been as stated in the Case, namely, that if the jury thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict.

I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all actions, and useful in deciding them. The question so entirely depends on the surrounding circumstances—the place where, the time when, the alleged nuisance what, the mode of committing it how, and the duration of it whether temporary or permanent, occasional or continual—as to make it impossible to lay down any rule of law

A applicable to every case, and which will also be useful in assisting a jury to come to a satisfactory conclusion. It must at all times be a question of fact with reference to all the circumstances of the case. Most certainly, in my judgment, it cannot be laid down as a legal proposition or doctrine that anything which under any circumstances lessens the comfort, or endangers the health or safety of a neighbour, must necessarily be an actionable nuisance.

B That may be a nuisance in Grosvenor Square which would be none in Smithfield Market; that may be a nuisance at midday which may not be a nuisance at midnight; that may be a nuisance which is permanent and continual, which would be no nuisance if temporary or occasional only. A clock striking the hour, or a bell ringing for some domestic purpose, may be a nuisance if unreasonably loud and discordant, of which the jury alone must judge; but,

C although not unnecessarily loud, if the owner from some whim or caprice made the clock strike the hour every ten minutes, or the bell ring continually, I think that a jury would be justified in considering it to be a very great nuisance. In general a kitchen chimney suitable to the establishment to which it belonged could not be deemed a nuisance; but if built in an inconvenient place, or on purpose to annoy the neighbours, it might, I think, very properly be treated as such. The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, will furnish an indefinite number of examples where some apparent natural right is invaded, some enjoyment abridged, to provide for the more general convenience or necessities of the whole community, and I think the more the details of the questions are examined, the more

E clearly it will appear that all that the law can do is to lay down some general or vague proposition which will be no guide to the jury in each particular case that may come before them. I am of opinion that the passage in *COMYNS' DIGEST* properly understood is good law.

I think the word "reasonable" cannot be an improper word, or too vague to be used on this occasion, seeing that the question whether a contract has been reasonably performed with reference to time, place and subject-matter, is one

F that is put to a jury almost as often as a jury is assembled, and if the act complained of be done in a convenient manner, by which I understand so as to give no unnecessary annoyance, and be a reasonable exercise of some apparent right, or a reasonable use of the land, house, or property of the party "under all the circumstances," in which I include the degree of inconvenience it will produce,

G then I think no action can be sustained if the jury find that it was reasonable, as the jury must be taken to have found that it was reasonable that the defendant should be allowed to do what he did, and reasonable that the plaintiff should submit to the inconvenience occasioned by what was done; and I cannot understand that any person administering the law can pronounce that to be a nuisance which the jury, under all the circumstances, have found to be a reasonable use,

H including this, to be "reasonable" that the defendant should do it, and reasonable that the plaintiff should submit to it. This gets rid entirely of the difficulty suggested by the judgment of *WILLIAMS, J.*, just read. No one can suppose that the jury could find that to be reasonable which produced any ruinous effect upon the neighbour.

I, however, have to add one word with respect to the proposed judgment of the court. The case does not state that leave was given by the consent of the defendant's counsel, or, indeed, at all, to enter a verdict for the plaintiff for 40s. damages. It appears to me that all that the Court of Appeal can do, if it disapproves of the direction of the Lord Chief Justice is to award a venire de novo, that the jury may find a verdict under a proper direction; for there is strong ground for contending that the entire plot of ground, of which the plaintiff's and the defendant's land formed a part, was sold in various lots, on the understanding that the brick-earth should be made into bricks, and burnt, in order to erect houses on the different lots, and it would seem not perfectly just, that the

purchaser of one of the lots should actually turn his brick-earth into bricks, and burn them on his plot, which is the fact here, and build a house, and then deny the same advantage to his neighbours, who have concurred with him in buying other portions of the same ground. It does not occur to me, in the statement of the present case, that this court has the power to enter for the plaintiff a verdict for 40s. In my judgment the decision of the court below should be affirmed.

BRAMWELL, B. (read by **MARTIN, B.**).—I am of opinion that the judgment should be reversed. The defendant has done that which, if done wantonly or maliciously, would be actionable, as being a nuisance to the plaintiff's habitation, by causing a sensible diminution of the comfortable enjoyment of it. This, therefore, calls on the defendant to justify or excuse what he has done, and his justification is this: he says that the nuisance is not to the health of the inhabitants of the plaintiff's house, that it is of a temporary character, and is necessary for the beneficial use of his (the defendant's) land, and that the public good requires that he should be entitled to do what he claims to do. The question seems to me to be, is this a justification in law? In order not to make a verbal mistake, I will say, a justification for what is done is a matter which makes what is done no nuisance. It is to be borne in mind, however, that in fact the act of the defendant is a nuisance such that it would be actionable if done wantonly or maliciously.

The plaintiff then has a *prima facie* case; the defendant has infringed the maxim *sic utere tuo ut alienum non lædas*. Then what principle or rule of law can he rely on to defend himself? It is clear to my mind that there is some exception to the general application of the maxim mentioned. The instances put during the argument, of burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because by the hypothesis they are, and it cannot be doubted that if a person maliciously, and without cause, made close to a dwelling-house the same offensive smells as may be made in emptying a cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases are properly used for testing a principle; nor can it be said that the jury settled such questions by finding there is no nuisance, though there is; for that is to suppose they violate their duty, and if they discharged their duty, such matters would be actionable.

There must be then some principle on which such cases must be accepted. It seems to me that that principle may be deduced from the character of these cases, and is this, namely, that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without submitting those who do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner, not unnatural or unusual, but not the common and ordinary use of land.

Then can this principle be extended to, or is there any other principle which will comprehend the present case? I know of none. It is for the defendant to show it. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another, for the very nuisance the one complained of as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live. But none of the above reasoning is applicable to such a case of nuisance as the present.

It had occurred to me that any unnatural use of the land, if of a temporary character, might be justified; but I cannot see why its being of a temporary nature should warrant it. What is temporary? One, five, or twenty years? If twenty, it would be difficult to say that a brick-kiln in the direction of the prevalent wind for twenty years would not be as objectionable as a permanent one in the opposite direction. If temporary to build a house on the land, why not temporary to exhaust the brick-earth? I cannot think, then, that the nuisance being temporary makes a difference.

But it is said that, temporary or permanent, it is lawful, because it is for the public benefit. In the first place, that law, to my mind, is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But, further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all; so that if all the loss or all the gain were borne and received by one individual, he or the whole would be a gainer. But wherever this is the case, wherever a thing is for the public benefit, properly understood, the loss of all the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site, and accordingly no one thinks it would be right to take an individual's land, without compensation, to make a railway. It is for the public benefit that trains should run, but not unless they pay their expenses. If one of those expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit they should if the wood is not their own. If, though the wood were their own, they still would find it compensated them to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains. So in like way in this case: a money value indeed cannot easily be put on the plaintiff's loss, but it is equal to some number of pounds or pence—£10, £50, or what not. Unless the defendant's profits are enough to compensate this, I deny it is for the public benefit he should do what he has done. If they are, he ought to compensate.

The only objection I can see to this reasoning is, that by injunction or abatement of nuisance a man who would not accept a pecuniary compensation might put a stop to works of great value, and much more than enough to compensate him. This objection, however, is of small practical importance. It may be that the law ought to be amended, and some means provided to legalise such cases, as I believe is the case in some foreign countries in giving compensation; but I am clearly of opinion, that though the present law may be defective, it would be made worse, and be unjust and inexpedient, if it permitted such power of inflicting loss and damage on individuals without compensation, as is claimed by the argument for the defendants. Since the decision of *Hole v. Barlow* (1), claims have been made to poison and foul rivers, and to burn up and to devastate land, on the ground of public benefit. I am aware that case did not decide so much; but I have a difficulty, for the reasons mentioned, in saying, that what has been so contended does not follow from the principles enunciated in that case. If we look to analogous cases, I find nothing to countenance the defendant's contention. A riparian owner cannot take water for the public benefit, he cannot foul it for the public benefit, if to the prejudice of another owner. A common cannot be inclosed on such principles. A window, the fee-simple value of which is 5s., cannot be stopped up by a building worth a million pounds, of the greatest public benefit. I confess, then, I can see no reason or principle for the defendant's contention.

With the greatest respect for those who decided in *Hole v. Barlow* (1), I cannot, for the reasons I have given, agree with it. That case reminds me strongly of what the late LORD TRURO said, that he suspected a case very much when he found it continually quoted immediately after its decision; and certainly *Hole v. Barlow* (1) has been so quoted, and defences made on its authority, which never would have been thought of before it appeared. It stands alone. It is practically opposed to cases of daily occurrence, where such a point might have been made, and was not. It is countenanced by the passage from COMYNS' DIGEST alone, which is contradicted in the same book, and is certainly dealt with by the judgment of WILLIAMS, J. In the result, then, I think it should be overruled, which practically is the question here, and that our judgment should be for the plaintiff. That is, the judgment is reversed.

Appeal allowed.

KIRKWOOD v. THOMPSON AND OTHERS

[COURT OF APPEAL IN CHANCERY (Lord Cranworth, L.C.), June 15, 18, 20, 1865]

[Reported 2 De G.J. & Sm. 613; 6 New Rep. 367; 34 L.J.Ch. 501;
12 L.T. 811; 13 W.R. 1052; 46 E.R. 513]

Mortgage—Sale—Sale of mortgaged property—Purchase by second mortgagees from first mortgagees.

On a sale by first mortgagees under their power of sale part of the property was purchased by the second mortgagees who were in possession of the property and held under an instrument in the form of a trust for sale. On a claim by the personal representatives of the mortgagor to redeem the property and to set aside the sale,

Held: it was a well settled rule that a mortgagee could purchase from the mortgagor and there was no difference in principle between a purchase from a mortgagor and a purchase from a first mortgagee under his power of sale, for his title was derived from the authority of the mortgagor and was paramount to that of the second mortgagee; the position of the second mortgagees in the present case—namely, holding under a trust for sale—did not constitute special circumstances which would preclude the operation of the general rule that a mortgagee might purchase the mortgaged property; and, therefore, the claim failed..

Shaw v. Bunny (1) (1865), 2 De G.J. & Sm. 468, followed.

Notes. Referred to: *Locking v. Parker* (1872), 8 Ch. App. 30; *Re Alison, Johnson v. Mounsey* (1879), 11 Ch.D. 284; *Banner v. Berridge* (1881), 18 Ch.D. 254; *Warner v. Jacob* (1882), 20 Ch.D. 220; *Charles v. Jones* (1887), 35 W.R. 645; *Rust v. Goodale*, [1956] 3 All E.R. 373.

As to who may purchase mortgaged property, see 27 HALSBURY'S LAWS (3rd Edn.) 307, 308; and for cases see 35 DIGEST (Repl.) 567, 568.

Case referred to:

- (1) *Shaw v. Bunny* (1865), 2 De G.J. & Sm. 468; 5 New Rep. 260; 34 L.J.Ch. 257; 11 L.T. 645; 11 Jur.N.S. 99; 13 W.R. 374; 46 E.R. 456, L.J.J.; 35 Digest (Repl.) 567, 2432.

A Also referred to in argument :

Rushworth's Case (1676), Freem. Ch. 13; 22 E.R. 1026; 35 Digest (Repl.) 354, 592.
Rakestraw v. Brewer (1729), 2 P.Wms. 511; Cas. temp. King, 55; Mos. 189;
 2 Eq. Cas. Abr. 162, 601; 24 E.R. 839, L.C.; 35 Digest (Repl.) 354, 593.
Smith v. Chichester (1842), 2 Dr. & War. 393; 4 I.Eq.R. 580; 1 Con. & Law. 486;
 35 Digest (Repl.) 472, *676.

B *Downes v. Grazebrook* (1817), 3 Mer. 200; 36 E.R. 77, L.C.; 35 Digest (Repl.) 569, 2444.

Re Dumbell, Ex parte Hughes, Ex parte Lyon (1802), 6 Ves. 617; 31 E.R. 1223, L.C.; 4 Digest (Repl.) 249, 2256.

A.-G. v. Hardy (1851), 1 Sim. N.S. 338; 20 L.J.Ch. 450; 15 Jur. 441; 61 E.R. 131; 43 Digest 784, 2246.

C *Knight v. Marjoribanks* (1849), 2 Mac. & G. 10; 2 H. & Tw. 308; 47 E.R. 1700, L.C.; 35 Digest (Repl.) 428, 1218.

Parkinson v. Hanbury (1860), 1 Drew. & Sm. 143; 8 W.R. 575; 62 E.R. 332; on appeal (1865), 2 De G.J. & Sm. 450, L.J.J.; (1867), L.R. 2 H.L. 1, H.L.; 35 Digest (Repl.) 580, 2543.

D **Appeal** from a decree of PAGE-WOOD, V.-C., reported 2 Hem. & M. 392, dismissing a bill filed by the plaintiffs, heir-at-law and administratrix of Stephen Kirkwood, to redeem certain hereditaments which had been mortgaged and sold.

In December, 1847, one Stephen Kirkwood conveyed premises to the defendant Thompson and another, as trustees for the North of England Fire and Life Insurance Co. as security for a sum advanced to him by the company; the premises (subject to a prior mortgage) were expressed to be held on trust for sale, out of the proceeds of which should be paid the prior mortgage, and the amount found due thereon, the surplus, if any, to be paid to Kirkwood. After the death of Kirkwood in 1848, the insurance company entered into possession of the mortgaged property, and continued to pay interest to the prior mortgagee. Considerable interest remaining unpaid on that mortgage, the prior mortgagee sold the property in October, 1850, under their power of sale, at a public auction. Part of the property was bought by a director of the insurance company as trustee for the company, which subsequently resold to another company. No notice of the sale was given to the personal representatives of Kirkwood, who now sought to redeem the mortgaged property and to set aside the sale.

G The question in issue was whether there was any rule to prevent a second mortgagee of real estate from becoming a purchaser of the property, on a sale by the first mortgagee under the power of sale contained in his mortgage deed. PAGE-WOOD, V.-C., decided in favour of the defendants and the plaintiffs appealed.

Willcock, Q.C., and *T. A. Roberts* for the plaintiffs.

Giffard, Q.C., and *Kay* for the defendants.

H **LORD CRANWORTH, L.C.**—This case presents no real difficulty. In the first place, that a mortgagee can purchase from his mortgagor is a matter that is always considered as settled, although in some early cases there has been allusion to a doubt on the subject. SIR EDWARD SUGDEN has said that the relation between trustee and cestui que trust (although in some sense that exists I mortgagee and mortgagor) never has been held to exist so that the mortgagee cannot purchase from the mortgagor. That is not disputed.

If that be so, why should there be any difficulty on this subject? The reason why a person standing in the relation of trustee cannot purchase from the cestui que trust is, that he cannot purchase that which he is to sell. He has a duty to perform, and he cannot purchase the property for that would be putting himself in a situation in which his interest would become inconsistent with the duty which he has to perform. The next step is: Can he purchase under a power of sale executed by a first mortgagee? It seems to me to follow as a

necessary corollary, because the sale that is made under the power of sale by a first mortgagee is substantially a sale by the mortgagor, for it is a sale made under an authority given by the mortgagor paramount to the title of the second mortgagee.

There is no difference whatever on the principle of the case between a purchase from a first mortgagee under a power of sale, and a purchase from the mortgagor himself. Even if that were doubtful upon principle, I consider it to have been settled by authority in *Shaw v. Bunny* (1). It is true that the judge, TURNER, L.J., expressed some doubt about it, but that does not signify; it is just the same as if the case were decided in a court where there are several judges, and the majority had so decided; and it is by Act of Parliament determined that the affirmance of a decree of one of the inferior courts by the Court of Appeal is just the same as if it had been so decided by the full court. KNIGHT-BRUCE, L.J., said that he affirmed it, not meaning to say that there might not be special circumstances to vary such a case. The only question is whether there are here any such special circumstances to vary the general rule.

The special circumstances relied on were, first, that the mortgagee was in possession. Being in possession could only make a difference if it created an obligation between the parties which would not have existed if one of them had not been in possession. Nothing of the sort is suggested here; no duty arises on being in possession, except to account to the mortgagor; but there is no duty which would make the relation between mortgagee and mortgagor different from what would have existed if the mortgagee had not been in possession. Then it was suggested that this was not strictly a mortgage at all; that it was merely a conveyance in trust to sell. It is true that it is in form a conveyance in trust to sell; but as between the mortgagor, the person conveying, and the person to whom it was conveyed in trust to sell, it certainly was a mortgage; he took possession, and taking possession, would be liable to account as mortgagee. It cannot be contradicted that, between the parties conveying and the parties to whom it was conveyed, it certainly was a mortgage. There might have been different duties as between him and the mortgagor, if he had sold, than would have existed in the case of a simple mortgagee; but what took place was something that comes in paramount and prior to the exercise of the duties of a trustee. He never can sell, because persons having a paramount title to his choose to exercise that right and therefore prevent the possibility of his exercising his right, which is a trust only to arise if it was ever in his power to sell, which it was not, in consequence of the sale made by the prior mortgagees.

That being so, the next special circumstance that is alleged here is, that the parties stood in such a situation that we must take this as a sale at an undervalue. It was not urged, indeed it could not be urged, that here there was any undervalue as between third parties, so as to enable them to set aside the sale. It was said, however, that the relation between these parties made that capable of being considered in a court of equity as an undervalue which would not have been an undervalue as between strangers. That begs the whole question; because the moment you determine that the mortgagee was entitled to purchase, you put him in exactly the position of a common stranger who purchases, so that there is no reason in the world to consider whether there is an undervalue different from what you would have looked to if any third parties had purchased. It would be out of the question to talk of this as an undervalue; it was competed for at an auction. I agree with counsel for the plaintiffs that the property being sold by auction would not be at all conclusive of the value, but there is no reason to treat this as a sale that was not made in the best manner possible. They had it valued, and steps were taken to secure that it should not be sold at an undervalue. It is perfectly true that, shortly after the sale, the persons who had purchased had made a good bargain; that it was a very speculative sort of property, and that they had an opportunity of selling it at an advance of £1,000. I think,

therefore, that the suggestion of undervalue fails entirely; and that it is not a matter which ought to influence my judgment.

It was then said that some negotiation went on between these parties, and there was some treaty between them. There was no other treaty, except the fact of the first mortgagees wanting to get their money, and they informed the second mortgagees that if they did not pay them off they would sell. They said they wanted to have someone from London to value it; the others said that was a very unsatisfactory mode of valuation; it should be valued by some one on the spot. Some negotiation of that sort took place, but nothing in the world that can create any difference in the position of the parties. I think clearly the decision of the vice-chancellor was perfectly right; and consequently that this appeal ought to be dismissed with costs.

Appeal dismissed.

SMITH v. WEGUELIN AND OTHERS

[ROLLS COURT (Lord Romilly, M.R.), April 28, 29, May 3, 27, 1869]

[Reported L.R. 8 Eq. 198; 38 L.J.Ch. 465; 20 L.T. 724;
17 W.R. 904]

Conflict of Laws—Contract—Foreign contract—Enforcement in England—Contract made between foreigners in foreign country in accordance with foreign law.

Conflict of Laws—Contract—Contract negotiated in foreign country—Government loan—Construction according to law of country negotiating loan.

In January, 1862, the Peruvian government entered into a contract with a Peruvian company, by which the government agreed to consign to the company all the guano permitted to be extracted from the Peruvian guano beds, to be shipped to Great Britain during a period of eight years. The net proceeds of the guano were to be held in London at the disposal of the government, and the company were thereout to set apart preferentially the amounts necessary to provide for the service of the Anglo-Peruvian debt. In August, 1862, the Peruvian government contracted a loan in London, by the terms of which, in addition to the formal guarantee of the government of Peru with all its revenues, the whole of the guano to be imported into the United Kingdom, and the whole of the proceeds resulting from the sale of the guano were hypothecated to secure repayment of the loan. The London consignees were to pay the sums necessary for payment of the interest and payments to the redemption fund, and the surplus proceeds of sale were to remain at the disposal of the government. Eight per cent. on the nominal amount of the loan was to be annually expended, by half-yearly payments, in the redemption of the bonds, by means of purchases at the market price, whenever the bonds should be below or at par, and by public drawing by lot and payment at par, whenever the bonds should be above par. In 1865 the Peruvian government contracted another loan in London, the bonds of which were issued at 83½, and after that date the agents of the government cancelled bonds of the loan of 1862 which they had accepted in payment of bonds of the new loan at 83½ up to the stipulated amount of the redemption fund, instead of buying them at the market price or drawing them by lot in accordance with the terms of the loan. In an action by one of the bondholders of the loan of 1862 on behalf of himself and all other the holders of bonds of

that loan, praying that all the guano in the United Kingdom, and all that should thereafter come into the possession of the company's agents might be applied under the direction of the court, in accordance with the terms of the loan of 1862, and that the company and their agents might be restrained from applying the proceeds of sale of the guano in any other manner,

Held: (i) the contract, being between the Peruvian government and the Peruvian company, was a foreign contract, entered into between foreigners in a foreign country in accordance with Peruvian law and the court had no jurisdiction to interfere in the matter; (ii) when a government negotiated a loan in a foreign country, the contract must be construed, not according to the law of the country in which the loan was negotiated, but according to that of the State negotiating the loan, and the present contract must, therefore, be construed according to the law of Peru; (iii) even assuming that the court had jurisdiction, the Peruvian government was, on the merits, justified in what it did, and had acted within the strict spirit, and according to the due construction of the terms of the loan.

Notes. Followed: *International Trustee for the Protection of Bondholders Aktiengesellschaft v. R.* (1935), 154 L.T. 56. Referred to: *Goodwin v. Roberts*, [1874-80] All E.R. Rep. 628; *R. v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] 2 All E.R. 164; *St. Pierre v. South American Stores (Gath and Chaves), Ltd. and Chilean Stores (Gath and Chaves), Ltd.*, [1937] 3 All E.R. 349.

As to the proper law of contracts, see 7 HALSBURY'S LAWS (3rd Edn.) 72 et seq.; and for cases see 11 DIGEST (Repl.) 420 et seq.

Cases referred to:

- (1) *Duke of Brunswick v. King of Hanover* (1844); 6 Beav. 1; 6 State Tr. N.S. 33; 13 L.J.Ch. 107; 2 L.T.O.S. 306; 8 Jur. 258; 49 E.R. 724; affirmed (1848), 2 H.L. Cas. 1, H.L.; 11 Digest (Repl.) 622, 491.
- (2) *Gladstone v. Musurus Bey* (1862), 1 Hem. & M. 495; 1 New Rep. 178; 32 L.J.Ch. 155; 7 L.T. 477; 9 Jur.N.S. 71; 11 W.R. 180; 71 E.R. 216; 11 Digest (Repl.) 628, 514.
- (3) *United States of America v. Prioleau* (1865), 2 Hem. & M. 559; 35 L.J.Ch. 7; 13 L.T. 92; 11 Jur.N.S. 792; 13 W.R. 1062; 71 E.R. 580; 11 Digest (Repl.) 627, 505.
- (4) *Gladstone v. Ottoman Bank* (1863), 1 Hem. & M. 505; 1 New Rep. 512; 32 L.J.Ch. 228; 8 L.T. 162; 9 Jur.N.S. 246; 11 W.R. 460; 71 E.R. 221; 28 Digest (Repl.) 815, 621.

Also referred to in argument:

- Carron Iron Co. v. Maclaren* (1855), 5 H.L.Cas. 416; 24 L.J.Ch. 620; 26 L.T.O.S. 42; 3 W.R. 597; 10 E.R. 961, H.L.; 11 Digest (Repl.) 547, 1543.
- Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L.J.Ex. 350; 2 L.T. 799; 6 Jur.N.S. 918; 8 W.R. 639; 157 E.R. 1371, Ex. Ch.; 11 Digest (Repl.) 524, 1372.

Action by the plaintiff, William Smith, on behalf of himself and all other the holders of bonds of the Peruvian Loan of 1862, against Thomas M. Weguelin, Wm. Gladstone, Charles Bell, and Christopher Weguelin, carrying on business in London under the firm name of Thompson, Bonar & Co., the other defendants being La Compañía de Consignacion de Huano en la Gran Bretaña, Lima (called hereinafter the Consignment company), the Republic of Peru, and John Derriek Ayres, a bondholder of the Peruvian Loan of 1865.

The bill prayed that all guano in the United Kingdom of Great Britain and Ireland, and the colonies thereof, or consigned thereto respectively, and in or thereafter to come into the possession of Messrs. Thompson, Bonar & Co., or their agents, or of the Consignment company, or their agents, might be applied under the direction of the court, in accordance with the terms of the hypothecation

A thereof for the Peruvian Loan of 1862; and that the defendants might be restrained, by the order and injunction of the court, from applying the proceeds of the sale of any such guano, or permitting them to be applied, to any other purpose than the purchase of bonds of the said loan at the market price, or the redemption of such bonds at par, in case their market price should be above par, until the said loan should be so far redeemed as it would have been if the sinking fund had always been duly provided and applied according to the terms thereof.

Previously to 1862 and at various times the Peruvian government had contracted loans, for the fulfilment of the obligations connected with which the government hypothecated the net proceeds derived from the sale of Peruvian guano in Great Britain and Ireland. The agents for the management of matters connected with these loans were Messrs. Antony Gibbs & Sons. In January, 1862, certain gentlemen made to the Peruvian government a proposal, dated at Lima, on Jan. 21, 1862, for the conclusion by the government of a contract for the consignment of guano from Peru to the United Kingdom of Great Britain and Ireland, and for the formation of a joint-stock company to work the contract. The Peruvian government, on Jan. 28, 1862, accepted the proposal with certain immaterial modifications, and the Consignment company was incorporated as a joint-stock company according to the laws of Peru, for the purpose of carrying out the contract. The contract, by its first article, provided that the government of Peru should consign to the company all the guano permitted to be extracted from the guano beds, to be shipped to Great Britain and Ireland during a period of eight years from the day when the sales in England by Messrs. Gibbs & Son should cease, and that the government should not allow guano to be sold or exported for this market unless by the company. The second article provided that the consignment of guano should comprise solely and exclusively what was exported for the consumption of Great Britain and Ireland, with the prohibition to export it elsewhere unless by authority of the government. By art. 13 the net proceeds of the guano were to be held in London at the disposal of the government. By art. 22 the Consignment company were to set apart preferentially the amounts necessary to provide for the service of the Anglo-Peruvian debt, and of the remainder one third was to be devoted to the reimbursement of the company. Under this contract the whole of the guano shipped to Great Britain and Ireland since January, 1862, was the property of the company, until sold, subject to their accounting to the Peruvian government in manner aforesaid for the proceeds. Shortly after the execution of this contract between the Consignment company and the Peruvian government, the company nominated as their agents instead of Messrs. Gibbs & Son, Messrs. Thompson, Bonar & Co., who were made parties to the present suit in that character.

On Aug. 28, 1862, the Peruvian government contracted a loan in London of £5,500,000, at the rate of £93 for each £100 of stock, bearing interest at the rate of $4\frac{1}{2}$ per cent. per annum, payable at the counting-house of Messrs. Gibbs & Sons (who were afterwards replaced by Messrs. Thompson, Bonar & Co.) every six months on Jan. 1 and July 1 in each year, the first coupon to be paid on Jan. 1, 1863. This loan was subject to certain conditions of which art. 8 provided :

I "In addition to the formal guarantee of the government of Peru, with all its revenues in general, it is expressly stipulated that the said government specially and exclusively hypothecates the whole of the guano that shall be imported into the United Kingdom of Great Britain and Ireland and her colonies, and into the kingdom of Belgium, and the whole of the proceeds resulting from the sale of such guano, after the deduction therefrom of the amount of expenses of shipment, of discharge, of freight, of commissions, and of all customary expenses whatsoever, but no other deductions whatever shall be made. If the net proceeds of the guano hypothecated for the loan

shall at any time from any event soever prove insufficient for the payment of the interest and of the redemption fund provided for by article 12, in such case the government of Peru shall immediately provide whatever sum may be necessary for those payments from other sources, and in particular shall appropriate and use for that purpose the proceeds of any other guano which may at any future time be at the disposal of the government."

By art. 12 :

"The sum of £440,000 being equal to 8 per cent. on the nominal amount of this loan, shall be applied annually as a sinking fund to the redemption of the bonds, which redemption shall commence on Jan. 1, 1863. This sum of £440,000 shall be invariably applied in each year to the said redemption by two equal half-yearly payments, whatever may be the capital of the debt then remaining outstanding. The interest which would have been payable upon any bonds which may have been redeemed and cancelled, shall also be applied to the redemption of the remaining bonds in the same manner as the £440,000. The following shall be adopted in redeeming the bonds, the first included, that is to say, at the end of every half-year, if the bonds should be above par, and the said redemption cannot be effected by purchase at or below par within three calendar months afterwards, the bonds which shall be required to complete the said redemption shall be drawn by lot, in the presence of the diplomatic representative of Peru, of a notary public, and of one of the firm of Messrs. A. Gibbs & Sons, and the numbers of such bonds designated by the drawing for redemption shall be published in the 'Times'; and their payment at par shall take place at the expiration of the half-year, that is to say, three months from the drawing, it being understood that no bond once drawn shall bear interest for any time subsequent to the half-year in which the drawing was held. So long as the stock shall be at or below par the redemption shall be made by means of purchases at the market price, until the sum to be applied to the redemption of the bonds in each half-year shall be exhausted."

By art. 13 :

"The holders of the bonds of this issue shall have all and every the rights and priority of claim upon the guano, or other the privileges attaching to the bonds of the existing debts hereinbefore mentioned which shall be received in payment aforesaid."

The plaintiff contended that the moneys appropriated and hypothecated to the redemption fund ought to have been employed in similar purchases at the market price on the occasion of the redemptions stipulated for Jan. 1 and July 1, 1866, and Jan. 1 and July 1, 1867. He alleged that on none of these occasions, except the last, had any of the bonds been purchased at the market price, and that on the last of these occasions a small part only of the amount of the redemption fund was employed in such purchases, but from the advertisements of the numbers, letters, and amounts of the cancelled bonds, which Thompson, Bonar & Co. (who had succeeded Gibbs & Sons as agents for the Consignment company) had from time to time caused to be inserted in the "Times," it appeared that on all these occasions, including the last, so far as bonds were not then purchased at the market price, they had uniformly cancelled bonds at the rate of $83\frac{1}{2}$ per cent., although the highest quotation of the bonds in the market in the month of January, 1866, was $73\frac{1}{4}$; in July, 1866, 64; in January, 1867, 68 per cent.; and in July, 1867, about 83 per cent. It was alleged by the plaintiff that none of the bonds cancelled at the rate of $83\frac{1}{2}$ per cent. were purchased with moneys belonging to the redemption fund, but that the bonds of the loan of 1862, which had been advertised by Thompson, Bonar & Co., as having

A been cancelled on the respective dates of the advertisements, had been surrendered to the Republic of Peru, in return for the issue of bonds of a loan effected in London by the Peruvian government in 1865, which bonds were issued at 83½. The plaintiff further contended that the defendants had broken the conditions of the loan of 1862, by not purchasing bonds at the market price on the occasion of the redemptions of January and July, 1866, and January and July, 1867, and that he and the other bondholders of the loan of 1862 had been greatly damnified by such breach of the conditions of the loan, as well through the depression of the market price of the bonds as by the delay in the redemption thereof, as a greater number of bonds would have been redeemed, if they had been redeemed at the market price.

C The Republic of Peru were served, but did not appear.

Jessel, Q.C., and Westlake for the plaintiff.

Southgate, Q.C., and C. Hall for Thompson, Bonar & Co.

Sir Roundell Palmer, Q.C., and Kekewich for the Consignment company.

E. Herbert for John Derrick Ayres, a bondholder of the loan of 1865.

Cur. adv. vult.

D

May 27, 1869. **LORD ROMILLY, M.R.**, delivered a judgment in which he stated the contract of January, 1862, and the conditions of the loan of 1862, and continued: The plaintiff is one of the holders of bonds under this issue of 1862. It is to be observed, first, that the loan, though negotiated in London, is not confined to Great Britain, but that all persons may subscribe; and, secondly, that the guano in Belgium, and the Belgian house of consignment, are included in the terms of this loan. The plaintiff contends that there was a breach of the conditions of the loan, and that the effect of it was to depress the market price of the bonds below what it would have stood at if the conditions of the loan had been properly executed. The question is whether the plaintiff is entitled to any, and, if any, what relief?

F

I am of opinion that he is entitled to none. It is obvious that if any party is to blame in this transaction, it is the Peruvian government and that alone. The contract which governs this question is, in my opinion, clearly and unmistakably a foreign contract. It is a contract between the Peruvian government, on the one hand, and the Consignment company, on the other, entered into in Peru between Peruvians, and according to the law of Peru, by which the government, on the one hand, gave leave to the company to consign to their agents in London guano the proceeds of the sale of which to be applied in payment of the loans contracted by the Peruvian government as the government should direct, and the surplus in certain proportions in payment of disbursements with which the plaintiffs have no concern. The Consignment company are bound to follow the directions of the government, and to account to the government. If the Consignment company misapply the proceeds, they are accountable to the Peruvian Republic and to no one else. The Peruvian government are not before the court, and are not amenable to this jurisdiction, and the court is asked, because the Peruvian government have entered into another and distinct contract with the plaintiff, in common with the other bondholders, many of whom are probably not British subjects, or resident in Great Britain, to take an account arising from a foreign contract, between the foreign government and the foreign company, which can bind no one, and have no possible result.

I

The most singular part of the argument was that, though this matter must be dealt with according to Peruvian law, in which, for aught that I am informed of in the suit, the doctrine of trusts is wholly unknown, it is contended that the agents of the Consignment company in London are trustees of the proceeds of the guano for the bondholders, and that the matter must be disposed of according to the English law of trustee and cestui que trust. If this be correct, then the

bondholders who have taken a part of the loan in Belgium are entitled to treat the guano in Belgium in the hands of the Belgian house of consignees as regulated by the law of Belgium. It is, in my opinion, a complete misapprehension to suppose that because a foreign government negotiates a loan in a foreign country, it thereby introduces into that transaction all the peculiarities of the law belonging to that country in which the negotiation is made. The place where the loan is negotiated does not, in my opinion, in the least degree affect the question of law. The contract is the same and the obligations are the same, whoever may be the bondholders. Suppose a French or a Belgian company, residing in Paris or in Brussels, instruct their agent in Peru to subscribe for some of these bonds, is the contract between the Peruvian government and a French company, or between the Peruvian government and a Belgian company, to be regulated by English law because the contract is made by their agents in London, or are the contracts to vary according to the domicile of the subscribers to the loan? If the French government should negotiate a loan on certain specified terms, whether negotiated in Brussels, London, or Paris, the same law must regulate the whole, and that law is the law of France as much as if it had been expressly notified in the articles that French law would be that by which the contract must be construed and governed. So, if the English government were to negotiate a loan in Paris, or in New York, English law must be applied to construe and regulate the contract.

But, assuming that it were otherwise, how can this court interfere? Suppose a palpable breach of the contract between the Peruvian government and the bondholders, and that the Peruvian government declared that it would not pay a penny to any of the bondholders, but would totally disclaim and repudiate them, could this court interfere? Some of the States of North America have negotiated loans partly here and partly at home, and afterwards repudiated them. No one ever attempted to seize any property belonging to that State in this country and enforce a contract between the State government and the holder of its bonds. If the court did try to further such an attempt it would fall into this dilemma, either it would make itself ridiculous in attempting what is impossible, or, if it could assume that the foreign government was answerable and bound to pay, and then found property belonging to the foreign government in this country, the Court of Chancery might authorise the bondholder to alter the relations between the two countries and practically declare war against the foreign country. It is clear that if the Court of Chancery could seize all the guano belonging to the foreign government, it might as well seize Peruvian vessels under the article which declares that all the other property and sources of revenue of the republic should be applicable to payment of the loan. But the case of the plaintiff fails even according to the English law, for I am of opinion that neither art. 8 nor any other article on which the plaintiff relies, according to the true construction of the contract gives him a right to regulate the management of the loan on the guano contract, and that it is not in his power under that contract to restrain the action of the Peruvian government with relation to the price at which the bonds are taken.

Counsel for the plaintiff rely on three cases in particular, namely, *Duke of Brunswick v. King of Hanover* (1); *Gladstone v. Musurus Bey* (2) and *United States of America v. Prioleau* (3). The first case has little to do with the matter; all that I understand to have been decided by it is that a foreign sovereign is not amenable to the Court of Chancery for any act done by him as a sovereign, and that he does not by appearing to a suit waive his right to take that defence, but that if he also has an English character distinct from that of a foreign sovereign, he may in respect of acts done in that character be made amenable.

The second case is that which is principally relied upon. In that case a company in London entered into a contract with a foreign government for the establishment of a bank. The foreign government, in order to secure the execu-

A tion of the contract by the English company, required £20,000 bonds of the foreign government to be deposited in the Bank of England, which were to be forfeited if the contract were not executed. The foreign government thought fit to declare that the contract had been violated, and directed its ambassador to withdraw the deposit, which but for the intervention of this court he would have been able to do. The court refused to make any order as to the ambassador, and allowed his objection to the jurisdiction, but on an interlocutory application restrained the bank from parting with the amount so deposited until the hearing of the cause, on the ground that it held this fund as a trustee for the foreign government or the English company according as the case should be proved at the hearing. It does not appear to me to have any bearing on the present case favourable to the plaintiff. The court did not enforce the specific performance of any contract between the foreign government and the English company, nor did it assume any power to do so; but, as an English company had deposited a sum in the hands of a third party to await a certain result, the court interposed indirectly to prevent the foreign government from taking possession of this fund until it had established that according to the contract entered into with the English company, it was entitled to do so. The court expressed no opinion as to the nature of the contract entered into with the English company, whether it was an English or a foreign contract; all it did was to prevent the foreign government from dealing with the fund as its own before it was shown that the amount was forfeited. Does it, therefore, follow that, at the instance of the English company, the court would have enforced the contract against the foreign government or touched the property of that government in this country, which is what is sought to be obtained here? Indeed, *Gladstone v. Ottoman Bank* (4), where the English company were the plaintiffs and sued, proves that the court would not have done so.

The third case, *United States of America v. Prioleau* (3) has, in my opinion, no bearing on the question before me. It merely establishes that a foreign government which puts down an insurrection in its own territories acquires all the rights of contract which the temporary and insurgent government it displaces possessed or exercised.

Assuming that the court had jurisdiction and could interfere in this matter, then I am of opinion that on the merits the Peruvian government was perfectly justified in what it did. It is said that the price of the shares in the market was from 63 to 73, and that the government paid off the shares at 83½. What possible motive could the Peruvian government have to give more for the shares than they were worth? In truth, the real complaint of the plaintiff is that if the government had gone into the market to buy at the price at which they could have been obtained, they would have risen to par, and would have been paid off by drawing, and that by this means they would have raised the value of the plaintiff's shares. If the government, by private negotiations, had taken the shares at 63, it would not have suited the plaintiff's purpose. He asserts that he bought in the hope of making a profit, expecting that when the government required a large number of the shares the price of them must be raised to par. I am of opinion that, in the absence of any evidence except share lists, if the government had gone into the market the shares would not have risen above £83 10s. By the terms of the contract, the Peruvian government were, in my opinion, entitled to buy where they pleased, in or out of any market, and in any manner they thought fit, and provided that the proper number of original bonds were extinguished, it was wholly immaterial to the other bondholders whether this was accomplished by payment of money, by the delivery of goods, or by the substitution of other bonds, the holders of which might obtain a lien on the guano, subject to the prior right of the plaintiff or the other former bondholders. I am of opinion that any of these means were open to the Peruvian government, and that it was at their option in what manner they extinguished the proper number of bonds, and

that is the transaction which is characterised by counsel as a fraud and gross breach of duty. I think the Peruvian government have acted within the strict spirit and according to the due construction of the articles on which the loan was taken. If they had not done so, I think it is a matter in which the court has no power to interfere; if it did interfere, it would necessitate the taking the accounts between two foreign parties to a foreign contract, both residing abroad, which is contrary to the principles of this court. It is made more difficult from the fact that one of these parties is a foreign government not before the court and cannot be made amenable to it. In all respects I think the plaintiff is in the wrong, and that his bill must be dismissed with costs.

SHEDDEN AND ANOTHER v. PATRICK AND OTHERS

[COURT FOR DIVORCE AND MATRIMONIAL CAUSES (Cresswell, J.O., Wightman and Williams, JJ.), November 9, 10-27, 1861]

[Reported 2 Sw. & Tr. 170; 30 L.J.P.M. & A. 217; 3 L.T. 592;
6 Jur.N.S. 1163; 9 W.R. 285; 164 E.R. 958]

[HOUSE OF LORDS (Lord Hatherley, L.C., Lord Chelmsford and Lord Colonsay), April 27, 29, 30, May 3, 4, 7, 10, 11, 31, June 1, 3, 4, 7, 8, 10, 11, 14, 15, 17, 18, 22, July 2, 5, 31, 1869]

[Reported L.R. 1 Sc. & Div. 470; 22 L.T. 631]

Legitimation—Declarations of relatives made post litem motam—Lis mota—Need to show controversy about subject-matter of action in which evidence tendered.

Held by the Court for Divorce and Matrimonial Causes: To constitute lis mota so as to render inadmissible in evidence declarations made post litem motam there must be more than the existence of facts which may lead to a dispute, or even of litigation on kindred matters. There must have been controversy about that which is the subject-matter of the action in which the evidence is tendered.

Legitimation—Evidence—Declarations of relatives made post litem motam—Declarations made in litigation over many years—Subject-matter of controversy the same throughout.

Practice—Trial—Witness—Recall—Discretion of judge—Exercise with caution.

Court of Appeal—New trial—Fresh evidence—Evidence at time of trial in possession of appellant or procurable by proper diligence.

Held by the House of Lords: (i) Family declarations, made during the progress of many years' litigation in various courts, were properly rejected as made post litem motam, the subject-matter of controversy having been the same throughout, though the ground on which the controversy was originally placed was changed during the litigation.

(ii) Permission to recall a witness is entirely within the discretion of the judge, and is usually exercised with great caution.

(iii) If evidence which either was in the possession of parties at the time of the trial, or might by proper diligence have been obtained, is not produced at the trial, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial.

A Notes. A petition for a decree declaring that the petitioner is legitimate is now brought under s. 17 of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388), as amended by the Administration of Justice Act, 1956, s. 31 (2), and Legitimacy Act, 1959, s. 2 (6).

Considered: *H.M.S. Hawke* (1912), 28 T.L.R. 319; *Nash v. Rochford R.D.C.*, [1917] 1 K.B. 384; *Young v. Grierson, Oldham* (1924), 41 R.P.C. 548. Referred to: *R. v. Copestake, Ex parte Wilkinson*, [1926] All E.R. Rep. 252; *United Molasses Co. v. National Petroleum, Ltd.* (1934), 50 T.L.R. 266; *Davy v. A.-G.*, [1934] All E.R. Rep. 176; *Braddock v. Tillotsons Newspapers, Ltd.*, [1949] 2 All E.R. 306; *Corbett v. Corbett*, [1953] 2 All E.R. 69; *Automatic Woodturning Co. v. Stringer*, [1957] 1 All E.R. 90; *Hext v. Hext*, [1963] 1 All E.R. 774.

As to the admissibility in evidence of declarations, see 15 HALSBURY'S LAWS (3rd Edn.) 302 et seq.; and for cases see 22 DIGEST (Repl.) 71 et seq.

Cases referred to:

- (1) *Berkeley Peerage Case* (1811), 4 Camp. 401, H.L.; 22 Digest (Repl.) 359, 3855.
- (2) *Walker v. Countess of Beauchamp* (1834), 6 C. & P. 552; 22 Digest (Repl.) 117, 1002.
- (3) *Reilly v. Fitzgerald* (1843), 6 I.Eq.R. 335; 22 Digest (Repl.) 73, *440.
- (4) *Freeman v. Phillipps* (1816), 4 M. & S. 486; 105 E.R. 914; 22 Digest (Repl.) 111, 932.
- (5) *Duke of Newcastle v. Broxtowe Hundred* (1832), 4 B. & Ad. 273; 1 Nev. & M.K.B. 598; 1 Nev. & M.M.C. 507; 2 L.J.M.C. 47; 10 E.R. 458; 22 Digest (Repl.) 111, 928.

E Petition for a declaration of legitimacy by William Patrick Ralston Shedden and Anabella Jean Shedden.

The petitioners claimed that they were natural-born British subjects, that W. P. R. Shedden was the son and heir, and Anabella Shedden was a granddaughter, of William Shedden, late of Roughwood, Ayr, Scotland, who died in New York in 1798, that William Shedden also was a natural-born British subject, and that the petitioners were domiciled in England. The petition stated that William Shedden was the son of John Shedden of Roughwood, and his wife Jean Shedden, formerly Ralston. John Shedden was the owner in fee of the estate called Roughwood, and other freehold estates in Ayrshire. He died in 1770 leaving William Shedden his only son, and two daughters—Marion, married to John Patrick, of Trearne, and Anabella, who died unmarried. William Shedden, who was born and resided in Scotland, left that country *animo revertendi*, and went to Virginia about the year 1770, for temporary trading purposes. In consequence of political disturbances which ensued in the North American provinces from 1774 till 1783 his return home was delayed. In 1783 he went to New York to establish certain claims to compensation under the treaty of peace [after the War of Independence] as a British subject who by reason of his loyalty to the British Crown had suffered losses, and also to wind-up his Virginia affairs. He always intended to leave New York and return to Scotland for life as soon as his claims should be settled. Those claims were not settled till 1802, and William Shedden died at New York, on Nov. 13, 1798, being then a British subject, and seised of real estates in Scotland, which had descended to him from his father, and of other real estates which he had acquired.

William Shedden, at the end of the year 1785, married Rachel Kennedy, who soon after died, and by whom he had an only child, a daughter, born in 1786. The petitioners alleged that while he was residing in the State of New York William Shedden was, in 1790, being then a widower, lawfully married to Ann Wilson. From and after their marriage William Shedden and Ann Wilson, then Shedden, lived together as husband and wife, until the death of William Shedden. During that time they acknowledged each other to be husband and wife, and as such were accounted, among their neighbours, friends, acquaintances and

others. The marriage was an open and notorious fact. There was issue of the marriage one daughter, Jean Ralston Shedden, born in 1792, and one son, the petitioner, William Patrick Ralston Shedden, born in 1794. A

The petitioners prayed that the court would pronounce that William Shedden and Ann Wilson were lawfully married prior to the birth of the petitioner, W. P. R. Shedden and his sister Jean Ralston Shedden, and that W. P. R. Shedden was their legitimate son and heir. B

The Attorney-General put the petitioners to the proof, and Robert Shedden Patrick and William Patrick, the parties cited, denied that W. P. R. Shedden was the legitimate son of William Shedden.

The case as summed-up by the counsel on either side, and, as decided by the court, was purely a question of fact, turning principally on documentary evidence, and the conduct of the parties in reference to certain previous suits. The question what constitutes *lis mota* so as to render declarations by members of the family inadmissible in cases of pedigree was, however, discussed, and the following extracts from the documentary evidence are made as being those which had the most direct bearing on the question of fact, and as having given rise to the question of *lis mota*. C

The following was a letter from William Shedden, of New York, to William Patrick, W. S. : D

"New York, Nov. 12, 1798.

"My very dear Nephew,—My long and painful illness must apologise for my long silence. I am now going to quit this world; I have married Miss Ann Wilson, which is approved of by my friends here, and which restores her, and two fine children I have by her, to honour and credit. I have settled all my affairs, and appointed executors here, who will correspond with you. One of my children is a boy, named William Patrick Shedden; they are charming children, he in particular. I have ordered my executors to send him to you. I now remit first of Griffith and Walrond's exchange on Messrs. Thomas Daniel & Co., London, dated Barbadoes, June 23, at 60 days, for £326 15s. 8d., and first of B. Farquharson & Co., on Barclay and Farquharson, London, dated Martinico, July 21, at 60 days, for £91, altogether £417 15s. 8d. sterling; and I desire that such further sum or sums of money may be appropriated for the purpose of maintaining and educating him genteelly and according to his talents and inclination, not exceeding £500 sterling, without the consent of my executors, of whom you are to be totally independent in this business. I can only add, that I remain till death, dear William, your affectionate uncle, E F G

WILLIAM SHEDDEN."

This letter and the first of exchange were, according to William Patrick's evidence, received by him in due course of post, and also two copies with second and third of exchange, in the handwriting of William Shedden's clerk. The original was not forthcoming. William Patrick said he had sent it, with other documents and letters, to W. P. R. Shedden in October, 1823, and had not received it back. W. P. R. Shedden admitted the receipt of certain documents in October, 1823, but alleged that he had returned them. A letter written by him to Mr. William Patrick, dated Edinburgh, Jan. 3, 1824, proved that some letter of his father had been received by W. P. R. Shedden : H I

"Dear Sir,—On my arrival last night from the West Country I received your letter of the 31st ult., and I have to thank you very sincerely for the letter of my father's to you, and the obituary. As I have never seen my father's handwriting before, you will easily be assured that it is a dear relic to me, being perhaps his last signature in this world. The time that is now left me before bidding you farewell is so short, that I am only able to make

A you a hurried acknowledgment; in doing this I beg leave to say that no person in the world can lament more deeply than I do the cause which has given rise to my unfortunate feelings and sufferings. . .

I regret exceedingly that your brother in America should, as an executor, and my father's nephew, have drawn up such an unfortunate paper for the counsel's opinion; and above all, that you, the best and almost only friend
B I have in the world, should have made use of it; yet while I live I can never forget you, and I hope you will allow me to be, and believe me still to remain, your sincere and affectionate friend.

W. P. R. SHEDDEN."

The following letter was written by John Patrick, of New York, to William
C Patrick, W. S. :

"New York, Nov. 9, 1798.

"Dear William,—It is with the most extreme sorrow I have now to inform you that our friend Mr. William Shedden's disorder has at last arrived at a crisis. He is at this moment in the most advanced stage of an unconquerable consumption, and all the weakness of mortality before his eyes.
D Every revolving hour threatens a dissolution to his existence. . . . But this is not all; he has, from considerations which he conceived moral, natural, legal and proper, at the moment when eternity was staring him in the face, united himself in matrimony to a woman who has for many years lived with him in a very different situation. His object in thus proceeding was to rescue from a state of bastardy, and introduce into the world, with all the privileges appertaining to those who are born under the influence of the law, two infant children, one a girl of about six years old, the other a boy of about five. The ceremony only took place on the 7th inst. It was to him a hard struggle; but the considerations above mentioned preponderated. I, of course, was not consulted, but he communicated the whole of it to me after it had taken place,
F with his motives. It was out of my power to interfere or prevent it, nor was it my wish. I have always had a pride in acting in things of that sort with a spirit of independence and propriety, nor did I ever interfere. In addition to that instrument he has likewise executed his last will and testament, the substance of which I am unable to communicate at present; but you may, of course, guess nearly the contents. On his deathbed (which
G it will doubtless prove) he communicated to me things that have been hid from the world; facts that would excite surprise. He likewise requested me to accept the office of executor, in conjunction with two others who are but little connected, to which I consented, being unwilling to refuse this last request, although it will indubitably entail on me a world of toil, trouble and difficulty, and, besides, place me in a situation that may prove unpleasant and delicate,—but the thing is done. Besides the two children mentioned,
H he has one other, a girl of about twelve years old, by another woman who is long dead—his very image—but who can reap no benefit from the measures adopted, being considered in the eye of the law a bastard."

This letter proceeded to point out the difficulties which the writer apprehended
I might arise between the children and others of the family. There was an addition, dated evening of Nov. 9, detailing the progress of William Shedden's disorder, and a further addition, under date Nov. 11 :

"In the morning Mr. Shedden gradually approaches his end. He has looked into his affairs and wrote his friends; he has two important letters to write, and he dies contented: one is to you respecting his children, &c.; the boy is to be sent to Scotland. . . . I requested him, if possible, to write to my brother Robert; his susceptible breast I know would be much gratified."

Mr. William Shedden died on Nov. 13, 1798, which event was communicated to William Patrick, W. S., by letter dated New York, Nov. 18, 1798. A

There were also put in evidence letters from William Patrick, of Virginia, to Miss Jane Shedden, of Beith, in Scotland, dated New York, Dec. 8, 1798. From the same, to the same, dated New York, Feb. 22, 1799. Other letters of John Patrick to Robert Shedden, of London, from New York, in the month of November, 1798; from Robert Shedden, jun., dated New York, Dec. 11, 1798, to Robert Shedden, sen., and other similar ones, all containing allusions and declarations respecting Mr. William Shedden's deathbed, marriage and previous cohabitation, to the same effect as the statements in John Patrick's letter of Nov. 9. It was admitted that, as declarations of members of the family in a question of legitimacy, they were admissible if made ante litem motam: *Berkeley Peerage Case* (1); the COURT observing: B

"We cannot find, since the *Berkeley Peerage Case* (1), that the fact of the lis being known or not known to the person making the declarations would affect the admissibility. Any doubt on this point can only have arisen from a note in TAYLOR ON EVIDENCE (3rd Edn.), p. 520." C

Counsel objected to the admissibility of the letter of Nov. 9, 1798, and the others, on the ground that a letter from William Patrick, W. S., of Dec. 31, 1798, in answer to that of Nov. 9, 1798, showed that the declarations sought to be used were not the natural effusion of unbiased and even minds: WOOD, B.'s, opinion in the *Berkeley Peerage Case* (1). He cited the definition of ALDERSON, B., of the commencement of a controversy (in which sense lis mota was to be taken in such cases), to be the arising of a state of facts on which the claim is founded, without anything more: *Walker v. Countess of Beauchamp* (2). D

By the COURT.—That opinion was repudiated by SIR EDWARD SUGDEN when Lord Chancellor of Ireland: see *Reilly v. Fitzgerald* (3), cited in TAYLOR ON EVIDENCE (3rd Edn.), p. 516. E

THE COURT, without calling on counsel on the other side, proceeded to express their opinion. F

CRESSWELL, J.O.—The declarations are admissible. The letter by John Patrick of Nov. 10 was commenced three days before the death of William Shedden. We cannot carry back the letter of William Patrick of Dec. 31 to that date. We must judge of the feelings of the party from what he knew at the time, and when it is said that there was then lis mota, I am of opinion that that means a controversy about that which is the very subject-matter of the action in which the evidence is tendered. There was then no controversy as to the deathbed marriage, or as to the fact that William Shedden and Ann Wilson had lived together previously. G

WIGHTMAN, J.—The whole of the argument was founded on certain expressions of ALDERSON, B., but the cases decided since establish that there must be not merely the existence of facts which may lead to a suit, but an actual controversy; and secondly, that if a controversy exist, it must be on the very point in respect of which the declarations are sought to be used. So far as we know, down to 1848 there was no question as to any marriage previous to that of Dec. 7, 1798. H

WILLIAMS, J.—I am of the same opinion. The point is quite clear. The controversy which is to exclude such evidence must be controversy in respect of the very point in dispute. It is quite immaterial that there has been controversy, even litigation, on kindred matters if the point itself has not been raised. The learned judge referred to *Freeman v. Phillipps* (4), and *Duke of Newcastle v. Broxtowe Hundred* (5), PARKE, B.'s, judgment.] I

Counsel then addressed the court on behalf of their clients.

A CRESSWELL, J.O.—We have now arrived at the last stage of a singular inquiry, the length and complexity of which impose a considerable responsibility on the court. Among the court there is a perfect union of opinion. We feel that we have before us no nice question of balanced evidence to decide, and have had no difficulty in arriving at a clear and unhesitating opinion. The question is one of fact, whether a marriage was really solemnised between the father and mother of the elder petitioner [the appellant W. P. R. Shedden] before his birth? The reasons I proceed to give for the conclusion at which we have arrived are my own only. [The learned judge commented on the evidence before the court, in the course of which he expressed his conviction of the genuineness of the deathbed letter and that the petitioners' case had wholly failed.]

C WIGHTMAN, J., adverted to the prominent points of the evidence on which his judgment was founded. He said that he was inclined to think that the petitioners had made out a *prima facie* case; but, on the consideration of the whole evidence, that was fully rebutted, and he had no doubt of the genuineness of the letter of Nov. 12.

D WILLIAMS, J., said that he was clearly of the same opinion, and did not consider it necessary to go over the evidence again.

THE COURT, therefore, pronounced that the elder petitioner was not legitimate, and not a natural-born British subject, and condemned the petitioners in the costs of the petition.

E The petitioners appealed to the House of Lords.

The appellants argued their case in person.

Mellish, Q.C., Powell, Q.C., Bourke and Ashley for the respondents, were not called on to argue.

F Their Lordships took time for consideration.

July 31, 1869. Their Lordships read opinions in which they made the following statements.

G LORD HATHERLEY, L.C.—The appeal in this case is from two orders of the Court for Divorce and Matrimonial Causes, the one being a decree by which it was declared in substance that the appellants had failed to make out the case which they propounded to the court, namely, a case in which they sought, under the Legitimacy Declaration Act, 1858, for a declaration with reference to the nationality and legitimacy of William Patrick Ralston Shedden. His daughter, Miss Shedden, appeared in the same suit as being a party interested in the declaration that was sought; every person so interested being, under the Act, entitled to appear. The other parties, who are now respondents before us, were cited as being persons interested in the consideration of the question. The first decree declared against the claim of the appellants; and the second proceeding, as to which there is an appeal, was a refusal on the part of the learned judge who tried the case to direct a new trial. Since that there has been put in a sort of supplementary application on the part of the appellants to your Lordships with reference to the custody of certain documents which are alleged to be false documents, or documents which have been in some way or other tampered with.

I With reference to the proceedings which have taken place before the judge of the court below, and which led to his decree, the complaint is this—(i) that the learned judge ought to have tried the issue by a jury; (ii) that the decision come to by the judge, with the assistance of two other most learned and able judges (*WIGHTMAN* and *WILLIAMS, JJ.*), was against evidence; (iii) that improper

evidence was admitted; (iv) that evidence that was tendered on the part of the appellants was improperly rejected; (v) that the appellants were taken by surprise, which was part of the foundation of the application for a new trial; and (vi) that new and material evidence has been discovered since the trial, upon which ground also the motion for a new trial was rested. As to the last two points, viz., the being taken by surprise, and the discovery of new evidence, there is really scarcely a question. The main questions that we have to consider are, in the first instance, whether the decree of the court was against the evidence then before it; whether the evidence then before the court consisted of anything that ought not to have been received; and lastly, whether there ought to have been other evidence before the court which was tendered and rejected. [HIS LORDSHIP reviewed the evidence, and continued:] I am, therefore, of opinion that the decision of the court below was according to the evidence. I am clearly of opinion that nothing was improperly excluded, and that nothing was improperly admitted.

[HIS LORDSHIP dealt with the contention that the appellants' petition should have been tried with a jury which, in view of the present Rules of the Supreme Court, it is unnecessary to report, and concluded:] I move your Lordships that these appeals be dismissed with costs.

LORD CHELMSFORD.—This is an appeal and supplemental appeal against two decrees or orders of the Court for Divorce and Matrimonial Causes, dismissing a petition presented by the appellants under the Legitimacy Declaration Act, 1858, by which they prayed that court to pronounce that William Shedden and Ann Wilson, the father and mother of the appellant William Patrick Ralston Shedden, were lawfully married prior to his birth, and that he was their legitimate son and heir, and a natural-born subject of Her Majesty.

I proceed to consider whether the appellants were entitled to a new trial on the ground of the rejection of evidence which ought to have been admitted, or the admission of evidence which ought to have been rejected. In order to lay the foundation for objections of this kind it is necessary to show that the question proposed to be put was formally tendered to the judges and rejected by them, or that the evidence admitted was received after having been objected to. The only authentic information as to the admission or rejection of evidence is the judges' notes. From them it appears that declarations of members of the family, made over a number of years, were rejected as having been made post litem motam. It was argued by the appellants that the rejection of these declarations was improper, because the previous lis or controversy, upon the ground of which they were included, was not, upon the very point which was in contest in the case then before the court. But in all the litigation which has taken place, and which commenced long prior to any of the declarations offered in evidence, the question in dispute was the legitimacy of the appellant. The subject-matter of controversy was the same throughout, although the ground upon which it was originally placed was changed during the litigation. No declaration of the legitimacy of the appellant, offered in evidence, was properly admissible. The appellants tendered in evidence certain extracts from Lloyd's books to show that only two vessels arrived from New York between certain dates in the beginning of the year 1799. It was proved that Lloyd's lists contain a report of the arrival and departure of vessels, which is printed from letters received daily from agents at the different ports. The court very properly rejected this evidence, as the books could not be of higher authority than the letters from which the entries were made, and the letters themselves clearly would not have been admissible. The appellants complained of the rejection of William Shedden's ledger, which was made up by his executors after his death. But it would have been contrary to one of the commonest rules of evidence to allow the account books of one person to be read in evidence against another, who was a stranger to their contents.

The appellants objected to the refusal of the judges to permit Miss Jean Ralston Shedden to be recalled to make some additions to her evidence previously given. The permission to recall a witness is entirely in the discretion of the judges, a discretion usually exercised with great caution, on account of the obvious danger of the proposed evidence being skilfully applied to supply any deficiencies which might have been left in the case upon the former proofs. I think the judges exercised a very sound discretion in refusing to allow this witness to be recalled towards the close of the case for the petitioners.

It has not been shown that any evidence was either admitted or rejected which would entitle the appellants to a new trial.

With respect to the application for a re-hearing, founded upon affidavits of the appellants, which was unanimously refused by the court, it is unnecessary to offer many observations. The affidavits, which were of a most irregular and unusual character, consisted partly of attacks upon the characters of some of the witnesses and of contradiction to their testimony, asserted to be proveable by documents and conversations, partly of arguments upon the evidence before the court at the trial, to show that the judges had come to an erroneous conclusion; and, lastly, of allegations of being taken by surprise at the evidence produced at the trial, and of statements of new evidence in the possession of the parties, and of additional evidence which had not been, but which might be, obtained by them. With respect to the grounds of application founded upon the impeachment of the credit of the witnesses, and upon the alleged erroneous view of the facts of the case taken by the judges, these were not the proper subjects of affidavits; but they ought to have been argued solely upon what was presented to or appeared before the court at the trial. It was for the judges to decide upon the credit due to the witnesses from their demeanour, as well as from the evidence which they gave, or which was offered against them; and if there were circumstances to impeach their credit which might have been produced at the trial, but which were not brought forward, the appellants could not be allowed another opportunity to rectify this omission. The appellants had no right to make their affidavits a vehicle for reasoning the case as to the alleged miscarriage of the judges. They could only regularly take the evidence as given at the trial, and argue from that evidence against the conclusions at which the court arrived.

As to the suggestion of further evidence than that produced at the trial being, at the time of swearing the affidavits, in the possession of the appellants, and of other evidence being obtainable which was not then obtained, the judges were quite right in refusing a re-hearing upon these grounds. It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial. If this were permitted, it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right if they failed to have the case re-tried upon additional evidence, which was all the time within their power. The learned judges were so clear as to the affidavit not furnishing sufficient grounds to entitle the appellant to a re-hearing, that they did not require any answer from the other side, but refused even a rule to show cause why there should not be a re-hearing; and I do not see the slightest reason to doubt the propriety of the determination at which they arrived. The appeal must be dismissed.

LORD COLONSAY said that after considering the evidence and the voluminous documents which had been put in he had arrived at the conclusion that the judgment was right upon the evidence as it was presented to the court. The

verdict was not against the evidence, nor was evidence improperly rejected. Then there comes the question of *res noviter veniens ad notitiam*. As to surprise, I cannot find anything set forth in these affidavits that the law would regard as surprise; and it is only upon matters which the law regards as surprise that a new trial could be granted. As to that matter, I think it is plain upon the face of the affidavits that there is nothing of the kind set forth that would be relevant and competent evidence in the cause. On the contrary, I think it came out in evidence and in the discussion that some of the main points now brought forward were matters known to him at a very early period. The law does not consider the mere discovery of a document, or the mere discovery of a fact, to be a matter *noviter veniens ad notitiam*, as giving a right to a new trial. It must be a matter not only that was not, in point of fact, before known to the party, but which the party could not, by reasonable inquiry, such as he ought to have made, have put himself in possession of. I see nothing of that kind here. I, therefore, feel that I am forced to arrive at the same conclusion as the rest of your Lordships with regard to the dismissal of these appeals.

Appeals dismissed.

EARL OF NORBURY v. KITCHIN

[COURT OF EXCHEQUER (Pollock, C.B., Channell, Wilde and Martin, BB.),
January 13, 14, 1863]

[Reported 1 New Rep. 241; 7 L.T. 685; 9 Jur.N.S. 132]

Water—Riparian rights—Right of riparian owner to take water—Amount—Reasonable quantity having regard to all circumstances—Use of pumping machinery.

A riparian proprietor **held** to have a right, by means of water-wheels and machinery, to pump water from a natural stream flowing past his land up to a supply tank from which it was directed to form an artificial pond or lake on his property and was also taken in pipes to his house, and there to apply it to domestic purposes; provided he took only a reasonable quantity, having regard to all the circumstances, including the size of the stream and the rights of his neighbour; but he had no right to take more water by means of the wheels and machinery than he would have a right to take otherwise.

New Trial—Misdirection—Misdirection directly on question to be decided by jury.

Per Curiam: Whatever mistake is made by a judge in directing a jury in point of law, unless it immediately applies to the subject-matter, and goes directly to the point which the jury has to determine, limiting and directing their verdict in point of fact, is utterly unimportant with reference to the right of the suitor to a new trial. If the judge, in laying down a proposition of law, states a part of it incorrectly, or quotes a passage from an authority as good law which counsel contends is bad law, and those errors do not concern the particular question of fact which alone the judge leaves to the jury, that is no such ground for a new trial, for, as the question of law so quoted to the jury did not concern the matter which they had to consider, so the wrong determination of that question can have no improper effect on their verdict.

Notes. Referred to: *Ormerod v. Todmorden Mill Co.* (1883), 11 Q.B.D. 155.

As to riparian rights, see 39 HALSBURY'S LAWS (3rd Edn.) 514 et seq.; and for cases see 44 DIGEST 11 et seq.

A Case referred to :

- (1) *Miner v. Gilmour* (1859), 12 Moo. P.C.C. 131; 33 L.T.O.S. 98; 7 W.R. 328; 14 E.R. 861, P.C.; 44 Digest 16, 79.

Also referred to in argument :

Embrey v. Owen (1851), 6 Exch. 353; 20 L.J.Ex. 212; 17 L.T.O.S. 79; 15 Jur. 633; 155 E.R. 579; 44 Digest 18, 95.

Wood v. Waud (1849), 3 Exch. 748; 18 L.J.Ex. 305; 13 L.T.O.S. 212; 13 Jur. 472; 154 E.R. 1047; 44 Digest 37, 268.

Sampson v. Hoddinott (1857), 1 C.B.N.S. 590; 26 L.J.C.P. 148; 28 L.T.O.S. 304; 21 J.P. 375; 3 Jur.N.S. 243; 5 W.R. 230; 140 E.R. 242; affirmed 3 C.B.N.S. 596, Ex. Ch.; 44 Digest 21, 122.

Mason v. Hill (1833), 5 B. & Ad. 1; 2 Nev. & M.K.B. 747; 2 L.J.K.B. 118; 110 E.R. 692; 44 Digest 5, 1.

Chasemore v. Richards (1857), 2 H. & N. 168; 26 L.J.Ex. 393; 3 Jur.N.S. 984; 5 W.R. 780, Ex. Ch.; affirmed (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 5 Jur.N.S. 873; 23 J.P. 596; 7 W.R. 685; 11 E.R. 140, H.L.; 44 Digest 34, 252.

D **Rule Nisi** for a new trial in an action for wrongfully diverting, stopping and fouling a watercourse.

The plaintiff was the owner and occupier of an estate called Valence or Hill Park, in the parishes of Westerham and Brasted, in Kent, and the defendant was the owner and occupier of an adjoining farm and estate. The watercourse in question was a natural stream, which rose from a farm of the defendant,

called Piper's Farm, adjoining the plaintiff's park. From the defendant's farm it flowed down into the plaintiff's park through a pond on the farm just outside the park called Cutmill Pond. Here in 1858 the defendant had erected water-wheels and machinery, the effect of which was to pump up the water in the pond about 150 feet above its level, and then direct it by a pipe to a supply

tank, and thence to an artificial pond or lake on another property of the defendant's called the Dunsdale estate, adjoining, and formerly forming one estate, with Valence or Hill Park belonging to plaintiff. From Cutmill Pond the natural stream ran through the plaintiff's park to and through several ornamental ponds or lakes therein, and to the plaintiff's mansion, and the effect of the defendant's work had been, as was alleged, to lessen the flow of water thereto. Between the

park and the Dunsdale property there was a ridge of land about 160 feet above the level of Cutmill Pond, so that but for the artificial works the water could not be brought to the Dunsdale estate. The wheel was between Cutmill Pond and the park, just inside the defendant's farm, so as to intercept the stream as it ran from the pond into the park. The wheel was a common water-wheel constructed with buckets, into which the water fell, and the water ran from the

pond upon it. The wheel worked two pumps, which raised the water, and it was then taken through pipes to the reservoir or supply tank on the defendant's property. The tank was 153 feet above the level of the pond, and it was capable of containing 13,000 gallons. From that reservoir the water was taken in pipes down to the defendant's house. There was also a waste-pipe connected with the waterworks by which the water, which was pumped up in excess beyond the capability of the reservoir to contain it, was carried off and discharged into the stream below the plaintiff's premises, and out of his reach.

The cause was tried before MARTIN, B., and a special jury, at the Maidstone assizes, in July, 1862, when it appeared by the plaintiff's evidence, that the supply of the water to the plaintiff's park had been greatly lessened and deteriorated, and that sometimes the supply had been wholly stopped by the action of the wheel, and at times also it had flowed down in a foul and dirty condition. The stream ran into the river Darent, and the water bailiff employed by the millowners on that river was called to prove a diminution in the quantity

of the water poured into the river from the stream since the works in question. The wheel raised and diverted about 10 gallons a minute, or 600 gallons an hour. On behalf of the defendant it was contended that he had a right to take away a reasonable portion of the water, so that he did not sensibly or materially diminish the quantity of water available for the plaintiff. He denied that he had done so permanently, although in the course of the erection of the works, etc., or in cleaning the pond, etc., there may have been a temporary obstruction of the flow of water. The defendant's evidence showed that his works took up, on an average, from 6,000 to 9,000 gallons a day, or one-fortieth part of the whole bulk of water which ran into Cutmill Pond. The highest quantity of the entire flow was 332,000 gallons a-day, and 9,000 gallons a-day might possibly be taken up by the pumps, i.e. about one-thirty-seventh part of the whole, and that this was a proportion of the water which, although appreciable was not really material.

The learned judge, in summing-up the case to the jury, said the right to a natural stream was very like the right to the air. It was as free as the air. So long as the stream ran through a man's land, it was, in a certain degree, his. He laid down the law upon the subject, as in *Miner v. Gilmour* (1). It was not there said that the owner of the land through which the water ran had only a right to take away an inappreciable quantity of the water, but any quantity, subject only to the condition that he did not inflict any sensible injury on other proprietors, or interfere with the lawful use of the water by them. The real complaint here was that the diversion of a part of the water and its occasional damming up was not of much consequence to the plaintiff, who put the water to no practical use. The question whether the quantity of water taken was reasonable must in a degree depend upon the entire quantity of water in the stream; and it was for the jury to consider whether the defendant took an unreasonable quantity. The total of the stream was about 330,000 gallons a-day and the defendant took from 6,000 to 9,000 gallons a-day, and left the rest to flow on to the plaintiff. The defendant had no right to take more by means of his wheels and waterworks than he would have a right to take otherwise, but he had a right to take as much as he wanted for domestic and other purposes of utility so that it was not an unreasonable quantity with reference to his neighbour's rights, and he must take it in a reasonable way. If what had been done by defendant had been done in a reasonable and proper manner, in the fair and reasonable exercise of his legal right, then any mere temporary inconvenience caused would not be a ground of action.

The jury found a verdict for the defendant as to the right to divert the water, and that the quantity taken by him was reasonable. But as to the damming back, they said it was objectionable, and thought it should be altered so as not to interfere with the natural course of the stream. As to that, and also as to the taking water for the ornamental pond, they found for the plaintiff with a farthing damages on each head. The verdict was entered for the defendant on his plea of "not guilty" to the first count; for the plaintiff with a farthing damages on "not guilty" to the second count; for the plaintiff with the like damages on "not guilty" to the third count; for the plaintiff on the second plea, denying the plaintiff's right to the benefit of the flow of the stream; for the defendant on the third plea, as to the use of the water in exercise of the defendant's right as riparian owner; and as to all the remaining issues on the defendant's special pleas, the jury were discharged, by consent, from giving any verdict.

A rule nisi was obtained for a new trial, on the grounds (i) that his Lordship should have directed the jury that the defendant had no right to divert and take the water as he did for the Dunsdale estate; (ii) that the learned judge ought not to have told the jury that the defendant, as a riparian proprietor, would have a right to take the whole of the water of the stream if he required it for his

reasonable use; (iii) that his Lordship should have directed the jury that the defendant was not entitled to take the water by the pumps and machinery, and to pump it up into the large reservoir; (iv) that his Lordship should have directed the jury that the defendant had no right to take the water for the gasworks, though the gasworks were connected with the defendant's house, nor for the ornamental ponds, if the verdict is considered as entered for the defendant upon that part of the case; (v) that the direction of the learned judge, being at variance with the above propositions respectively, was not correct.

Serjeant Shee, Hawkins, Q.C., and J. P. Murphy showed cause against the rule. *Bovill, Q.C., Lush, Q.C., and Honyman* supported the rule.

POLLOCK, C.B.—We are all of opinion that this rule ought to be discharged. **CHANNELL, B.**, who is not now present, was of the same opinion. The action was brought for withdrawing water from Lord Norbury's service, and the verdict was found for the defendant in respect of one question, which is the only important question, namely, whether the defendant had taken an unreasonable quantity under all the circumstances.

My brother MARTIN laid down at the trial that no taking of the water for purposes other than those of utility could be justified. The jury, therefore, in accordance with my brother MARTIN's direction, found that the taking the water for those other purposes was not justifiable, and found a verdict for the plaintiff, but gave a farthing damages in respect of those matters which were complained of. The argument of counsel supporting the rule chiefly amounts to this, that the rule of law laid down by the Privy Council in *Miner v. Gilmour* (1) is not correct. That law was laid down by my brother MARTIN to the jury at the trial, and, therefore, counsel contended that he was entitled to a new trial. It appears to me that, whether we take the report of the shorthand writer or the probably more accurate report taken by a learned reporter, handed up to us (3 F. & F. 292), in which the substance of the summing-up is, I think, very clearly and accurately stated, the result is the same. Whatever mistake is made by a judge in directing a jury in point of law, unless it immediately applies to the subject-matter, and goes directly to the point which the jury has to determine, limiting and directing their verdict in point of fact, is utterly unimportant, with reference to the right of the suitor to a new trial. If, in laying down a proposition of law, a part of it be incorrectly stated, having no application whatever to the subject before the court, that is wholly immaterial. To what end complain that it has been improperly laid down that a riparian proprietor may take the whole in a case where the flow of water was upwards of 300,000 gallons, and it was quite clear that the defendant had never taken more than from 6,000 to 9,000 gallons? Whatever, therefore, may be the law in a case that would, I should think, very rarely occur, and which, in my professional experience, I never met with, where the riparian proprietors were contending about a few pints of water flowing down, and who should have the smaller quantity, yet in a case where the quantity is so abundant as in the present case, to what end complain that an extreme case was alluded to and an opinion adopted of a learned judge in a matter, as far as this case is concerned, I think, purely hypothetical? For whether or not a riparian proprietor may take the whole to the utter disregard of the wants of those to whom the water is to flow is a matter wholly immaterial to the present question.

Then it was contended that this had a tendency to mislead the jury, for, if a man has a right to take the whole, the jury might be misled by supposing that, if he might take the whole, why of course it would not be unreasonable in him to take from 6,000 to 9,000 gallons. No such result, in my judgment, at all follows. As far as I can collect, my brother MARTIN never adopted, for the purpose of this case, any part of that judgment of which counsel supporting the rule complains.

My brother MARTIN read the judgment to the jury as giving them what he considered to be the state of the law as laid down in that case, but then he disposed of the present case by putting certain specific questions to the jury, questions which I think were perfectly correct, and, in my judgment, the jury have very satisfactorily and correctly answered them. The questions whether the defendant had a right to use the machinery, whether he had a right to apply the water to wash gaspipes, or to purify the gas itself, or to use it for any other extraordinary purposes of domestic life, not known to our ancestors, do not at all arise. None of these questions was so specifically presented as to be in any degree the foundation for a just application for a new trial. I think, therefore, upon the whole, the questions that arose and were presented to the jury were the true points upon which the cause turned, and by the answers to which the case was correctly disposed of. I think these questions were properly put; I think they were correctly answered; and I think the result of the whole matter is that there ought not to be a new trial, and that this rule must be discharged.

WILDE, B.—I am of the same opinion. The question turns upon a supposed misdirection of the judge, who quoted in his summing-up a passage from the decision of the Privy Council [in *Miner v. Gilmour* (1)], and it is stated that the passage which was so quoted was bad law, and that, as the learned judge quoted it to the jury, and expressed his opinion that it was good law, that necessarily must be misdirection. I do not propose to offer any opinion whether it is good or bad law, because I do not think that question arises, for I think that the learned judge, in what he said about that particular passage of the judgment, was speaking of something that did not concern the particular question of fact which, alone, he left to the jury in this case; and as the question of law so quoted to the jury did not concern the matter which they had to consider, so the wrong determination of that question can have no improper effect on their verdict.

What was the question that the learned judge did leave to the jury? And was the question that he did so leave to them entirely independent of that proposition of law? I have looked, with great care, at the two reports that have been handed to me—the one a printed report (3 F. & F. 292)—and, in that report I find that the learned judge told the jury that:

“The defendant had no right to take more by means of his wheels and waterworks than he would have a right to take otherwise; but he had a right to take as much as he wanted, so that it was not an *unreasonable* quantity, with reference to his neighbour's rights.”

In the shorthand writer's notes, I find the expressions repeated over and over again, to this effect:

“This right depends upon the *reasonable* use of the water; according to the law laid down by LORD KINGSDOWN, it does appear to me that the question for you to consider is, whether the quantity of water that Mr. Kitchin abstracted is a *reasonable* quantity. According to that you have the evidence of Mr. Easton.”

Then the learned judge reads the evidence and remarks upon what was said about pumping out, and he repeats, “he is not entitled to take more by means of pumps than otherwise.” He also remarks that:

“It might not be reasonable to take a certain quantity in respect to a small stream. It is impossible for the human mind not to compare quantities; when you are talking of a reasonable use, you must consider the size of the stream.”

A Therefore, he clearly points to the size of the stream as one of the circumstances to be looked at by the jury in determining the question of reasonableness. In winding-up his remarks in reference to the first question, he says :

B "Therefore, upon that first question you will say whether or not the use made of this water which the defendant is entitled to use, not as of favour, but as of right, is more than the *reasonable* use for the purposes of his house and those other matters."

Finally, he disposes of the other question about damming-up, and when the question goes to the jury, it goes in this way :

C "The substantial question is, aye or no, is the quantity of water that the defendant has taken from this place a *reasonable* quantity, *with a view to all the circumstances of the case*? That is the real and substantial point."

Again he says :

D "Aye or no, is the quantity of water taken by the defendant, *looking at all the circumstances of the case*, sufficient only for a *reasonable* use of the water, taking that which is beneficial to himself without doing that which is injurious to any other person?"

E I cannot read these passages from the summing-up and come to the conclusion that the jury were influenced by the learned judge, that the defendant was entitled to take all the water from the stream if he pleased, and that, therefore, it was very reasonable of him if he took something less. It is impossible not to see that they were invited to look at every circumstance in the case, and invited to look at the size of the stream, and the quantity that a man might take for domestic purposes. I think there is no ground for saying that there is any misdirection, and that the rule for a new trial must be discharged.

F **MARTIN, B.**—With respect to this matter, if it were a question in this cause whether or not that opinion of LORD KINGSDOWN [in *Miner v. Gilmour* (1)], that the higher riparian proprietor might take all that is necessary for his purposes without reference to the wants of the person below him, were correct law, and if that had anything in the slightest degree to do with this question, although, probably, LORD KINGSDOWN, in expressing the opinion of the Privy Council, is right, yet I think that would be a matter that ought to be put on the record, and decided in the most solemn manner, but it has no more to do with this case than it has to do with any other matter that may occur in the next case, which may be about a bill of exchange.

H I observe from what counsel supporting the rule read from the shorthand writer's note, that I said : "If this be correct, it may be done; but it has nothing to do with this case, not the slightest." The question in this case was whether a man who had built a house on the other side of a hill could take water from this stream, and supply his house with it, and there is no doubt it did rather seem, at first, a thing which had not occurred; that he had made a reservoir at the top of this hill, and raised the water by means of wheels and pumps to this reservoir, and in that manner brought it down to his house. It was a new instance of the use of water, as far as I remember. Neither of the learned counsel for the plaintiff to any great extent relied on that circumstance. In all probability it will be found that it was an immaterial circumstance, and that the right of the riparian proprietor neither did nor could depend upon the fact whether his house was on one side of the hill or the other. The water in a stream must necessarily be below the bank, and if the riparian proprietor can lift it over the bank, he has a right to do it.

Here were two persons who were riparian proprietors in this stream, which flowed at the rate of 330,000 gallons a-day, and at the outside, as was proved by the plaintiff's witnesses, the defendant took from it from 6,000 to 9,000 gallons a-day. The real question was whether a man who had left to him at the least 321,000 gallons a-day could complain of his neighbour taking 9,000 gallons or 10,000 gallons a-day. That was the real question. My brother WILDE has read the terms in which I left the question to the jury; and I can only say that, if I had the same question to leave to the jury again, I would leave it in the same way. I believe it is quite correct, and that in fact there was no other mode of dealing with it. I agree with the rest of the court that our judgment must be to discharge the rule for a new trial.

Rule discharged.

OAKES v. TURQUAND AND OTHERS PEEK v. SAME

[HOUSE OF LORDS (Lord Chelmsford, L.C., Lord Cranworth and Lord Colonsay),
July 22, 23, 25, 26, 29, August 15, 1867]

[Reported L.R. 2 H.L. 325; 36 L.J.Ch. 949; 16 L.T. 808;
15 W.R. 1201]

Contract—Avoidance—Contract induced by fraud—Contract effective until avoided by party defrauded.

Company—Winding-up—Contributory—Liability of shareholder induced to buy shares by fraud.

A contract induced by fraud is not void, but only voidable at the option of the party defrauded. The consent of the will which constitutes the agreement is one thing; the inducement to give that consent is another and different thing.

Accordingly, where a shareholder in a company had been induced to buy his shares by false and fraudulent representations in the prospectus, **held**, that on the winding-up of the company the agreement by which he became a shareholder remained binding on him and he was liable to be placed on the list of contributories and to contribute to the assets of the company.

Company—Winding-up—Voluntary winding-up—Liquidator—Appointment at meeting passing winding-up resolution.

Per LORD CHELTENHAM, L.C.: The necessary consequence of a voluntary winding-up being the appointment of liquidators, I am disposed to think that they may be appointed at the same general meeting as that at which the resolution for voluntary winding-up is passed without special notice.

Notes. The present Statute regulating the conduct of companies is the Companies Act, 1948: 3 HALSBURY'S STATUTES (2nd Edn.) 452. The sections in this Act which correspond with the sections of the Companies Act, 1862, referred to in their Lordships' opinions (*infra*) are specified where the sections of the earlier Act are mentioned.

Applied: *Re Cleveland Iron Co., Ex parte Stevenson* (1867), 16 W.R. 95. Considered: *Ogilvie v. Currie* (1868), 37 L.J.Ch. 541. Followed: *Kent v. Freehold*

- A** *Land and Brickmaking Co.* (1868), 3 Ch. App. 493; *Re London and County General Agency Association, Hare's Case* (1869), 4 Ch. App. 503. Considered: *Reece River Silver Mining Co. v. Smith* (1869), L.R. 4 H.L. 64. Distinguished: *Re Warren's Blacking Co., Rentelov's Case* (1869), 4 Ch. App. 178. Considered: *Overend, Gurney & Co. v. Gurney* (1869), 4 Ch. App. 701; *Re Estates Investment Co., Pawle's Case* (1869), 4 Ch. App. 497. Distinguished: *Waterhouse v. Jamieson* (1870), L.R.
- B** 2 Sc. & Div. 29. Applied: *Re General Provincial Life Assurance, Ex parte Daintree* (1870), 18 W.R. 396. Considered: *Re Imperial Land Co. of Marseilles, Ex parte Jeaffreson* (1870), L.R. 11 Eq. 109; *Peek v. Gurney* (1871), L.R. 13 Eq. 79; *Re London and Mediterranean Bank, Wright's Case* (1871), 7 Ch. App. 55. Applied: *Re Empire Assurance Corpn., Challis's Case, Somerville's Case* (1871), 6 Ch. App. 266. Considered: *Re Paraguassu Steam Tramroad Co., Black's Case* (1872), 8
- C** Ch. App. 254. Applied: *Re Welsh Flannel and Tweed Co.* (1875), L.R. 20 Eq. 360; *Stone v. City and County Bank, Collins v. City and County Bank* (1877), 3 C.P.D. 282; *Cree v. Somervail* (1879), 4 A.C. 648. Considered: *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615; *Re Hull and County Bank, Burgess's Case* (1880), 15 Ch.D. 507. Applied: *Re Ystalyfera Co.* (1886), 2 T.L.R. 900. Followed: *Re Lennox Publishing Co., Ex parte Storey* (1890), 62 L.T. 791; *Westmoreland Green and Blue Slate Co. v. Feilden* (1891), 7 T.L.R. 585. Considered: *Re National Debenture and Assets Corpn.*, [1891] 2 Ch. 505; *Cocksedge v. Metropolitan Coal Consumers Association* (1891), 64 L.T. 826; *Re Trench and Tubeless Tyre Co., Bethell v. Trench and Tubeless Tyre Co.* (1899), 69 L.J.Ch. 97; *First National Reinsurance v. Greenfield*, [1921] 2 K.B. 260. Referred to: *Henderson v. Lacon* (1867), L.R. 5 Eq. 249; *Re Overend, Gurney & Co., Ex parte Musgrave* (1867), 37 L.J.Ch. 161; *Re Universal Banking Corpn., Gunn's Case* (1867), 3 Ch. App. 40; *Re Oriental Commercial Bank, Alabaster's Case* (1868), L.R. 7 Eq. 273; *Downes v. Ship* (1868), L.R. 3 H.L. 343; *Re Aberaman Ironworks, Peek's Case* (1869), 4 Ch. App. 532; *Re London and Northern Insurance Corpn., Stace and Worth's Case* (1869), 4 Ch. App. 682; *Re Contract Corpn., Hudson's Case* (1871), L.R. 12 Eq. 1;
- F** *McEwen v. West London Wharves and Warehouses Co.* (1871), 6 Ch. App. 655; *Re Hercules Insurance, Pugh and Charman's Case* (1872), L.R. 13 Eq. 566; *Re Blakely, Ordnance Co., Brett's Case, Re Oriental Commercial Bank, Morris' Case* (1873), 8 Ch. App. 800; *Twycross v. Grant* (1877), 46 L.J.Q.B. 636; *Re Nassau Phosphate Co.* (1876), 2 Ch.D. 610; *Re Scottish Petroleum Co.* (1883), 23 Ch.D. 413; *Re London and Leeds Bank, Ex parte Carling, Carling v. London and Leeds*
- G** *Bank* (1887), 56 L.J.Ch. 321; *Re British Burmah Land Co.* (1888), 4 T.L.R. 631; *Re London Celluloid Co., Bayley and Hanbury's Case* (1888), 36 W.R. 673; *Re Laxon* (No. 2), [1892] 3 Ch. 555; *Boaler v. Brodhurst* (1892), 8 T.L.R. 398; *East Broken Hill Consols v. Mallaby-Deeley* (1895), 11 T.L.R. 465; *Re Hemp, Yarn and Cordage Co.; Hindley's Case*, [1896] 2 Ch. 121; *Re Yolland, Husson and Birkett, Leicester v. Yolland, Husson and Birkett* (1907), 77 L.J.Ch. 43; *Moosa Goolam*
- H** *Ariff v. Ebrahim Goolam Ariff* (1912), 28 T.L.R. 505; *Abram Steamship Co. v. Westville Shipping Co.*, [1923] All E.R. Rep. 645.
- As to contributories, see 6 HALSBURY'S LAWS (3rd Edn.) 630-650; and for cases see 10 DIGEST (Repl.) 953 et seq., 1055-1057, 1066-1075.

Cases referred to :

- I** (1) *Central Rail. Co. of Venezuela (Directors, etc.) v. Kisch* (1867), L.R. 2 H.L. 99; 36 L.J.Ch. 849; 16 L.T. 500; 15 W.R. 821, H.L.; 35 Digest (Repl.) 63, 578.
- (2) *Bwlch-y-Plwm Lead Mining Co. v. Baynes* (1867), L.R. 2 Exch. 324; 36 L.J.Ex. 183; 16 L.T. 597; 15 W.R. 1108; 9 Digest (Repl.) 265, 1675.
- (3) *Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145, H.L.; 9 Digest (Repl.) 119, 617.
- (4) *Clarke v. Dickson* (1858), E.B. & E. 148; 27 L.J.Q.B. 223; 31 L.T.O.S. 97; 4 Jur.N.S. 832; 120 E.R. 463; 12 Digest (Repl.) 633, 4891.

- (5) *Smith v. Reese River Co.* (1866), L.R. 2 Eq. 264; subsequent proceedings sub nom. *Re Reese River Silver Mining Co., Smith's Case* (1867), 2 Ch. App. 604; 36 L.J.Ch. 618; 16 L.T. 549; 15 W.R. 882, L.J.J.; affirmed sub nom. *Reese River Silver Mining Co. v. Smith* (1869), L.R. 4 H.L. 64; 39 L.J.Ch. 849; 17 W.R. 1042, H.L.; 9 Digest (Repl.) 135, 770.
- (6) *Henderson v. Royal British Bank* (1857), 7 E. & B. 356; 28 L.T.O.S. 286; 3 Jur.N.S. 111; 5 W.R. 286; 119 E.R. 1279; 3 Digest (Repl.) 159, 210.
- (7) *Dosset v. Harding (Royal British Bank Official Receiver)* (1857), 1 C.B.N.S. 524; 26 L.J.C.P. 110; 3 Jur.N.S. 140; 140 E.R. 214; 3 Digest (Repl.) 159, 207.
- (8) *Daniell v. Royal British Bank (Official Manager)* (1857), 1 H. & N. 681; 3 Jur.N.S. 119; 156 E.R. 1375; 3 Digest (Repl.) 159, 208.
- (9) *Re Imperial Mercantile Credit Association, Chapman and Barker's Case* (1867), L.R. 3 Eq. 361; 15 L.T. 528; 15 W.R. 334; 9 Digest (Repl.) 206, 1309.
- (10) *Re Scottish and Universal Finance Bank, Ltd., Ship's Case* (1865), 2 De G.J. & Sm. 544; 13 W.R. 599, L.J.J.; affirmed sub nom. *Downes v. Ship* (1868), L.R. 3 H.L. 343; 37 L.J.Ch. 642; 17 W.R. 34; sub nom. *Downes v. Ship, Re Scottish and Universal Finance Bank, Ltd.*, 19 L.T. 74, H.L.; 9 Digest (Repl.) 142, 822.
- (11) *Re Russian (Vyksounsky) Iron Works Co., Webster's Case* (1866), L.R. 2 Eq. 741; 14 L.T. 728; 9 Digest (Repl.) 144, 831.
- (12) *Re Russian (Vyksounsky) Iron Works Co., Stewart's Case* (1866), 1 Ch. App. 574; 35 L.J.Ch. 738; 14 L.T. 817; 12 Jur.N.S. 755; 14 W.R. 943; 9 Digest (Repl.) 142, 821.
- (13) *Re Cachar Co., Lawrence's Case, Re Russian (Vyksounsky) Iron Works Co., Kincaid's Case* (1867), 2 Ch. App. 412; 36 L.J.Ch. 490, 499; 16 L.T. 222; 15 W.R. 571; 9 Digest (Repl.) 144, 832.
- (14) *Re Madrid Bank, Wilkinson's Case* (1867), 2 Ch. App. 536; 36 L.J.Ch. 489; 15 W.R. 499; 9 Digest (Repl.) 144, 833.
- (15) *Re Barned's Banking Co., Peel's Case* (1867), 2 Ch. App. 674; 36 L.J.Ch. 757; 16 L.T. 780; 15 W.R. 1100; 9 Digest (Repl.) 79, 319.

Appeals against decisions of MALINS, V.-C., reported L.R. 3 Eq. 576, dismissing motions, one by the appellant Oakes and the other by the appellant Peek, asking that their names should be struck off the register of members and the list of contributories of Overend, Gurney & Co., Ltd., a company which was being wound-up.

The facts of the case are fully stated in the opinions of their Lordships (*infra*).

Giffard, Q.C., and *Swanston* for the appellants.

Sir Roundell Palmer, Q.C., *Mellish, Q.C.*, and *Roxburgh, Q.C.*, for the respondents.

LORD CHELMSFORD, L.C.—These are appeals from orders of MALINS, V.-C., refusing to remove the names of the appellants from the register of members of the company of Overend, Gurney & Co., Ltd., and from the list of contributories of the company, and to rectify the register accordingly. The cases are of the greatest importance, and the decision of this House upon them will determine for the future the rights and liabilities of creditors and shareholders of a limited liability company upon its winding-up under the Companies Act, 1862.

The appellants dispute their liability to be placed upon the list of contributories on the ground that they were induced to take shares in the company by false and fraudulent representations made by the directors in a prospectus issued to them on its formation; that, consequently, their agreements to become shareholders in the company were not binding upon them, and that they never, by any subsequent act, affirmed them or acquiesced in their validity. The appellant Oakes was an original allottee of his shares; the appellant Peek purchased his in the market,

A either from an allottee or from a purchaser from an allottee. In considering the case I shall look at it throughout as if Oakes was the only appellant, because if he fails to establish his right to be relieved from liability, Peek cannot possibly succeed. The prospectus of the company was dated on July 12, 1865. Oakes on July 15 applied for 100 shares, but twenty-five only were allotted to him. There can be no doubt that Oakes was induced by the prospectus to take his shares

B and, therefore, the first question to be considered is whether, as he alleges, the representations it contained were false and fraudulent. The company was formed, as the prospectus states, "for the purpose of carrying into effect an arrangement for the purchase from Overend, Gurney & Co. of their long-established business of bill-brokers and money-dealers."

C In order to form an opinion of the true character of the statements made in the prospectus, it is necessary to know what was the state of the firm of Overend, Gurney & Co., at the time when it was proposed to convert that partnership into a joint-stock company. At this period they stood high in the commercial world. Their dealings and transactions were known to be of a most extensive description, and they were supposed to be carrying on their business upon a safe and sure basis. But it appears from the affirmation of Mr. John Henry Gurney, one of the

D firm, that for some time previously the partners managing the business had been making considerable advances of an exceptional character to various parties and companies upon securities of a speculative and uncertain nature, and that "on a close examination which was undertaken prior to the transfer of the business to the company of Overend, Gurney & Co., Ltd., it was found that the doubtful advances amounted to £4,199,000, of which sum it was estimated that £1,082,000

E only would be realised, leaving the sum of £3,117,000 to be provided." From the same source of information we learn that from the year 1860 the total result of all the operations of the firm had been the loss of about £500,000 a year. Mr. Gurney described the business carried on by Overend, Gurney & Co. to be of an exceedingly extensive and profitable nature, and stated that for the five years

F ending on Dec. 31, 1860, after allowing interest upon capital and upon the balance to the credit of the partners, the profits divided among the several partners averaged upwards of £190,000 per annum, but that subsequent to that period the actual net profits had not been ascertained or appropriated, but were reserved to meet the losses consequent upon the exceptional business before mentioned. From this statement it might be supposed that a different course was adopted with

G respect to the profits of the business after 1860 from that which had been pursued previously. But upon the cross-examination of Mr. Gurney, he proved that in 1855 and every succeeding year down to 1860 portions of the business had always been employed in writing off losses.

Such was the condition of the partnership of Overend, Gurney & Co. at the time when it was proposed to turn it into a joint-stock company. The partners

H in the firm who were to become directors of the new company were, of course, acquainted with all these particulars, and the other persons whose names appear on the prospectus as directors must have been fully informed of them. Under these circumstances the prospectus which the appellant alleges to be false and fraudulent was issued. It is headed in very large characters with a name likely to attract attention and inspire confidence, "Overend, Gurney & Co., Ltd.," and describes the intended capital of the company to be £5,000,000 in 100,000 shares of £50 each, but, it is said, it is not intended to call up more than £15 per share. After describing the purposes for which the company was formed the prospectus proceeds:

I

"the consideration for the goodwill being £500,000, one-half to be paid in cash, and the remainder in shares in the company, with £15 per share credited thereon, terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the shareholders."

It is said that everything that is stated in the prospectus is literally true, and so it is; but the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood. If the real circumstances of the firm of Overend, Gurney & Co. had been disclosed, it is not very probable that any company founded upon it could have been formed. It was said in the course of the argument that if the true position of the affairs of Overend, Gurney & Co. had been published it would have entailed the ruin of the old firm, and would have been utterly prohibitory of the formation of the new. To which the only answer to be given is, then, no company ought ever to have been attempted, because it was only possible to entice persons to become shareholders by improper concealment of facts.

From the memorandum and articles of association and deed of covenant in relation to the business, to which applicants for shares were referred in the prospectus, nothing unfavourable to the prospects of the new company can be gathered; but from the terms of a deed of arrangement contemporaneous with the deed of covenant, the existence of which was not made known in the prospectus, the real conditions of the transfer of the business of Overend, Gurney & Co. would have appeared. It is true the prospectus states that the vendors guaranteed the company against any loss on the assets and liabilities transferred, which, it is said, was sufficient to inform, or, at least, to caution, persons disposed to take shares that there might be unsatisfied liabilities of Overend, Gurney & Co., to be provided for. But, without dwelling on the postponement of the full effect of the guarantee for three years by the private deed of arrangement, the statement of the consideration for the goodwill being £500,000 was calculated not to lull suspicion merely of the state of the affairs of Overend, Gurney & Co., but to attract persons to join the company. No one can for a moment suppose that, if it had been possible to take the goodwill of Overend, Gurney & Co.'s business into the market with a disclosure of all the circumstances attending the business, it would have realised a single shilling; but the parties, some of whom were both vendors and purchasers, arranged among themselves for the payment of a sum for this unmarketable goodwill, the half of which was to have come out of the moneys of the shareholders.

It is said that the directors believed bona fide that the company would be a profitable concern, and upon the strength of that opinion they took shares themselves, and never parted with them, although at one time they were at a premium. With respect to this proof of the sincerity of their belief, it must be observed that they were each of them compelled to have 200 shares, as the qualification of a director under the articles of association. I entertain no doubt, however, that the directors were honestly and sincerely of opinion that if they could procure additional capital, and could carry on some of the business of Overend, Gurney & Co. on a healthier system, the company would succeed; but as the experiment was to be made with other people's money, as well as with their own, I think they were bound to furnish to others the information which they possessed themselves, and to enable them to form a competent judgment as to the prudence of embarking in the concern. If this could not be done without making it impossible to form a company, in my opinion, the attempt ought never to have been made, which could only be successful by suppressing facts material to be known.

If this had been a case between Oakes and the company, in which he sought to be relieved from his contract, as in *Central Rail. Co. of Venezuela (Directors, etc.) v. Kisch* (1), or the company had been suing him for calls, as in *Bwlch-y-Plwm Lead Mining Co. v. Baynes* (2), he would have succeeded in the one case and the company would have failed in the other, on the ground which, I venture to think, was correctly laid down in *Western Bank of Scotland v. Addie* (3), in this House, that

- A "where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations [and, I would here add, by fraudulent concealment] by the directors, and the directors seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agent."

It is quite clear, therefore, that Oakes might originally have disaffirmed the contract and divested himself of his shares, and that he never did any act to affirm it, nor was he aware of the true state of the firm of Overend, Gurney & Co. at the time of the formation of the new company until after the failure. No dividend was paid to the shareholders, and a general meeting was called, the articles of association prescribing that the first general meeting should be held not more than twelve nor less than ten months from the day of incorporation, and the company having come to an end before the twelve months had expired. Such was the position of Oakes when the order for winding-up the company was made on June 22, 1866. His name being on the register of shareholders was placed, as a matter of course, by the liquidators upon the list of contributories. A motion was made before MALINS, V.-C., to remove his name from the list, when his Honour refused to make any order, and from that refusal the present appeal is brought.

- The question is one of the highest importance, involving present pecuniary interests to an enormous extent, and calling for a final decision upon the relation to each other of creditors and shareholders of limited companies in every case of a winding-up under the Companies Act, 1862. On the part of the creditors it is said that every person whose name is found upon the register at the time when the order for winding-up is made is a shareholder, and liable to contribute to the payment of the debts of the company to the extent of the sums due upon his shares, unless he can prove that his name was put upon the register without his consent. On the part of the shareholders it is contended that a person who has been induced by fraud to enter into a contract to take shares, and whose name is afterwards placed upon the register, never becomes a shareholder, because his agreement, being obtained by fraud, is of no validity. In support of this proposition the words of my noble and learned friend, LORD CRANWORTH, in *Central Rail. Co. of Venezuela (Directors, etc.) v. Kisch* (1), were cited, where he said (L.R. 2 H.L. at p. 123):

- G "The case of the respondent is that he never was liable, for that he was induced to take shares by fraudulent representations, which entitle him to repudiate and treat as null all which he was induced to do."

- My noble and learned friend never meant to draw a distinction between void and voidable contracts, or to say that an agreement obtained by fraud is no agreement at all. The language of my noble and learned friend must be understood in its application to the case before him, in which the respondent, seeking relief from the contract into which he had been drawn by fraud, was entitled, if he chose to repudiate it, to treat it as null, and to say that he never was a member.

- The distinction between void and voidable contracts is one which will be found very necessary to be borne in mind when we come to consider the words of the Companies Act, 1862, upon which the question of Oakes's liability will ultimately turn. It is a settled rule of law, as CROMPTON, J., said in *Clarke v. Dickson* (4), "that a contract induced by fraud is not void, but voidable only at the option of the party defrauded." If it were otherwise, if a contract induced by fraud were void, there would be an end of the question in this case, because a contract void in itself can have no valid beginning, and Oakes never would have become a shareholder in the company.

Before considering the provisions of the Companies Act, 1862, it will be necessary to advert to some of the previous Acts in *pari materia*, because it was

pressed upon us in argument that, whatever may have been the decisions under former Acts, they are inapplicable to the case of companies with limited liability. A distinction between the Companies Act, 1862, and former Acts was suggested by LORD CAIRNS in *Re Reese Silver Mining Co., Smith's Case* (5), where his Lordship says (2 Ch. App. at p. 616):

"There is, with regard to companies established under the Act of 1862, no contract whatever between a creditor and a shareholder of a company. The contract is between the creditor and the company, and when the legislature introduced the principle of limited liability, it was absolutely necessary to give effect to that principle by setting up the company, and the company alone, as that with which creditors or third persons could contract."

The first Act which enabled joint-stock companies to limit their liability is the Limited Liability Act, 1855 [repealed by the Statute Law Revision Act, 1875], and that Act, by s. 7 gave the same remedy by execution against the shareholders to the extent of the portions of their shares in the capital of the company as creditors could use against shareholders of companies with unlimited liability under the former Acts of 1844, 1848, and 1849 [relating to joint-stock companies: all repealed by Companies Act, 1862.] The first Act which enabled a creditor to become a party to the winding-up of a company, whether with limited or unlimited liability, was the Joint Stock Companies Act, 1856 [repealed by Companies Act, 1862], and by s. 61 of this Act, in the event of a company being wound-up, the existing shareholders were to be liable to contribute to the assets of the company to an amount sufficient to pay the debts of the company, and the costs, charges, and expenses of winding-up the same, with this qualification, that if the company was limited no contribution should be required from any shareholder exceeding the amount (if any) unpaid on the shares held by him. This Act was followed by the Joint Stock Companies Winding-up Amendment Act, 1857 [repealed by Companies Act, 1862], which by s. 1 enacted that where an order was made for the winding-up of a company the judge, in all cases in which it appeared expedient and for the benefit of all parties interested, might call upon the creditors to appoint a person to represent them, and after the appointment of such representative the creditors were to be deemed parties to the winding-up. These and the subsequent Joint Stock Companies Act, 1858 [repealed by Companies Act, 1862], contained all the provisions with respect to the rights of creditors against shareholders prior to the Companies Act, 1862. As I understand these Acts, they merely changed the remedy which the creditor previously possessed of issuing execution against the shareholder (which, as I have shown, was continued to him when companies with limited liability were first established) into a right to obtain satisfaction of his debt by means of forced contributions, either by compelling a winding-up of the company or becoming a party to a winding-up which had been already ordered. They do not appear to me to have changed the right of the creditor, on the one hand, or the liability of the shareholder, on the other; and, therefore, I cannot adopt the argument of the counsel for the appellant that the cases which were decided upon the Acts prior to 1856 must be considered as inapplicable.

Henderson v. Royal British Bank (6), upon which, in his judgment, MALINS, V.-C., placed so much reliance, seems to me, unless the law has been altered by the Companies Act, 1862, to be an authority of great weight against the appellant. LORD CAMPBELL, in describing the attempt of a shareholder to relieve himself from liability under similar circumstances to those in which the appellant is placed, expressed his opinion in the strongest language. He said (7 E. & B. at p. 364):

"It would be monstrous to say, he having become a partner and a shareholder, and having held himself out to the world as such, and having so

A remained until the concern stopped payment, could by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank who had given credit to it on the faith that he was a shareholder."

B The decision in this case was considered so satisfactory that it was followed by the Court of Common Pleas in *Dossett v. Harding* (*Royal British Bank Official Receiver*) (7), and by the Court of Exchequer in *Daniell v. Royal British Bank (Official Manager)* (8), without anything more being said in either court than an expression of acquiescence in the judgment. *Henderson v. Royal British Bank* (6), being supported by such a weight of authority, will greatly influence my opinion upon the present case, unless I can be satisfied that the Companies Act, 1862, has placed creditors and shareholders in a different relation to each other from that in which they previously stood. I have shown that if it was necessary to give effect to the principle of limited liability by setting up the company alone as that with which third persons could contract, this was done the very year after companies with limited liability were established, by taking away the sci. fa. of creditors, and enabling them to intervene in the winding-up of a company. This power of petitioning for the winding-up of a company was not first conferred upon, but merely continued to, creditors by s. 82 of the Act of 1862.

The real question in this appeal is whether the Companies Act, 1862, has placed a shareholder on such a different footing from that in which he stood at the time of the decision in *Henderson v. Royal British Bank* (6), that, his name being upon the register when the order for winding-up is made, it is competent to him to defend himself against his prima facie liability to contribute by alleging and proving that he was induced by fraud to become a shareholder. There are very few sections of the Act which it will be necessary to consider. By s. 18, upon the registration of the memorandum of association and of the articles of association, the registrar shall certify that the company is incorporated, and in the case of a limited company that the company is limited, the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate, etc., but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound-up as is hereafter mentioned [Companies Act, 1948, s. 13]. Section 38 is here referred to, which, among the qualifications of the liabilities of contributories, provides that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member [Act of 1948, s. 212 (1)]. By s. 23 every person who has agreed to become a member of the company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company [Act of 1948, s. 26 (2)]. By s. 74 the term "contributory" shall mean every person liable to contribute to the assets of a company under this Act in the event of the same being wound-up [Act of 1948, s. 213].

The result of these provisions of the Act is that a contributory is a person who has agreed to become a member of the company, and whose name is upon the register. Did the appellant agree to become a member? His counsel answer this question in the negative, because they say that a person who is induced by fraud to enter into an agreement cannot be said to have agreed, the word "agreed" meaning having entered into a binding agreement. But this is a fallacy. The consent of the will which constitutes the agreement is one thing, the motive and inducement to give that consent is another and different thing. An agreement induced by fraud is certainly in one sense not a binding agreement, as it is entirely at the option of the person defrauded whether he will be bound by it or not. In the present case, if the company formed on the basis of the partnership of

Overend, Gurney & Co. had realised the expectations held out by the prospectus, the appellant would probably have retained his shares, as he would have had an undoubted right to do. When the order for winding-up came and found him with the shares in his possession, and his name upon the register, the agreement was a subsisting one. How could it then be said that he was not a person who had agreed to become a member? To hold otherwise would be to disregard the established distinction between void and voidable contracts. A

But it was said by the counsel for the appellant that the Companies Act, 1862, was to be regarded merely as adjusting the rights of the shareholders inter se, and that, as the liquidators represented the company, the liability of the appellant must be determined as between himself and the company, and not as respects creditors with whom he never contracted. It is true that there was no contract between the creditor and the shareholders, and that the creditor probably never thought of the shareholders in his dealings with the company. But he must be taken to have known what his rights were under the Act, and that he had the security of all the persons whose names were to be found upon the register, and who had agreed to become shareholders. The liability of these shareholders is not under a contract with the creditors, but it is a statutable liability under which the creditors have a right which attaches upon the shareholders to contribute to the extent of their shares towards the payment of the debts of the company. It is not the mere fact of the name appearing upon the register which makes a person liable as a member of the company. If he has not agreed to become a member, he cannot be made a contributory. This was the ground of decision in some of the cases which were cited to show that the order for winding-up did not preclude the appellant from disputing his liability. As PAGE-WOOD, V.-C., said in *Chapman and Barker's Case* (9) (L.R. 3 Eq. at p. 365): B C D E

"If the mere placing upon the register, rightly or wrongly, is to give the creditors a right to proceed against the individual, any one of us now in this court might find himself upon the register of some company, and liable to its creditors. It is an absurdity to say that I am to be liable because directors choose to put me down upon the register as a shareholder." F

The want of consent was the ground on which *Ship's Case* (10) was decided. There the prospectus of a proposed company, described as a finance bank, stated several objects, some of which went beyond ordinary banking business. Ship, on the footing of the prospectus, applied in May, 1864, for shares, and paid a deposit. On June 1 the company was registered with a memorandum of association defining its objects, which went considerably beyond the objects mentioned in the prospectus, and on the same day the directors sent Ship a letter of allotment of his shares. In the December following the company failed. Upon an application by Ship to have his name removed from the register on the ground that he never had agreed to become a shareholder in a company with these extended objects, and upon his oath that he never had notice of the extension of the objects of the company beyond those named in the prospectus, PAGE-WOOD, V.-C., removed his name from the register, and his decision was afterwards affirmed by the lords justices. This case was followed by *Webster's Case* (11) and by *Stewart's Case* (12), both of which related to the same company, the Russian (Vyksounsky) Ironworks Co., where the objects of the company, as stated in the memorandum and articles of association, were more extensive than those stated in the prospectus, and in both of which cases the parties who were induced by the prospectus to become shareholders were removed from the list of contributories. G H I

I confess that these decisions are not at all satisfactory to my mind. I think that persons who have taken shares in a company are bound to make themselves acquainted with the memorandum of association, which is the basis upon which the company is established. If they fail to do so, and the objects of the

A company are extended beyond those described in the prospectus (a fact which may be easily ascertained), the persons who have so taken shares on the faith of the prospectus ought to be held to be bound by acquiescence. In *Ship's Case* (10) the judges partly proceeded on the oath of the party that he never had notice of the extension of the objects of the company. However true this may be, it depends entirely upon the party's own assertion, and the answer to it is: You might have made yourself acquainted with the proceedings of the company, and ought to have done so. Accordingly, in subsequent cases connected with the *Russian Iron Co.: Lawrence's Case* (13) and *Kincaid's Case* (13); and in *Re Madrid Bank, Wilkinson's Case* (14), in which last case also there was a material variance between the prospectus and the memorandum of association, it was held that persons were bound, within a reasonable time after the allotment of shares, to inform themselves of the nature of the documents of title under which they and the company were proceeding to carry on trade, and in all these cases the parties were retained on the list of contributories.

In a still later case, *Re Barned's Banking Co., Peel's Case* (15), LORD CAIRNS expressed an opinion on the subject to which I entirely subscribe. He said (2 Ch. App. at p. 684):

"It is the bounden duty [of a person] at the earliest practicable moment to ascertain what is the charter or title-deed under which the company in which he has agreed to become a shareholder is carrying on business . . . I think he ought to be held bound to look to the memorandum and articles of association before he applies for shares. But where the memorandum and articles of association are not in existence at the time of application, I think that at the very latest when he receives his allotment of shares he ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make any objection."

This appears to me to lay down a clear and precise rule, which will render unnecessary the consideration in each case whether a reasonable time has or has not elapsed from which acquiescence may be assumed, a question which has occasioned some variety, and apparent if not actual discrepancy in the decisions.

These views, thus expressed by LORD CAIRNS, in some degree apply to *Re Reese River Silver Mining Co.* (5), which appears to me not to have been well decided upon another ground. There is no doubt that Smith had been led to take shares in the company by the false representations of the flourishing condition of the mines contained in the prospectus. When the order for winding-up the company was made his name was upon the register. It is true that he had filed his bill against the company to be relieved of his shares; but he still held them, and the winding-up order found him in the condition of a person who had agreed to become a member, and whose name was upon the register, and who, therefore, exactly answered the description of a contributory contained in the Companies Act, 1862.

In the conclusion at which I have arrived in this case I rely altogether upon the words of the Act. I do not take into consideration the principle which has governed many decisions, as to which of two innocent persons is to suffer; but I cannot help remarking upon the singular state of things which would result from relieving the appellant from his liability. The same right of relief established by him would belong to all the allottees of shares who had retained them in their possession; and in the winding-up of this company the only contributories to the debts of the company would be the directors and those unfortunate shareholders who had purchased their shares in the market, so that, although the shareholders who had suffered by the fraud of the directors might recover from them the full amount of the damages sustained, the creditors could only make the directors of this limited liability company contribute towards payment of their debts to the extent of their shares.

Upon the principal and important question in this case I entirely agree with the decision of MALINS, V.-C. But after his Honour had given judgment, and even after his decree was enrolled, the appellants made a fresh motion to have their names removed from the list of contributories upon grounds which were clearly open to them upon the original motion. Two of them, indeed, are preliminary objections which, if well founded, would have superseded all further argument. For if there was no valid winding-up order, and no liquidators were duly appointed, there could be no list of contributories upon which the appellants' names could be placed, and the whole of the proceedings must have fallen to the ground. The vice-chancellor, therefore, rightly refused to entertain the motion, but as the objections have been argued before your Lordships, it will be proper to consider them. The first of them strikes at the root of the company's existence, for it asserts that there was no memorandum of association subscribed by seven persons, and consequently, that there never was any incorporated company. This, as I understand, is founded upon an alleged variance between the prospectus and the memorandum of association, which is made the ground of a separate objection. The short answer to this objection is found in the Companies Act, 1862, which in s. 6 provides that any seven or more persons may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of the Act in respect of registration, form an incorporated company [Act of 1948, s. 1 (1)]; and, by s. 18 [Act of 1948, s. 13], upon the registration of the memorandum of association, etc., the registrar shall certify under his hand that the company is incorporated, and a certificate of the incorporation of the company given by the registrar shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with [Act of 1948, s. 15.] I think that the certificate prevents all recurrence to prior matters essential to registration, among which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case that all previous requisites had been complied with.

The next objection to be considered is that the official liquidators were not duly appointed. The ground of this objection is that in the case of a voluntary winding-up the appointment of liquidators can be made only at an extraordinary general meeting, the notice of which must specify the objects for which it is called, and that the notice issued by the directors omitted all mention of the intention to appoint liquidators. That notice, which was intituled in the matter of the Companies Act, 1862, as well as of Overend, Gurney & Co., Ltd., stated that the meeting would be held "to consider the position of the affairs of the company," and if deemed expedient to pass the following resolution :

"That the company cannot by reason of its liabilities continue its business, and that it is advisable to wind-up the same voluntarily."

Section 133 of the Companies Act, 1862 (under which the notice was given), enacts that certain consequences shall ensue upon the voluntary winding-up of a company, and among them that "liquidators shall be appointed for the purpose of winding-up the affairs of the company, and distributing the property" [Act of 1948, s. 285 (1)]. The necessary consequence of a voluntary winding-up being the appointment of liquidators, I am disposed to think that they may be appointed at the same general meeting as that at which the resolution for voluntary winding-up is passed without special notice. But if it is doubtful whether liquidators were duly appointed at the extraordinary general meeting of the company, I think the respondents may rely upon the appointments made by the orders of KINDERSLEY, V.-C. On May 11, 1866, the vice-chancellor made an order under s. 85 of the Companies Act, 1862, appointing provisionally Messrs. Turquand and Harding to be the official liquidators of the estate and effects of the company. At the extraordinary general meeting held on June 11, 1866, it was

A resolved that the same two gentlemen should be appointed liquidators. If this was not a valid appointment then, as by s. 141 of the Act,

“if from any cause whatever there is no liquidator acting in the case of a voluntary winding-up, the court may, on the application of a contributory, appoint a liquidator or liquidators,”

B it was competent to KINDERSLEY, V.-C., to make an appointment [Act of 1948, s. 304]. This he did by his order of June 22, 1866, for although that order is in terms “that Turquand and Harding be continued liquidators,” it would be mere trifling to hold that if necessary it may not be held to be an original appointment.

C The last objection is founded upon an alleged variance between the prospectus and the memorandum of association. It is said by the appellant that the proposal in the prospectus is limited to carrying on the business of Overend, Gurney & Co., but that the memorandum of association extends to

D “the acquisition whether by way of purchase or amalgamation or otherwise of such other business or businesses of a like character, and upon such terms as the directors shall think expedient.”

E He contends upon the authority of *Ship's Case* (10) that this variance releases him from the obligation of his contract. His excuse for not bringing this forward upon the original argument is that, until the first order of MALINS, V.-C., made on Feb. 9, 1867, he believed that the memorandum and articles of association of the company were strictly confined to the company mentioned in the prospectus. But, although the appellant might have remained ignorant of the variance between the prospectus and the memorandum of association until the time that he mentions, it must have been previously known to his solicitor, and the memorandum of association is actually made an exhibit to an affidavit sworn by the appellant's accountant, on Nov. 2, 1866. There is, therefore, no excuse for keeping back this objection at the time of the original hearing. But the cases which have been mentioned in the course of my observations upon the principal question in this case will satisfy your Lordships that this objection ought not to prevail. There may be some doubt whether the terms of the memorandum of association are such a departure from the object put forward in the prospectus as to constitute a different company. But, be that as it may, the appellant had an opportunity during ten months of inspecting the memorandum of association of which he was bound to avail himself, and his voluntary ignorance upon the subject, until the winding-up order came, precludes him altogether from raising the objection.

F It only remains to observe that all that has been said with respect to Oakes H applies with greater force to Peek, even if his situation as a purchaser of shares in the market did not preclude him from most of the objections which have been raised in Oakes's case. The decree of the vice-chancellor must be affirmed, but with a variation as to costs, which must be borne by each of the appellants in respect of his own case. I submit to your Lordships that the appeal ought to be dismissed with costs.

I

LORD CRANWORTH.—The appellant, in order to sustain his appeal, must make out two propositions. He must satisfy the House, first, that he was induced to take his shares in Overend, Gurney & Co., Ltd., by the fraud of the company or of those for whom the company became responsible; and, secondly, if that is made out, that he ought not to be retained on the list of contributories. The first question is one of fact, and its determination, however important to the parties concerned, is of no general interest. The other question is of very extensive consequence in the mercantile world. It is of the utmost importance

that persons dealing with joint-stock companies should be in no doubt as to who the persons are to whom they are entitled to look as liable to perform the obligations and pay the debts of the partnership. I shall proceed at once to consider this second question—to determine what are the relative rights of Mr. Oakes and the creditors, assuming it to be true that he was induced to take shares by the fraud of the company, or of those for whom the company became responsible.

There is no doubt that the direct remedy of a creditor is solely against the incorporated company. He has no dealing with any individual shareholder; and if he is driven to bring an action to enforce any right he may have acquired, he must sue the company, and not any of the members of whom it is composed. This being so, the argument of the appellant is that it is only to the assets of the company that the creditor can resort, and so the only question is of what those assets consist. This question, he contends, so far as the assets consist of money to be recovered by legal process against other persons, whether shareholders or not, can only be solved by ascertaining what rights the company has against other persons. If in any proceeding by the company instituted for the purpose of recovering money from any person, that person has a valid defence, whether legal or equitable, the appellant contends that the sum claimed from him does not form part of the assets of the company. Those assets, he says, consist solely of property in the actual possession of the company, or which the company can recover by legal proceedings. He contends that he was induced to become a shareholder by means of a fraud, which entitles him to repudiate the status of shareholder, and to say, as between himself and the company, that he never held a share. If he can say this against the company, he contends he can say it against all the world, for his liability is a liability to the company and to no one else.

But it must be borne in mind that a company formed under the statute of 1862 is not a mere common law corporation. Its rights and liabilities depend in great measure on statutory provisions, and in order fully to understand and interpret them, we must consider not merely the enactments of the Companies Act, 1862, under which Overend, Gurney & Co., Ltd., was incorporated, but also the other Acts previously passed in *pari materia*. When it became the habit and interest of persons engaged in commerce to unite in great numbers for carrying on any particular trade, it soon became evident that the ordinary provisions of the law of this country were ill adapted to the business of such bodies. It is a general principle of mercantile law that when two or more persons are associated in partnership for carrying on a trade, every partner can in general bind his co-partners in all contracts made in the ordinary course of the business. But where a hundred persons or upwards are engaged in any particular trade, to be managed by directors acting for the whole body, that principle plainly becomes very inconvenient in its application. So, again, it was a principle of our courts that in any proceeding by or against a partnership all the partners must, either as plaintiffs or defendants, be made parties to the proceeding; but when numerous members of a partnership, to the extent of many hundreds of persons, were concerned as partners, this rule would, if adhered to, have made litigation practically impossible, and so have often amounted to a denial of justice. To meet these and many other difficulties arising from the same or similar causes, the legislature has from time to time interfered, the last general Act on the subject being the Companies Act, 1862, under which Overend, Gurney & Co., Ltd., became incorporated. I have already observed that in order to understand the true effect of that statute it is necessary to understand some of those which preceded it.

The first general statute to which I need refer is the Banking Act of 1826 (7 Geo. 4, c. 46) [repealed by Statute Law Revision Act, 1958]. Before the passing of that Act it was not lawful for more than six persons to be united

A together as partners in carrying on the business of bankers. This restriction was removed by that statute as to banking partnerships carrying on business at a distance of more than sixty-five miles from London. The Act provides that the company shall file annually at the Stamp Office a list of all partners, open to general inspection, and in order to make it possible for such companies, the number of whose partners was unlimited, to defend and maintain suits instituted **B** by and against them, they were bound to appoint a public officer, who in all disputes between the company and third persons should represent the company—an officer by whom the company might sue and be sued. Any creditor or other person having a demand on the company might proceed against the public officer, and on recovering judgment against him might issue execution against any member of the company or any person who has ceased for not more than three **C** years to be a member, but who was a member when the contract recovered on was entered into. Companies trading under the provisions of this Act were not incorporated. They were mere associations of individuals trading in partnership, but with several important statutory incidents connected with them. This Act was confined to banking partnerships. No general Act relating to partnerships in any other business was passed until the year 1844, although numerous private **D** Acts had been obtained by persons engaged in speculations requiring capital beyond what could be supplied from private resources, incorporating them, and introducing regulations for the benefit of creditors and other persons dealing with them.

In 1844 the legislature passed the Joint Stock Companies Act, 1844 [repealed by Companies Act, 1862], being the first general joint-stock company Act. The **E** provisions of that Act material for the question now before us were as follows. It was declared to apply with some exception to all companies, the capital of which was divided into shares transferable without the consent of all the other shareholders. The persons intending to become shareholders were obliged to execute a deed stating the nature and particulars of the proposed **F** business. A public officer was appointed for keeping a register of, among other things, the name of every projected company, a statement of the nature of every business, the amount of its capital, and the name and address of every subscriber, with the number of the shares to be taken by him. The persons intending to form themselves into a company were obliged to furnish to the registrar these particulars with many others, to which I do not feel it necessary to advert; and on its **G** being certified that this had been done, it is enacted that the shareholders shall thenceforth be incorporated for the purpose of carrying on the business mentioned in the deed, and shall so continue until it is dissolved, and its affairs wound-up; but so, nevertheless, as not to restrict the liability of any shareholder under a judgment recovered against the company, it being expressly declared that every shareholder should continue liable, as if the company had not been incorporated. **H** As the company thus became incorporated for the purpose of its business, it was unnecessary that it should (as in the case of banking companies trading under the Act of 1826 (*supra*)) appoint a public officer for the purpose of suing and being sued. The company itself was able to bring and defend actions and suits in its own name without any special enactment for the purpose; but the statute provided that any person having recovered judgment against the company may, if **I** he cannot obtain satisfaction against the incorporated body, obtain execution against any shareholder, or against any person who should have ceased for less than three years to be a shareholder, and who was a shareholder when the debt or liability accrued in respect of which the judgment was recovered. I have said that certain companies were excepted from the operation of this Act, and among those so excepted were all banking companies.

Concurrently with this Act another Act was passed (7 & 8 Vict., c. 113), entitled, "An Act to regulate joint stock banks in England" [repealed by Companies Acts, 1862 & 1948]. It differed in some important particulars from the

other Act. It did not incorporate any joint-stock banking company, but it A enabled persons desirous of forming themselves into such a company, upon complying with certain requisitions, to obtain, under the sanction of the Board of Trade, a royal charter of incorporation, subject to various statutable qualifications, among other things that, notwithstanding the incorporation, the shareholders should be liable as if they were not incorporated. And there is the same B provision as in the former Banking Act, and in the general Joint-Stock Companies Act, making former shareholders liable, in certain cases, for a term of years after they have ceased to be shareholders. It thus appears that under the Act of 1844 or the Banking Act of 1826, the provisions in these two statutes, so far as regards the present question, being nearly the same, the course which a creditor was to take in order to enforce a debt or demand, was to sue the incorporated C company as his debtor, and, having recovered judgment against that body, he was in the first instance to endeavour to levy his debt by an execution against them, and if that did not produce sufficient to satisfy him, then he was entitled to issue execution against any shareholder, or, within certain limits, against any of those who had been shareholders when his right arose. If the present question had arisen under either of these statutes, the right of the creditor could not have D been controverted. It would have been no answer on the part of any person who had agreed that his name should be on the list of shareholders, and against whom a fi. fa. had been issued out, to say he had been induced by fraud to become a shareholder.

This was decided by LORD CAMPBELL, in the Court of Queen's Bench, in *Henderson v. Royal British Bank* (6), and nearly at the same time by the Courts E of Common Pleas & Exchequer in cases before them, in which the circumstances were similar. LORD CAMPBELL said (7 E. & B. at p. 364):

"It would be monstrous to say that [the party against whom the application was made] having become a partner and a shareholder, and having held himself out to the world as such and having so remained until the concern stopped payment, could, by repudiating the shares on the ground F that he had been defrauded, make himself no longer [liable]."

This observation commends itself so entirely to common sense, that I cannot hesitate at once to accede to it. When this passage was quoted in the argument at the Bar, I doubted whether LORD CAMPBELL had not been wrong in attributing the liability of the person against whom the application was made in any G respect to his having held himself out to the world as a partner, for a shareholder never takes any part in managing the joint business. But on further reflection I think the observation was just. The application of the creditor was resisted by the shareholder on the ground that he had been induced by fraud to take shares. It is a fair answer by the creditor to such a defence to say: "I know nothing of the circumstances which led you to become a shareholder. H All I know is that you in fact allowed yourself to be represented as a shareholder, and on the faith of your being so I trusted the company."

But whether the observation of LORD CAMPBELL was or was not altogether warranted, the decision itself seems to me to be incontrovertible, and the only question, therefore, is whether the same principle ought to govern a case like the present, arising, not under the Act 7 & 8 Vict., c. 113, but under the Companies I Act, 1862. There are important differences between the provisions of the Act of 1862, and the two Acts of 1844. In the first place all the enactments contained in the previous Acts for enforcing a debt or demand by execution against a shareholder are repealed. The creditor must, as under the former Act, proceed against the company, but if on recovering judgment against the company he is unable to obtain satisfaction, he has no power to proceed against any individual shareholder. He must obtain an order for winding-up the affairs of the company by causing all its assets to be called in and distributed among all the creditors

A rateably, as in a bankruptcy. But there is another very material distinction between the two statutes arising from the power given by the Act of 1862 of constituting a company where shareholders shall not, like partners at common law, or like shareholders under the Act of 7 & 8 Vict., c. 110, s. 113, be indefinitely liable for all obligations of the partnership, but whose liability shall be limited to the extent and in the manner specified in the articles under which the incorporation takes place. Two modes of limiting the responsibility of the shareholders are provided by the Act; but we need not advert to that which is described in the Act as the limitation of shares. Any joint-stock company may adopt such a limitation by making it a part of its constitution that the shareholders shall be liable only to the extent of so much of their shares as shall not have been paid up. This was the principle of limitation on which the firm of Overend, Gurney & Co., Ltd., was formed, and with which alone we have to deal. It may be well to remark that the Act of 1862 (so far as we have to deal with it) is identical with a previous Act passed in 1856, and for convenience, therefore, I will refer only to the Act of 1862. It is obvious that when the legislature sanctioned the principle of limited liability the powers given by the former Acts of taking out execution against individual shareholders necessarily fell to the ground. It would be impossible for a creditor to know to what extent his right to take the shareholder's goods in execution would extend. This difficulty, indeed, would not arise under the Act of 1862 as to the companies formed with unlimited liability; but experience has shown that the system of execution against individual shareholders often operated very unfairly, and the legislature probably thought, and correctly thought, that companies with unlimited liability would be but few in number, and the remedy by winding-up, which was necessarily adopted in the case of limited companies, was equally just and efficacious where there was no limit, and the same course of proceeding was, therefore, prescribed in both cases.

The first question, then, is whether the change in the mode in which a creditor is obliged under the Act of 1862 to seek relief makes any difference as to who are liable to him as shareholders. I think not. In order to bring this question to a test we may consider how the case would have stood if there had been no change effected by the Act of 1862, except in the mode of making a judgment available. Suppose that the statute of 1862 had only said that in case of a judgment recovered against the company the creditor should not levy execution against any individual shareholder, but should proceed to wind-up the affairs of the company in the manner there pointed out, I can discover nothing which would in such circumstances relieve from responsibility any person who, if there had been no change, would have been liable to an execution. The winding-up is but a mode of enforcing payment. It closely resembles a bankruptcy, and a bankruptcy has been called not improperly a statutable execution for the benefit of all creditors. The same description may be given to a winding-up, and, as in the bankruptcy of an ordinary partnership, every person against whom a judgment-creditor of the firm could have levied execution as a partner would be liable to have his estate administered in the bankruptcy, just so must every person against whom a creditor might under the Act of 1844 have levied execution as a shareholder be liable to have his estate dealt with under a winding-up order. The change, therefore, from the right in the creditor to levy execution to a right to wind-up the affairs of the company does not seem to me to affect the question who are liable as shareholders, as according to the principle acted on in *Henderson v. Royal British Bank* (6), the appellant would certainly have been liable to have his goods taken in execution, so also he must be liable to be dealt with in a winding-up order. But if this change in the mode in which the creditor is to seek his remedy makes no difference as to the persons liable to him, how is he affected by the introduction of the principle of limited liability? I cannot see that he is at all affected by it. His remedy is cut down in amount; but as to the persons liable to him the principle of limited liability had no effect. The introduction of that principle

renders necessary, as I have already stated, some substitute for the remedy by execution against individual shareholders, but it did no more. It plainly left every shareholder subject to all previous liabilities, except only that a line or boundary was fixed beyond which his obligations could not be extended. I have, therefore, satisfied myself that, if the Act of 1862 had done no more than introduce the principle of limited liability and substitute a winding-up of the affairs of the company for execution against individual shareholders, it left the law just as it stood when *Henderson's* case (6) was decided.

But it was argued that there are provisions in the Act of 1844 expressly declaring the liability of shareholders to be the same as that of ordinary partners, which provisions were not found in the Act of 1862. This difference, it is said, makes the principle of *Henderson's* case (6) inapplicable. The clause relied on for this purpose is s. 25 of the Joint Stock Companies Act, 1844, which after providing that the persons taking shares forming themselves into a company, and complying with the requirements of the Act, shall become incorporated, proceeds to say that such incorporation shall not in any wise restrict the liability of any shareholder under any judgment for payment of money recovered against the company, but every shareholder shall, in respect of such moneys, be and continue liable as if the company had not been incorporated. This is the provision in the Act of 1844; and in the statute relating to joint-stock banks, 7 & 8 Vict., c. 113, passed on the same day, there is in s. 7 a provision to the same effect. There is no such provision in the Act of 1862, and so it was contended the legislature must be understood to have contemplated a change in this particular. I cannot, however, think that this is a fair inference. The introduction of limited liability made the retention of such a provision as those which existed in the Acts of 1844, to which I have just referred, impossible, and the question is whether we are to suppose that the legislature contemplated any other changes as to the liability of shareholders beyond those which were the natural, indeed, the necessary consequence of limited liability.

I think not. In the first place, the object of legislation on the subject of these companies has been to enable capitalists to carry on commercial speculations in numbers beyond what the ordinary machinery of the law could deal with. Except for the introduction of the principle of limited liability, legislation has been confined to the giving facilities for carrying on businesses differing in no respect from ordinary commercial partnerships, save in the vast extent of capital embarked, and the great number of the partners engaged. I cannot conceive that the legislature intended by the Act of 1862 to introduce any rules or principles as to the acts or conduct whereby a person should render himself liable to be treated as a shareholder different from those which existed previously. The omission of the clauses declaring shareholders to be liable, as if not incorporated, was, as I have pointed out, necessary; but the Act seems to me to contain on the face of it ample proof that the rights of creditors were not intended to be affected, except only by the introduction of the principle of limited liability.

In the first place I will refer to s. 49 of the Act of 1844. It is there provided, that the directors of every company shall keep a register of shareholders, containing their names and addresses, showing also the number of shares they respectively held, and the amount paid up [Act of 1948, s. 110]; and by s. 50 every shareholder is to have liberty to search this register at all reasonable time. Nobody, however, was to be at liberty to search it who was not a shareholder. There is a similar obligation in the Act of 1862 as to keeping a register, but there is an important change. For, by s. 32 of that Act, it is provided that the register shall be open to the inspection, not only of shareholders, but on payment of 1s., of all other persons, which would, therefore, include creditors [Act of 1948, s. 113]. This seems to me strongly to indicate the intention of the legislature that the creditors were to look to this document as showing them to what extent they might trust the company. Before the introduction of the principle of limited

A liability, such a power of inspection was not necessary, or certainly not at all so necessary. A creditor could hardly fail to know who were some, at least, of the shareholders, and there was no limit to the extent to which he might obtain execution against shareholders of wealth. But when the legislature enabled shareholders to limit their liability, not merely to the amount of their shares, but to so much of the amount as should remain unpaid, it is obvious that no creditor
B could safely trust the company without having the means of ascertaining, first, who the shareholders might be, and, secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world, indicating, as I think very clearly, that persons dealing with the company might trust to that register as containing a true exposition of the assets they had to rely on. The permission to all persons not shareholders to
C inspect the register, and so to ascertain who were shareholders and to what extent they were liable, would have been an unwarrantable exposure of the affairs of the company were it not that all persons have, or may have, an interest in knowing who are liable and to what extent.

This view of the case is strongly confirmed by the language of the statute where it defines contributories. Section 74 defines contributories to be all persons liable
D to contribute to the assets in the event of the company being wound-up [Act of 1948, s. 213]; and s. 38 declares that in that event every present and past member shall be liable to contribute, subject to certain qualifications [Act of 1948, s. 212 (1)]. In order to ascertain who are designated by the word "members" in s. 38, we must refer to s. 23, which states that every person who has agreed to
E become a member, and whose name is entered on the register, shall be deemed to be a member [Act of 1948, s. 2 6(2)]. The name of Mr. Oakes was certainly entered on the register; if, therefore, he agreed to become a member within the meaning of s. 23, he is a contributory. The argument is that he did not so agree, because all which he did was under the influence of fraud and misrepresentation. But, assuming all that to be, and I believe it was, just as Mr. Oakes represents
F it, still he did agree to become a member, i.e., he in fact agreed. He may have full rights against those who deceived him; but with that the outer world can have no concern. The legislature took care to provide the register as the means of enabling persons dealing with the company to know to whom and to what they had to trust. It intended to put the persons whose names are on it in the same position towards creditors (subject of course to the statutable restrictions) as
G persons engaged in an ordinary partnership, or persons trading formerly under the Acts of 1844. In neither of those cases would it have been any answer to a creditor that the person sought to be charged had been induced by fraud to become a partner or a shareholder, and I see no reason whatever for adopting any other principle here.

It was strongly pressed upon us that a decision against Mr. Oakes would be
H at variance with *Central Rail Co. of Venezuela v. Kisch* (1). But there is no inconsistency between the two decisions. The question there was not one in which creditors were concerned. It was the case of a person seeking against a company to be relieved from a contract which he had by fraudulent representations of that company been induced to enter into. This House held, conformably with the decision of the lords justices, considering the fraud to be
I established, that the company could not compel the person thus deceived to retain the shares which he had thus been fraudulently induced to purchase. This decision proceeded upon the grounds of obvious justice and good sense, on which courts, both of law and equity including this House, have of late frequently acted. But it has no bearing on a question between the shareholders and creditors. Great stress was laid on a part of the language which I used in expressing my opinion, and which is supposed to be inconsistent with what I have given as my opinion in the present case. I do not see any such inconsistency. The question there was whether, as between Kisch, the respondent, and the company, he was

to be treated as a shareholder. This House held that he was not. He had been imposed upon by means of a fraudulent concealment of something which the company ought to have disclosed. The company contended that he must be taken to have known the facts which were concealed from him, for that those facts appeared on the face of the articles of association, and the statute provides that the articles of association shall bind every member, whether he seals them or not. Mr. Kisch did not seal them, but the company contended that he must be taken according to the statute to have done so, and so to be aware of their contract. I thought that such an argument did not lie in the mouth of the company, that they could not by fraudulently concealing what they ought to have disclosed induce him to become a member, and then say: "Your membership gives you by force of the statute knowledge which prevents you from alleging that there was fraudulent concealment." I was then, and am still, of opinion that, as between the parties then in litigation and with reference to the clause in the statute to which I have referred, he was not a member. But such a case has evidently no bearing on the question between a shareholder and a creditor.

The conclusion at which I have thus arrived makes it not absolutely necessary that I should express any opinion on the question of fact. But it must not be supposed that because I do not investigate closely the question of fact, therefore, I doubt the soundness of the opinion expressed by my noble and learned friend. For the honour of the great mercantile community of the city of London, I wish I could have believed that the prospectus was honestly and fairly framed. But I cannot. I must believe that the truth was intentionally concealed, and hopes held out which those who framed the prospectus must have known would deceive those who trusted to it. There was both *suggestio falsi* and *suppressio veri*. But for the reasons I have stated this does not, in my view of the case, affect the liability of Mr. Oakes.

There were two or three matters of a minor character put forward in a supplemental form to which I may advert, though I think they rest on no solid grounds. It was said that Mr. Oakes never agreed to become a member of the company whose business is indicated by the memorandum of association actually filed. A change was made in that memorandum after he had agreed to take shares and before it was filed. The change was not of any great importance. But I am far from saying that if Mr. Oakes had, within a reasonable time after he agreed to take shares, examined the memorandum and found that it differed, in however small a degree, from that on the faith of which he had acted, he might thereupon have repudiated his status as a shareholder. But it is impossible to allow a person who has taken shares, and has gone on for nearly a year taking his chance of profit, to turn round when the speculation has proved a failure, and claimed to be released on the ground that he was ignorant of something with which the least diligence must have made him acquainted. It is the duty of a person taking shares in a company to use all reasonable diligence in ascertaining the terms of the memorandum of association, which is, in fact, his title-deed. It was certainly very wrong to make any change in the language of the memorandum of association. But there is no reason to suppose that it was done otherwise than with honest intentions.

The appellant then contends that in consequence of this change there never was an incorporated company. I think that the section of the Act giving effect to the certificate of the registrar [Act of 1948, s. 13] is an answer to this suggestion. But, further, if there never was a company, then there could be no valid winding-up order, and the proper remedy of Mr. Oakes would be to get rid of that order, or to take such steps as might be right on the assumption that no such order exists. The same observation applies to the objection that there was no proper meeting sanctioning the winding-up. I need say nothing as to Mr. Peek's appeal, except that he certainly stands in no better position than Mr. Oakes. I entirely concur in the opinion your Lordship has pronounced.

A LORD COLONSAY.—In regard to one important part of the appellant's case, there is, unhappily, no room to doubt. I allude to the deceptive character of the prospectus. The evidence contained in this volume discloses a state of matters to which no court of law, no court of equity, no court administering law and equity, can hesitate to attach the legal character which the vice-chancellor has attached to it. The suggestion and arguments by which it was attempted to

B give to these transactions a different complexion may have a legitimate influence on the judgment to be pronounced by a more numerous tribunal out of doors on the morality of some of the actions that have been brought before us; but they were not such as could weigh with this tribunal in dealing as a court with the rights of contending parties.

C Upon this part of the case, I do not consider it necessary to say more. But out of the state of matters to which I have been alluding, the fictitious origin and the disastrous termination of this great scheme of Overend, Gurney & Co., Ltd., has arisen the important question we are now called upon to decide. The company was announced as incorporated under the Act of 1862, with limited liability. The prospectus bore date July 12, 1865. The company stopped payment on May 11, 1866. Proceedings were adopted for having the company wound-up under the

D Act of 1862, and on June 22, 1866, KINDERSLEY, V.-C., made an order for winding-up under the supervision of the court. Assuming for the present that the registration and the proceedings for winding-up to which I shall afterwards advert were regular, and that the company is now properly in course of being wound-up under the supervision of the court, what is the position of the appellant

E Mr. Oakes? On July 16, 1865, he applied for shares, which were allotted to him on July 28; he made the stipulated payments, and his name was placed on the register. After the stoppage of the company in May, 1866, some of the shareholders caused investigations to be made which resulted in certain discoveries that have led to the present litigation. It does not distinctly appear whether Mr. Oakes was or was not a party to those investigations; but I think he is entitled to have it assumed in his favour that, if he was not directly a party to those investigations, he was at least watching those proceedings, and intending to avail himself of the results of the investigations. In the meantime, the liquidators had been making up a list of contributories, and had placed the name of Mr. Oakes on that list; and on, I think, Aug. 20, 1866 (there seems to be some difference in the statements as to the date, but at any rate it was about that time) they made a call of £10 per share on Mr. Oakes and others. On

G Oct. 30, 1866, the appellant's solicitors gave notice of a motion to have the appellant's name taken off the register, and off the list of contributories, and to stay proceedings for enforcing the call. That application was ultimately refused by MALINS, V.-C., and we are now reviewing his judgment.

H The ground on which the appellant rested his application was that he had been induced to apply for and accept shares in the company entirely through fraud on the part of the company, the fraudulent character of the prospectus issued by them, and that as soon as he became aware of the fraud, or could have become aware of it, and before he had dealt with the shares in any way, or had derived any benefit from them, he had challenged the transaction and demanded to be relieved. He refers to *Central Rail. Co. of Venezuela v. Kisch* (1), and other

I cases, as showing that at all events, as in a question with the company, he would be entitled to repudiate the contract, and to have his name removed from the register. Starting from that point he says as to the creditors of the company that there was no privity of contract between him and them; that they did not transact with him or with the shareholders, but only with the company in its corporate capacity; and that they cannot, through the liquidator, subject him to any liability to which the company could not have subjected him; that the liquidator can only take up the rights of the company subject to such equities as could be pleaded against the company; and, consequently, subject to the appellant's

right to be relieved from the contract to which he had been induced by the fraud of the company. This view is rested in some measure on the corporate character of the company and on certain recognised principles of law as to the relative position of the creditors of corporations, and the individual members of such corporations, and it is contended that the Act of 1862 must be read and construed with reference to these principles, giving effect to them in so far as that Act has not expressly, or by necessary implication, displaced them as to companies such as this. The appellant says that certain decisions and dicta that have been founded on by the liquidators are inapplicable, inasmuch as they occurred under a different state of the law, and as companies which were then governed by a different statute, a statute that expressly provided that in regard to such questions they should be dealt with as if the companies were not incorporated. Further, he examines the Act of 1862, and contends that there is nothing in the provisions of that Act, when read according to their true intendment, which can be held to deprive him of the relief he demands. *Re Reese River Silver Mining Co.* (5) is referred to as a recent and direct authority in favour of the appellant.

Such is a brief outline of the case that was presented to us on behalf of the appellant, and which was elucidated and enforced in argument with remarkable ability. Up to a certain point the argument for the appellant commanded my assent at the time, and I have not on reflection seen any sufficient reason to withdraw that assent. If this case had been presented to us in circumstances similar to those which existed in *Central Rail. Co. of Venezuela v. Kisch* (1)—if, while Overend, Gurney & Co., Ltd., was a going company, it had made a demand on Mr. Oakes for a call, and he had resisted it on the ground of fraud, I think he might have been entitled to succeed in that resistance, and to have his name removed from the register. Whether that would have finally exempted him from any possible contingent demand in the event of an immediate stoppage and winding-up of the company I do not think it necessary to inquire. The case now before us has reference to a company which had stopped payment, and was in course of winding-up, while the appellant's name was still on the register, and before any challenge was made. The cases, therefore, are not the same. It may be that the decision in *Kisch's* case (1) advances the appellant a step in his argument. It may even be that it gives him a resting place for the engines by which he is to endeavour to remove other obstacles. But those other obstacles required to be removed, and the question is whether they have been effectually removed by the power of the argument that was used.

Having given to the case the most careful consideration, I have come to the conclusion that the argument for the appellant ought not to prevail. I think it proceeds on an erroneous view of the nature of these companies, and of the relative positions of the creditors and members of these companies. This company was formed under the provisions of the Act of 1862, which was a comprehensive repealing and consolidating Act, collecting as it were into one code the provisions which were thenceforth to be applicable to such companies. During the immediately preceding period of thirty-seven years there had been a continuous course of legislation on the subject, beginning in 1825, with the statute 6 Geo. 4, c. 91 [relating to "bubble" companies]. After 1825 statute after statute followed in rapid succession, some fifteen or eighteen statutes having been passed on the subject before matters were brought into the position in which they have been placed by the Act of 1862. What was the tendency and scope of that course of legislation? An important part of it—indeed the great object of it—was to give to the formation of joint-stock trading companies facilities and encouragement which had previously been withheld from them. The genius of the law of England, which regarded with disfavour the notion of an unincorporated company having a persona distinguishable from its component members, was very unfavourable, if not an absolute barrier, to the formation of joint-stock companies. Accordingly

A the efforts of the legislature were directed to giving to these companies a separate persona without conferring upon them all the attributes of proper corporations without qualification.

That principle pervades the whole of the legislation on the subject. I am not speaking of limited liability companies only. Limited liability is merely a step, and a recent step, in the progress. My observations apply to joint-stock trading
B companies generally. The course of legislation was to rear up the company into a separate persona with certain powers and privileges, but without conferring on it in an unqualified manner all the attributes of a perfect corporation. They were said to be incorporated, but they were only incorporated to certain effects, they were quasi corporations. In giving this position to joint-stock trading companies provisions were introduced, on the one hand to preserve the members from
C unnecessary molestation by creditors of the company, and, on the other hand, to preserve the rights of creditors to ultimate payment out of the estates of the members. Among the most important of these were the provisions as to registration of the companies and of the shareholders, and the right of any one to inspect the register, and the provisions for winding-up, which were some of them embodied in separate statutes, of which there are two or three. In 1855 came
D the first Limited Liability Act [repealed by Statute Law Revision Act, 1875]. Beyond giving power to limit the pecuniary amount of the liability of each shareholder it made no important alteration, I think, in law, in the relative position or rights of creditors or members. Indeed, s. 16 provides that it is to be taken as part of the Act of 1844, the 7 & 8 Vict., c. 110 [relating to joint-stock companies]. In 1856 came an Act of the nature of a consolidating Act. In 1858
E the limited liability principle was extended to banking companies. In 1862 came the Act now in force, which I think must be taken as the code applicable to these companies. It appears in the preamble of it to be intended to consolidate and extend the principles of those companies. It also sets forth the various departments into which it is divided, and seems to be a comprehensive code of law
F applicable to them.

Such having been the course of legislation, and such the character of the Act of 1862, we may expect to find in it a solution of the question: Who are to be regarded and treated as contributories when such companies come to be wound-up? If we are not to look beyond the words of the Act of 1862 for a solution of that question, it does not appear to me that there would be much difficulty in the
G case. Section 74 tells us that

"a 'contributory' shall mean every person liable to contribute to the assets of a company under this Act in the event of the same being wound-up."

[Act of 1948, s. 213.] Section 38, which relates to the liability of members, tells us that
H

"in the event of a company formed under this Act being wound-up, every present and past member of such company shall be liable to contribute to the assets"

of such company [Act of 1948, s. 212 (1)]. And s. 23, which defines a member,
I tells us that every

"person who has agreed to become a member of a company under this Act, and whose name is registered on the register of members, shall be deemed to be a member of the company."

[Act of 1948, s. 26 (2).] The appellant says that he cannot be held to have agreed to become a member, inasmuch as his application for and acceptance of shares was induced by fraud, and never having done anything to affirm the contract, he is still entitled to disaffirm it. I cannot agree in that. The contract

was not void, it was only voidable. What does that mean? I think that point was well put by counsel for the respondents in the course of his argument. He said :

"A contract obtained by fraud is voidable, but not void; does it mean void till ratified, or valid till rescinded? The latter is the rule where the rights of third parties intervene."

That I hold to be clearly the import of the doctrine that a contract induced by fraud is not void, but voidable.

I hold that the appellant did agree to become a member of the company. He may have been induced to agree by fraud, but having regard to the language of the statute, what we have to look to is whether he has agreed to become a member or not. It might be a different case, and would be a different case, in regard to a party who had no power, no will, to give an assent, such as an insane person or a pupil. But when the question comes to be as to a party who has the power to act, although he may afterwards recall what he has done upon a certain footing, still in the meantime he has agreed, and what is only voidable and not void cannot be held as invalid until it has been rescinded. I do not very well see how that is to be got over. In this case the appellant says that all this must be read subject to the overruling operation of certain legal principles: First, the principle that in corporations there is no privity of contract between the individual corporators and the creditors of the corporation; secondly, that in such questions there is no room for the doctrine of holding out; and, thirdly, that as the claims or rights of the creditors can only be through the sides of the corporation, they must be subject to any latent equities competent to the incorporator against the incorporation.

These three propositions appear to me to involve several fallacies. First, it is a fallacy to hold that the liability of the partners of these companies must rest entirely on the same principle of contract which was the foundation of the liability of the partners of unincorporated companies prior to the institution of this class of associations. The question is not whether there was any privity of contract between the appellant and the creditors of the company; it is whether, under the constitution of these newly created societies there is a statutory liability imposed on persons in the position of the appellant. Secondly, it is an error to hold that creditors are not supposed to trust to the responsibility of the shareholders. The careful regulations of the registers of shareholders and the publicity to be given to them are a sufficient answer to that view. Indeed, it is plain, from the reason of the thing, that no credit would otherwise be given to the abstraction of a company. It is also a mistake to hold that these companies must to all legal effects and consequences be regarded as unqualified corporations, and in no respect as partnerships. I have already shown that they partake in some respects of both capacities, and I have shown how and why that condition of matters came into existence. Let us for a moment relieve our minds from the trammels imposed by a technical use of words, and look to the substance and reality of the thing. Why are these companies not partnerships? They are associations of individuals for the purpose of trading with the capital they contribute, and of participating in the profits to be derived from that trade. In several of the statutes they are called partnerships, and in one, if not more, of them, provision is made for a deed of partnership. As to their being corporations, I have already shown that they are so, only subject to certain qualifications, and, indeed, in this very statute of 1862, the clause which incorporates them provides that nevertheless they shall be subject to certain qualifications and liabilities, and when we look to the subsequent part of the statute we find among those liabilities the liability of being contributories in the sense that I have described [Act of 1948, s. 212 (1)]. I think it would be contrary to the tendency and scope of all the statutes to hold that these companies are stripped of all the characteristics of mercantile

A partnerships and clothed with all the attributes of perfect corporations without qualification.

I am, therefore, inclined to distrust an argument which seeks to subjugate the plain provisions of this code to the rules of law applicable to a state of things when no such companies existed. There is another consideration which leads me to distrust this mode of moulding the provisions of the Act of 1862 into a different shape from that in which the statute presents them. That statute, as I have already observed, professes to consolidate into one code all the laws and rules applicable to these associations or aggregate societies. It prohibits their existence except under the cover and control of its provisions. It is a general statute applicable to all parts of the kingdom, to Scotland as well as to England, which was not the case with several of the statutes which preceded it in the series. In several of them Scotland was excepted; and why? Your Lordships know that the law of Scotland in regard to partnerships was not the same as the law of England; that in Scotland, as in some other countries, the separate persona of unincorporated trading companies was fully recognised, that joint-stock companies for trading existed there at common law, and that the country had derived great advantage from them. There were other differences also. I apprehend that the Act of 1862 was intended to establish a uniform system of law in both ends of the island in regard to such companies. But if, in reference to joint-stock companies in England, the provisions of the statute are not to be read in a literal or obvious sense, but are to be overridden and qualified and controlled by implications and inferences deduced from rules of the law of England applicable to a state of things antecedent to the existence of any such companies, then by parity of reasoning in reference to joint-stock companies in Scotland, the statute would be qualified and controlled by implications and inferences deduced from the different principles that had prevailed in Scotland, and thus there would be again produced a diversity instead of the uniformity which it was the object of the statute to establish. For these reasons, I think that the line of argument which was put forward by the appellant cannot be maintained.

Reference was made to *Re Reese River Silver Mining Co.* (5) as being a direct authority in point. I do not think that the decision in that case was necessarily an authority in point, for the circumstances under which that case presented itself for decision, appear from the reports that I have seen of it to have been materially different from the present. It seems that in that case the party had made an application to have his name removed from the register on the ground of fraud, before there had been any proceedings for winding-up the concern; and the import of the decision appears to have been that the case must be dealt with in reference to the state of matters at the time that he made that application and sought to repudiate the contract. Whether that decision was one which would upon a consideration of the law be upheld or not is not a matter that I have occasion to go into now. I receive it with all the respect that is due to the court that pronounced it, but it is in that aspect of it not the same as the present case.

As regards other objections which have been stated and which are of a sort of subsidiary and supplementary character, I shall not add anything to the observations which have been made by my noble and learned friends who have already addressed the House on the subject. I entirely concur in their observations. With reference to some questions that I myself put at the close of the argument as to the effect that would be produced by sustaining the plea of the appellant, whether it would not practically reduce the company to the mere directors who had originally issued the prospectus or not, I wish to explain that in putting those questions I did not form any opinion whatever as to the effect that would be due to that result. I had not at that time considered the whole matter of this case; but I wished to have before me all the facts which I thought might or might not enter as elements into the formation of my opinion. In forming my opinion,

I found it my duty to discharge altogether that element, and to hold that the fact of the appellant being only associated as a dupe along with others would not be a reason why he should not have justice dealt to him in the same manner as if he had been the only dupe. In such a proceeding the number of the dupes does not affect the character of the transaction. The greater number of dupes only shows the greater dexterity of the process of inflating the bubble of these concerns. I, therefore, concur in the judgment which your Lordships have been advised to pronounce.

Appeal dismissed.

BEER v. TAPP

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), February 15, 1862]

[Reported 31 L.J.Ch. 513; 6 L.T. 269; 10 W.R. 277]

Trustee—Costs—Incorrect administration—Insufficient estate for all costs—Allowance to trustees of part of costs.

Trustees of an estate, who were directed to pay an annuity to an annuitant and to accumulate a legacy given to an infant, paid the annuity, but failed to make any provision for the legacy. In an action by the legatee after attaining 21 for administration of the estate it appeared that the estate was insufficient to pay the costs of the trustees and also of the legatee.

Held: the trustees should be allowed only part of their costs out of the estate and the former infant's costs would be ordered to be paid out of the moneys remaining.

Notes. As to the costs of trustees in an administration action, where proceedings are occasioned by trustees' neglect, see 38 HALSBURY'S LAWS (3rd Edn.) 948; and for cases see 43 DIGEST 830 et seq.

Appeal by trustees against an order of SIR JOHN ROMILLY, M.R., refusing payment of their costs in an action for the administration of the estate of a testator.

The testator, William Tapp, of South Molton, in the county of Devon, by his will dated Sept. 2, 1839, gave to his daughter Mary Chapple the sum of 1s. 6d. weekly for her life; and he gave to his trustees, namely, the defendants William Jones Tapp and Richard Tepper (and another person who never acted in the trusts, and was now deceased), the sum of £40 upon trust for the plaintiff William Tapp Beer, who was at that time, and for many years after, an infant. The testator declared that the said weekly sum given to Mary Chapple should not be paid to her until after the decease of his brother Peter Tapp. The testator, subject to the payment of his debts and funeral and testamentary expenses and the above-mentioned annuity and legacy, gave the whole of his real and personal estate to the above-named trustees, upon trust for the said Peter Tapp for his life, and after his decease, upon certain trusts not relevant here. He appointed the said William Jones Tapp, Richard Tepper and the third mentioned trustee executors of his will.

A The testator died on Mar. 8, 1840; his will was proved by William Jones Tapp and Richard Tepper only, who proceeded to administer the estate and to act in discharge of the trusts. Peter Tapp survived the testator, and died in 1843, from which time the trustees entered into possession of the real estate, which consisted exclusively of an undivided share of certain small freehold cottages, at the time greatly out of repair. Out of the estate which they got in and of the rents received by them, the trustees paid the annuity of 1s. 6d. per week in full, but they made no provision to meet the legacy of £40 to the plaintiff or any part thereof.

C The plaintiff did not attain twenty-one until January, 1857, and in December, 1858, he instituted this suit against the trustees and other persons, praying administration of the testator's real and personal estate, and payment to him of his legacy of £40. By his bill he charged the trustees with wilful default, in not having raised or provided for the legacy given to him, *pari passu* with the annuity to Mary Chapple.

D The trustees were interrogated to the bill, and put in an answer, in which they swore that they had got in the whole of the testator's personal estate and that it amounted to £25 only, and that it had proved barely sufficient to pay the testator's funeral expenses and his debts; that they had been advised that, owing to difficulties and circumstances of doubt upon the title, they would be unable to proceed to a sale of the real estate, and they submitted that they had done everything in their power fairly to administer the estate short of throwing the administration into Chancery.

E The plaintiff considered the answer insufficient; and required a further answer: the pleadings became protracted, and much evidence was adduced by both parties.

F His Honour, by his decree at the original hearing, which took place on July 9, 1859, ordered the usual accounts and inquiries to be taken, and directed a sale of the testator's real estate. His Honour's chief clerk, by a separate certificate, made on Feb. 28, 1861, found that the sum due to the plaintiff for his legacy and interest thereon was £90 10s.; that the trustees had retained in their hands on account of the personal estate a sum of £14 18s. 10d.; that they had advanced to the tenant for life, Peter Tapp, a sum of £16 to enable him to repair the real property, and that this sum ought not to be allowed to them; and he accordingly disallowed the same.

G The chief clerk made his general certificate on July 11, 1861, and thereby found a balance of £68 12s., due from the trustees in respect of the rents and profits of the real estate, including in that amount a sum of £55 15s. 6d. paid in respect of the annuity, which the certificate disallowed; and it was further certified that the whole of the real estate had been sold, and had produced only £72 1s. 9d., which had been paid into court to the credit of the cause.

H It appeared that the whole amount of the rents during the time that the trustees had managed the real estate was £127 6s. 2d., of which the above £55 15s. 6d. had been paid to the annuitant, and the payments properly made by the trustees on account of the estate and allowed were £58 17s. 3d.

I The order appealed from was made, on further consideration, on Dec. 4, 1861, and it was thereby ordered that the trustees should retain the aforesaid balance of £14 18s. 10d. in respect of their costs, and that the proceeds of sale of the real estate (£72 1s. 9d.) should be paid to the solicitor of the plaintiff in respect of his costs; and it was ordered that all further proceedings should be stayed. His Honour's order was, however, wholly silent as to the sum of £68 12s. found due from the trustees on account of the rents and profits which they had received, and as no order was made for them to pay it into court or otherwise to account for it, they would be entitled to retain it in further satisfaction of their costs of the suit. It soon became apparent that the costs of the trustees would considerably exceed the two sums allowed them—together £83 10s. 10d.—and they

were advised that under the circumstances they were entitled to be paid their costs in full before any part of the estate could be applied in payment of the plaintiff's costs. Conceiving themselves, therefore, entitled also to the £72 1s. 9d. for that purpose, they appealed against that order.

Selwyn, Q.C., and *Karslake* for the trustees.

Follett, Q.C., and *Southgate* for the plaintiff.

KNIGHT-BRUCE, L.J.—The funds in this case consist of three sums, namely, £14 and a fraction, £68 and a fraction, and £72 and a fraction. The two former sums were in the hands of the trustees and executors; the third sum was in court, as the proceeds of sale of the real estate. The only claimants to the funds were the trustees and executors, and the plaintiff, the legatee. The plaintiff did not claim against the executors and trustees the sum of £14 and a fraction, and the sum of £68 and a fraction due from them, or in their hands.

It is plain that the costs in the suit incurred by the trustees and executors will exceed in amount these two sums, and it is also sufficiently plain that the costs in the suit incurred by the plaintiff must exceed the amount of the third sum of £70 and a fraction. Moreover, it is, if not plain, at all events highly probable, that the costs of the trustees will amount to more than the three sums put together. They had been allowed the two smaller sums, and the question is whether they are to have the third sum of £72 and a fraction to meet their costs, or whether the plaintiff is to have it towards his costs.

Prima facie trustees would be entitled to all the three sums in respect of their costs, charges and expenses, but in my opinion they ought not to be considered so entitled in the present instance. Without any improper intention, they have not acted in such a way as to entitle them to the whole advantage in respect of costs which trustees and executors generally have.

The real estate which formed the principal part of the property became saleable in 1843. It was an undivided share of some houses in a very bad condition. They might well have sold it in 1843, when the tenant for life died, which was a few years after the death of the testator, but they did not do so. They laid out sums for repairs, and received from time to time the rents. Out of these rents they paid an annuity, which, by the will, was charged upon them, amounting to 78s. per annum; but there was a charge on the fund equal in rank with the annuity, to which they paid no attention—the legacy, namely, which was given to the plaintiff. If they paid (as they did pay) the annuity to Mary Chapple, they might and ought to have paid something to the owner of the legacy, or on his account. That they did not do.

I do not think that in this respect they acted correctly, though I do not impute any bad intentions to them; nor do I think they acted rightly in keeping the property unsold from the year 1843, for a period of more than fourteen years. For these considerations as they have been allowed the £14 and the £68 towards their costs, they have, under the circumstances, received enough, and I am of opinion that, under the circumstances of the case, no more than justice has been done in allowing the plaintiff to retain for his costs the £72 and a fraction. That was what the Master of the Rolls has done, and I would only add that the order should expressly direct that the trustees should retain the £68 as well as the £14, which direction was intended, although it has escaped attention. The order should be also express that the sum of £72 is to be paid to the plaintiff's solicitor, on account of the plaintiff in respect of his costs. There should also be added an undertaking on the part of the plaintiff's solicitor to account for that sum to the plaintiff. These additions are necessary, more for regularity than substance, and I think that those alterations ought not to make any difference as to costs. Justice would be done by giving the plaintiff the deposit.

TURNER, L.J.—Although trustees have a right to their costs out of the trust estate, that depends on their conduct of the trust, and whether they have strictly observed their trust duties. In this case there was the annuity of 1s. 6d. a week to be paid by the trustees, and a legacy of £40 to be received and set apart and accumulated for the benefit of an infant. Both accrued due in the year 1843, upon the death in that year of the tenant for life. The trustees, being in possession of the estate, applied the whole of the rents and profits, except £12 13s. 9d., in payment of the annuity alone. On looking to the certificate, the amount of rent received by them was £127 6s. 6d., of which the payments which were properly made on account of the estate amounted to £58 17s. 3d., and the sums paid for the annuity were £55 15s. 6d., making a total of £114 12s. 9d., and leaving only £12 13s. 9d. to meet the legacy of £40 and the interest upon it. They made these payments without making any provision for the legacy of £40. They were not justified in this. They ought to have taken care of the infant legatee as well as of the annuitant.

Again I do not feel satisfied upon the answer as to the course which they had taken when the application was made to them for an account. In February, 1858, they were applied to, on the part of the infant, to pay the legacy and for an account. That correspondence dropped later in 1858. From that time the correspondence went on, not with the solicitor of the plaintiff, but with the solicitor of the devisee, who was entitled to the estate, subject to the charge of the legacy. The result of the correspondence was, that, instead of executing the trusts, they tried to throw off the trusts on the devisees. In my judgment the order has done substantial justice. As to the form of the order, however, I do not feel sure that I might not have gone further than my brother in favour of the plaintiff; but, on the whole, I am more disposed to agree with him.

Appeal dismissed.

O'BRIEN v. LEWIS AND ANOTHER

[COURT OF APPEAL IN CHANCERY (Lord Westbury, L.C.), January 30, 1863]

[Reported 32 L.J.Ch. 569; 8 L.T. 179; 27 J.P. 244; 9 Jur.N.S. 528;
11 W.R. 318]

Solicitor—Remuneration—Gift by client in addition to payment of costs—Validity.

The law has laid down certain rules and scales of charges for the remuneration of a solicitor's services, and, giving him that right, it imposes the obligation on him not to bargain, or permit his client to promise that any additional benefit shall be given beyond the legal remuneration.

The plaintiff instituted a suit to recover, on the ground that it was a gift in addition to the defendant's costs for services rendered, £300 which had been retained nine years previously by the defendants, a firm of solicitors, out of a sum paid on the settlement of an action in which they were acting on his behalf.

Held: the gift was invalid, and, notwithstanding the lapse of time, the plaintiff was entitled to recover.

Notes. As to transactions between solicitor and client, see 36 HALSBURY'S LAWS (3rd Edn.) 85 et seq.; and for cases see 42 DIGEST 76 et seq.

Cases referred to in argument :

Harris v. Tremenheere (1808), 15 Ves. 34; 33 E.R. 668; 42 Digest 77, 688.

Cooke v. Lamotte (1851), 15 Beav. 234; 21 L.J.Ch. 371; 51 E.R. 527; 7 Digest (Repl.) 181, 139.

Hoghton v. Hoghton (1852), 15 Beav. 278; 51 E.R. 545; 22 Digest (Repl.) 369, 3973.

Re Holmes' Estate (1861), 3 Giff. 337; 5 L.T. 378; 8 Jur.N.S. 252; 66 E.R. 439; 42 Digest 77, 690.

Hatch v. Hatch (1804), 9 Ves. 292; 1 Smith, K.B. 226; 32 E.R. 615; 42 Digest 77, 687.

Appeal from a decree made by STUART, V.-C., in favour of the plaintiff in an action instituted by John O'Brien against the defendants, James Graham Lewis and George Coleman Hamilton Lewis, solicitors, for a declaration that the defendants were liable to pay, and might be decreed to pay, to the plaintiff a sum of £300 alleged to have been improperly retained by them with interest at 5 per cent., and also for a general account.

The amended bill, after stating various transactions between the plaintiff and the defendants, who in 1852 were his solicitors, alleged that two sums of £120 and £800 were received by the defendants from a Mr. Davis, the solicitor for Sir Robert Clifton, for the use of the plaintiff, as one of the terms of a compromise of a suit in which they were acting as solicitors on his behalf. The defendants accounted to the plaintiff for £500 only, part of the sums received from Mr. Davis, and appropriated the sum of £300, the residue thereof, and costs, to their own use. The amended bill further alleged that the defendants admitted that they appropriated the £300 and costs, but they alleged that the plaintiff, before the settlement of the matter in question, made them a promise of, and told them to retain, £300 and to keep the same as a present to themselves. This allegation was wholly untrue; the plaintiff did not make the defendants a present of the £300, and, if he told them to keep the same as a present, they would not be entitled to retain the same, inasmuch as, being solicitors, they had no right to make a gain at the expense of their client. The defendants, by their answer, said that the plaintiff had repeatedly, both by letter and orally, acknowledged to them their generous conduct towards himself, and the ability and industry with which they had conducted his business. The plaintiff knew that he could compel the defendants to deliver their bill of costs to him. He never did, however, demand any bill of costs. When Sir Robert Clifton filed his bill, the plaintiff told the defendants that he would do anything to avoid putting in an answer to the bill, and that he was most desirous to have the matter settled, and he then stated to the defendants that if they could get the matter arranged by his giving up certain letters in his possession, he would make them a present of £300 besides paying them their fair bill of costs in the matter. The terms were arranged, and before the final settlement were communicated to the plaintiff. The defendants alleged, further, that the proceedings were finally settled in April, 1852, by the defendants receiving, in the presence of the plaintiff and with his knowledge, £800 in satisfaction of his rights, and £120 for costs; that the defendants thereupon paid to the plaintiff £500, part of the £800, and, in accordance with the plaintiff's promise to give them £300 in the event of their settling the before-mentioned proceedings, retained in their hands by his then repeated directions the £300; that accounts had been settled between the plaintiff and the defendants, and that, particularly in May, 1852, the plaintiff had himself made out and signed an account in which he charged the defendants with £500 only, and this was repeated in November, 1853, when the plaintiff signed a further similar account, and the balance due to him was at once paid by the defendants. From 1852 to 1861 the plaintiff never alleged that he had any claim in respect of the £300.

The plaintiff in person.

Malins, Q.C., and *Brooksbank* for the defendants.

A **LORD WESTBURY, L.C.**—This case must be decided on the general principle which had been long established on grounds of public utility. The law treats the relation of solicitor and client in a particular manner. It has laid down certain rules and scales of charges for the remuneration of his services, and, giving him that right, it imposes the obligation on him not to bargain, or permit his client to promise that any additional benefit shall be given beyond the legal remuneration.

B I particularly wish to express that principle, because at present I am not dealing with gifts made after the determination of the relation of solicitor and client. I shall take the defendants' case from their own representation appearing on their answer. They say that a bill in equity had been filed against the plaintiff containing many personal charges against him and that they were employed by the plaintiff as his solicitors to conduct the defence, that the plaintiff was under

C considerable anxiety respecting it and told them that he would make them a present of £300 beyond the fair bill of costs in the matter if they could get it settled. It was the duty of the defendants to have said that the plaintiff should make no such promise, that they could accept no such gift; yet they not only accepted the promise, but, having got a settlement of the suit by obtaining payment of £800, they retained out of it the £300 so promised. The promise

D was good for nothing, it involved no legal right or obligation, and it was the duty of the solicitors to prevent their client from making any such promise at all.

The present bill was filed after a long period—a period filled up by the continuance of the relation of solicitor and client between the parties. It has been said that the lapse of time alone was a bar to the claim. I am not of that opinion.

E There is no authority for such an argument. Again, it has been said that there has been a recognition of the promise on the part of the plaintiff—that is to say, of a promise which is a void thing—and on that the plaintiff is to be held liable. I cannot permit the view to be entertained that the promise can be made valid by such recognition; but there is no evidence of any such recognition, except that, in the accounts between them, the plaintiff has not debited them with the

F amount in question as a debt due to him, which he was under no obligation so to do. I am willing to take it for granted that the demand was an ungrateful one. There could be no doubt that the defendants have conferred great services on the plaintiff, which he has acknowledged. But I do not order the £300 to be returned to the plaintiff for his individual merit, but because it is my duty to uphold the general rule, on considerations of public policy, that a solicitor

G must not be a party to such proceedings. I have been pressed to relieve the defendants from the costs, but I cannot do so, for it was their duty to have protected their client, and they should neither have permitted the promise to be made nor retained the money. It was their bounden duty to know this, and, therefore, no costs will be given. **STUART, V.-C.**, has taken a correct view of the case, and the petition of re-hearing must be dismissed with costs.

H *Petition dismissed.*

SWIRE v. LEACH

[COURT OF COMMON PLEAS (Erle, C.J., Williams and Keating, JJ.), January 27, 1865]

[Reported 18 C.B.N.S. 479; 5 New Rep. 314; 34 L.J.C.P. 150;
11 L.T. 680; 11 Jur.N.S. 179; 13 W.R. 385; 144 E.R. 531]

Distress—For rent—Illegal distress—Goods pledged with pawnbroker—Measure of damages.

Goods pledged with a pawnbroker are privileged from distress for rent due to the pawnbroker's landlord. If they are distrained, the pawnbroker is entitled to recover their full value from the landlord and not merely the amount which he has advanced on them.

Notes. Applied: *Miles v. Furber* (1873), L.R. 8 Q.B. 77. Referred to: *Johnson v. Lancashire and Yorkshire Rail. Co.* (1878), 3 C.P.D. 499; *The Winkfield*, [1900-3] All E.R. Rep. 346.

As to wrongful distress, see 12 HALSBURY'S LAWS (3rd Edn.) 157 et seq.; and for cases see 18 DIGEST (Repl.) 377 et seq.

Cases referred to:

- (1) *Simpson v. Hartopp* (1744), Willes, 512; 125 E.R. 1295; 18 Digest (Repl.) 277, 247.
- (2) *Coggs v. Bernard (Barnard)* (1703), 2 Ld. Raym. 909; Com. 133; 1 Salk. 26; 3 Salk. 11; Holt, K.B. 13; 92 E.R. 107; 1 Digest (Repl.) 496, 1343.
- (3) *Johnson (Assignee of Cumming) v. Stear* (1863), 15 C.B.N.S. 330; 3 New Rep. 425; 33 L.J.C.P. 130; 9 L.T. 538; 10 Jur.N.S. 99; 12 W.R. 347; 143 E.R. 812; 37 Digest (Repl.) 11, 69.
- (4) *Thompson v. Mushiler* (1823), 1 Bing. 283; 8 Moore, C.P. 254; 1 L.J.O.S.C.P. 104; 130 E.R. 114; 18 Digest (Repl.) 283, 303.
- (5) *Adams v. Grane* (1833), 1 Cr. & M. 380; 3 Tyr. 326; 2 L.J.Ex. 105; 149 E.R. 447; 18 Digest (Repl.) 283, 297.
- (6) *Brown v. Shevill* (1834), 2 Ad. & El. 138; 4 Nev. & M.K.B. 277; 4 L.J.K.B. 50; 111 E.R. 54; 18 Digest (Repl.) 280, 276.

Also referred to in argument:

- Gibson v. Ireson* (1842), 3 Q.B. 39; 114 E.R. 422; 18 Digest (Repl.) 280, 270.
Wickendon v. Webster (1856), 6 E. & B. 387; 25 L.J.Q.B. 264; 27 L.T.O.S. 122; 2 Jur.N.S. 590; 4 W.R. 562; 119 E.R. 909; 31 Digest (Repl.) 167, 3017.
Muspratt v. Gregory (1836), 1 M. & W. 633; Tyr. & Gr. 1086; 2 Gale, 158; 6 L.J.Ex. 34; 150 E.R. 588, Ex. Ch.; 18 Digest (Repl.) 288, 369.
Joule v. Jackson (1841), 7 M. & W. 450; 10 L.J.Ex. 142; 151 E.R. 842; 18 Digest (Repl.) 283, 302.
Findon v. M'Laren (1845), 6 Q.B. 891; 1 New Pract. Cas. 152; 14 L.J.Q.B. 183; 4 L.T.O.S. 355; 9 Jur. 369; 115 E.R. 336; 18 Digest (Repl.) 282, 287.
Walter v. Smith (1822), 5 B. & Ald. 439; 1 Dow. & Ry. K.B. 1; 106 E.R. 1251; 37 Digest (Repl.) 24, 190.
Parsons v. Gingell (1847), 4 C.B. 545; 16 L.J.C.P. 227; 9 L.T.O.S. 222; 11 Jur. 437; 136 E.R. 621; 18 Digest (Repl.) 228, 284.

Rule Nisi obtained by the defendant to enter a nonsuit in or for a new trial of an action of trover for goods and chattels pledged with the plaintiff in the way of his trade as a pawnbroker. The defendant distrained the goods for rent due to him from the plaintiff, and pleaded Not Guilty by statute (Distress for Rent Act, 1737, s. 21). *Pigott, B.*, directed the jury to find for the plaintiff for £30, the full value of the goods so seized, the defendant having leave to

A move to enter a verdict for him, or to reduce the damages by the value of the forfeited pledges, or to the amount actually advanced on them by the plaintiff. The defendant obtained a rule nisi.

W. Saunders and Holker showed cause against the rule.

Monk, Q.C., supported the rule.

B **ERLE, C.J.**—I am of opinion that this rule should be discharged. The action is brought by a pawnbroker against his landlord for distraining goods pledged with him in the way of his trade as a pawnbroker. The governing principle is that goods entrusted to a person in the way of his trade are exempt. This rule is laid down in the notes to *Simpson v. Hartopp* (1) in 1 SMITH'S LEADING CASES. Many judges have tried to lay down a general principle relating to trades which are public trades within this rule, but no general principle or definition is to be found, and the law must be derived from a great number of specific instances in which trades have been held to be, or not to be, within the rule. I can see no distinction between the case of a pawnbroker and the case of an auctioneer, a wharfinger and a warehouseman, which have been held to be within the exemption. The right of a pledgee with respect to the goods pledged is very like an ordinary lien. The pawnbroker incurs a liability to the party pledging, and he is bound to have the goods ready to be reclaimed, and to take reasonable care of them, as laid down in *Coggs v. Bernard* (2). The case comes close to that of a warehouseman.

E Then comes the question whether the plaintiff is entitled to have the full value of the goods. It is said that he only holds the goods as a security for the money which he has advanced, and that he is only entitled to recover the amount which he has so advanced. No doubt, if the owner of the goods had wrongfully taken them out of the pawnbroker's possession and he had sued to recover them, the same question would arise whether the measure of damages should not be the money due on them, as arose in *Johnson (Assignee of Cumming) v. Stear* (3), where the rest of the court had the misfortune to differ from WILLIAMS, J. There, we held that the owner was only bound to indemnify the pledgee for what he had advanced. But that case bears no approximation to the present. If the landlord is not entitled to distrain the goods he is an absolute wrongdoer, and, therefore, the bailee is entitled to recover their full value, out of which he must keep so much as will repay him for what he has advanced, and must hand over the remainder to the owners. This is the reasonable view, for the pawnbroker is probably responsible for the goods to the parties who deposited them. I think that, on these grounds, the rule should be discharged.

H **WILLIAMS, J.**—I am of the same opinion. The goods are privileged on the general ground that they are goods placed in the hands of the pawnbroker to be taken care of and dealt with by him in the way of his trade; and the case so resembles those cited of the wharfinger (*Thompson v. Mashiter* (4)), the auctioneer (*Adams v. Grane* (5)), and that of the calf at the butcher's (*Brown v. Shevill* (6)). As to the amount of the damages, it is clear that the distrainer is a wrongdoer, and, therefore, the measure of damages is the full value at the time of the seizure.

I **KEATING, J.**, concurred.

Rule discharged.

Ex parte HUGUET

[COURT OF EXCHEQUER (Kelly, C.B., Martin and Pollock, BB.), June 7, 8, 1873]

[Reported 29 L.T. 41; 12 Cox, C.C. 551]

Extradition—Evidence—Admissibility of deposition taken before another magistrate in same proceedings—Power of court to question magistrate's decision.

The applicant was brought before a magistrate in extradition proceedings in accordance with the provisions of the Extradition Act, 1873. A witness gave evidence, was cross-examined by counsel for the applicant, and signed his deposition in due form. The case was adjourned and, at the adjourned hearing, another magistrate presided who, after hearing further evidence, received in evidence the witness's deposition. The applicant was committed to prison. On a rule nisi for a writ of habeas corpus on the grounds that (i) there was not sufficient evidence of any offence justifying the application of the Act of 1870, and (ii) the second magistrate had no jurisdiction to act on a deposition not taken before himself,

Held: (i) it was for the magistrate to decide whether the evidence was sufficient and the court was not a court of appeal from the magistrate's decision; (ii) (KELLY, C.B., dubitante) the deposition taken before the first magistrate was receivable by the second magistrate; accordingly, the rule must be discharged.

Notes. Considered: *R. v. Maurer* (1883), 10 Q.B.D. 513; *Re Guerin* (1888), 58 L.J.M.C. 42. Referred to: *Ex parte Castioni* (1890), 7 T.L.R. 50; *Re Bluhm*, [1901] 1 K.B. 764; *R. v. Briston Prison, Ex parte Shure*, [1926] 1 K.B. 127; *Re Kolczynski*, [1955] 1 All E.R. 31.

As to procedure on extradition of offenders from the United Kingdom, see 16 HALSBURY'S LAWS (3rd Edn.) 567 et seq.; and for cases see 24 DIGEST (Repl.) 995 et seq. For the Extradition Act, 1870, s. 9, see 9 HALSBURY'S STATUTES (2nd Edn.) 880.

Case referred to:

(1) *R. v. De Vidil* (1861), 9 Cox, C.C. 4; 14 Digest (Repl.) 222, 1854.

Also referred to in argument:

R. v. Bolton (1841), 1 Q.B. 66; Arn. & H. 261; 4 Per. & Dav. 679; 10 L.J.M.C. 49; 5 J.P. 370; 5 Jur. 1154; 113 E.R. 1054; 16 Digest (Repl.) 127, 105.

R. v. Watts (1863), Le. & Ca. 339; 3 New Rep. 175; 33 L.J.M.C. 63; 9 L.T. 453; 27 J.P. 821; 12 W.R. 112; 9 Cox, C.C. 395; 14 Digest (Repl.) 217, 1804.

Rule Nisi for a writ of habeas corpus to bring up Ernest Etienne Huguet, a Frenchman in custody of the Governor of the House of Detention, on a warrant of Sir Thomas Henry under the provisions of the Extradition Act, 1870, in order that he might be discharged from custody.

It appeared from the affidavits that the applicant, who was a French subject, left France and came to England in April, 1872, having in his possession the sum of 27,000f., being at that time a banker in Paris and the editor and proprietor of a newspaper called "L'Avenir Liberal." While in England he was adjudged by the French courts to be a fraudulent bankrupt and was ordered to be put on his trial for fraudulent bankruptcy. A requisition was accordingly made by the French authorities to the Foreign Secretary, a warrant was issued, and the applicant was brought before Mr. Vaughan, one of the police magistrates at Bow Street. Evidence was then taken, and Monsieur de Monchairville, the official assignee in France under the bankruptcy, gave evidence of all the facts connected with such bankruptcy of an official nature. He was cross-examined by the counsel of the applicant, and he signed his deposition in due form.

A The further hearing of the case was then adjourned, and on the adjourned meeting Sir Thomas Henry presided. On that occasion a quantity of French documentary evidence was produced, and a Monsieur Adolphe Moreau, counsel to the French Embassy in London, gave evidence of the French law on the subject, and thereby established the fact that the applicant had, according to the evidence, made himself amenable to the charge of being a fraudulent bankrupt. Monsieur B de Monchairville was not required to give evidence before Sir Thomas Henry as he had before given it before Mr. Vaughan, for it appeared that, at the adjournment of the former hearing, he announced that he would not again attend, and would go to Paris, and he did not in fact again attend. On this, the second clerk at Bow Street deposed to the due taking of the deposition of Monsieur de Monchairville before Mr. Vaughan, and to his cross-examination on behalf of C the applicant. On this proof, Sir Thomas Henry received in evidence the deposition so made, and, the case being complete, he committed the applicant to the Middlesex House of Detention to await the warrant of the Secretary of State for his surrender.

D The rule was moved on the grounds: (i) that there was not sufficient evidence of the commission of any offence justifying the application of the Extradition Act, 1870; (ii) that Sir Thomas Henry had no jurisdiction to act on any deposition not taken before himself.

The Attorney-General (Sir J. D. Coleridge, Q.C.) and Bowen showed cause against the rule.

E *Chambers, Q.C., and Besley for the applicant.*

KELLY, C.B.—I am of opinion that this rule should be discharged. It has been said by the Attorney-General that, as there was evidence before the magistrate of a fraudulent bankruptcy, his jurisdiction to make his warrant of commitment cannot be impeached. No arguments have been addressed to us F with regard to our jurisdiction to deal with a case like this, but it is said that, if the magistrate had jurisdiction to hear, we have no power to interfere. This, however, is stated in terms rather too wide. Suppose, for instance, a charge be made against a foreigner residing in this country for a murder committed by him in France, and that, when it came before the magistrate, it should appear G that the party survived more than a twelvemonth; I am of opinion that that would not be a subject of extradition, and that, if the magistrate were to make his warrant for his detention, we could interfere. Where, however, there is evidence of experts in French law which shows a crime committed in France, which, if committed here, would be punishable by our law, we have no right to question the truth of the testimony. In such a case it is for the magistrate to decide, and, although we may think that the case is very inconclusive, we cannot H interfere. He is the only party authorised to decide on the facts.

Such being the law, what are the objections? It appears that the applicant was charged with fraudulent bankruptcy, and the first question is: Had he been guilty according to law? On that, I cannot bring myself to entertain a doubt. [His LORDSHIP reviewed the evidence on this point, and continued:] Then there is another objection. It appears that, in the course of the proceedings, I the evidence of a gentleman named Monchairville was taken before another magistrate than the one who ultimately decided the case. The receiving of such evidence is certainly almost entirely contrary to practice. If evidence is to be acted on, it should be heard by the committing magistrate, and he ought not to act on any deposition taken before another magistrate; and except in *R. v. De Vidil* (1), before BLACKBURN, J., I know of no other case of a similar description; and, notwithstanding the opinion of MARTIN, B., I entertain great doubt whether the deposition of M. de Monchairville was admissible in evidence before Sir Thomas Henry. I accede to the Attorney-General's argument, that,

if there was sufficient evidence before Sir Thomas Henry without that deposition, then it becomes immaterial, and I think that there was sufficient evidence without it. Under these circumstances, the objection fails.

MARTIN, B.—I am of opinion that the law has been correctly laid down in the cases cited. The question is: Was this a proceeding within the jurisdiction of Sir Thomas Henry? I do not say that, if there had been no evidence before him, or he had acted contrary to law, we would not have discharged the applicant; but it appears to me that all the proceedings have been properly taken. This is not a court of appeal from his decision, and it is for him to decide whether or not the evidence is sufficient. It has, however, been strongly insisted that the evidence taken before Mr. Vaughan was not admissible before Sir Thomas Henry so as to enable him to act on it. I do not mean to express any positive opinion, but I think that such evidence was admissible at common law. The witness who has made a deposition on oath will not appear, but goes abroad. Here is an inquiry in the same matter between the same parties, and the witness's deposition is admissible at common law. The argument as to the provisions of the various criminal statutes cited is not applicable; their provisions were intended merely for the convenience of proof. This certainly is my own impression.

POLLOCK, B.—I also think that this rule should be discharged. The Extradition Act, 1870, points out the mode of proceeding, and it directs that the case is to be treated by the magistrate in the same way as though it were a hearing of an ordinary case with a view to a committal to trial. As regards the evidence taken before Mr. Vaughan, this was taken in the presence of the applicant, and I should have thought that it was receivable. But whether it was so or not, if there were other sufficient evidence, it may be disregarded. This is not like the case of the admission on a trial of improper evidence on which a jury may have acted. This was only a preliminary inquiry, and, if the magistrate had sufficient materials, we cannot question his decision.

Rule discharged.

PICKERING AND ANOTHER v. ILFRACOMBE RAIL. CO.

[COURT OF COMMON PLEAS (Bovill, C.J., Willes, Keating and Montague Smith, JJ.), January 23, 27, 1868]

[Reported L.R. 3 C.P. 235; 37 L.J.C.P. 118; 17 L.T. 650;
16 W.R. 458]

Company—Calls—Assignment—Validity—Assignment to creditor—Power to sell call—Constructive notice to shareholder present at meeting authorising assignment.

On May 12, 1866, the plaintiffs, contractors to a railway company, received from the company's engineer a certificate in agreed form that £96,000 was due to them for work done and materials supplied, a sum of £11,000 being in respect of materials brought on to the line, but not yet attached to it. On June 4 the company gave the plaintiffs £56,000 worth of paid-up shares in respect of the debt, leaving a balance due of £40,000. On June 11 the company made a call of £5 per share payable on July 14, and by a deed, dated July 13, which recited that they were indebted to the plaintiffs in the sum of £40,000, they assigned the proceeds of the call to the plaintiffs by way of security with a power of sale at any time after October 13. On July 13 the defendants, having previously got judgment in an action against the company, obtained a garnishee order nisi ordering that all debts due and owing or accruing due from P., the chairman of the company and the holder of 200 shares, should be attached to answer the judgment. Before the order was made absolute the plaintiffs claimed £1,000, the amount of the call due from P. who had been chairman of the meeting at which the call was made and the assignment proposed, although he had no actual notice of the assignment. He paid the money into court and an interpleader issue was directed to be tried between the plaintiffs and the defendants.

Held: (i) it was competent to the company's engineer under the contract with the company to certify for materials not yet attached to the line, but intended to be used in its construction; (ii) the company had power to assign the call as security for a bona fide debt although the call had not been paid, and the assignment was not void by reason of the power to sell the call contained therein because the invalid part of the deed would be inoperative and the remainder would stand; (iii) if notice of the assignment to P. were necessary, he must in any event be taken to have had notice when he was present at the meeting at which the assignment was proposed.

Notes. Considered: *Baker v. Hedgecock* (1888), 39 Ch.D. 520; *Re Burdett, Ex parte Byrne* (1888), 20 Q.B.D. 310; *Cole v. Eley*, [1894] 2 Q.B. 180; *Vacuum Oil Co. v. Ellis*, [1914] 1 K.B. 693. Referred to: *Robinson v. Nesbitt* (1868), L.R. 3 C.P. 264; *Mosse v. Killick* (1881), 44 L.T. 149; *Punchard v. Tomkins* (1882), 31 W.R. 286; *Re Leavesley*, [1891] 2 Ch. 1; *Brunton v. Dixon* (1892), 36 Sol. Jo. 556; *Royal Exchange Assurance Corp'n. v. Sjørorsakrings Akt. Vega*, [1901] 2 K.B. 567; *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169; *Wild v. Simpson*, [1918-19] All E.R. Rep. 682; *Putzman v. Taylor*, [1927] All E.R. Rep. 356.

As to notice of equitable assignments, see 4 HALSBURY'S LAWS (3rd Edn.) 498 et seq.; and for cases see 8 DIGEST (Repl.) 568 et seq. As to equitable mortgages of personalty, see 27 HALSBURY'S LAWS (3rd Edn.) 172 et seq.; and for cases see 7 DIGEST (Repl.) 363 et seq.

Cases referred to:

- (1) *Watts v. Porter* (1854), 3 E. & B. 743; 2 C.L.R. 1553; 23 L.J.Q.B. 345; 23 L.T.O.S. 228; 1 Jur.N.S. 133; 118 E.R. 1319; 21 Digest (Repl.) 763, 2478.

- (2) *Beavan v. Earl of Oxford* (1856), 6 De G.M. & G. 507; 25 L.J.Ch. 299; 26 A.L.T.O.S. 277; 2 Jur.N.S. 121; 4 W.R. 274; 43 E.R. 1331; 21 Digest (Repl.) 660, 1495.
- (3) *Kinderley v. Jervis* (1856), 22 Beav. 1; 25 L.J.Ch. 538; 27 L.T.O.S. 245; 2 Jur.N.S. 602; 4 W.R. 579; 52 E.R. 1007; 21 Digest (Repl.) 596, 846.
- (4) *Mauleverer v. Hawxby* (1670), 2 Saund. 78; 85 E.R. 748; sub nom. *Maleverer v. Hawksby*, 1 Sid. 456; 2 Keb. 625; sub nom. *Maleverer v. Redshaw*, 1 Vent. 39; 1 Mod. Rep. 35; 7 Digest (Repl.) 190, 235.
- (5) *Collins v. Blantern* (1767), 2 Wils. K.B. 342; 95 E.R. 847; 1 Digest (Repl.) 47, 353.
- (6) *Gaskell v. King* (1809), 11 East 165; 103 E.R. 967; 12 Digest (Repl.) 328, 2539.
- (7) *Payne v. Brecon Corpn.* (1858), 3 H. & N. 572; 27 L.J.Ex. 495; 31 L.T.O.S. 328; 22 J.P. 690; 6 W.R. 801; 157 E.R. 597; 17 Digest (Repl.) 248, 513.
- (8) *Bateman v. Ashton-under-Lyne Corpn.* (1858), 3 H. & N. 323; 27 L.J.Ex. 458; 31 L.T.O.S. 299; 22 J.P. 498; 6 W.R. 829; 157 E.R. 494; 36 Digest (Repl.) 384, 287.

Also referred to in argument :

Webster v. Webster (1862), 31 Beav. 393; 31 L.J.Ch. 655; 6 L.T. 11; 8 Jur.N.S. 1047; 10 W.R. 503; 54 E.R. 1191; 21 Digest (Repl.) 729, 2237.

Sympson v. Prothero (1857), 26 L.J.Ch. 671; 29 L.T.O.S. 325; 3 Jur.N.S. 711; 5 W.R. 814; 21 Digest (Repl.) 748, 2349.

Hirsch v. Coates (1856), 18 C.B. 757; 25 L.J.C.P. 315; 27 L.T.O.S. 202; 4 W.R. 656; 139 E.R. 1568; 21 Digest (Repl.) 731, 2248.

Interpleader Issue to try whether an indenture of assignment, dated July 13, 1866, whereby the Devon and Somerset Railway Co. purported to assign a call of £5 per share on the shareholders in such company to the plaintiffs, by way of mortgage, was a good and valid assignment of such call as against the Ilfracombe Rail. Co., the defendants. The cause came on before BYLES, J., when a verdict was found for the plaintiffs for £1,000 subject to the opinion of the court on a Case.

The plaintiffs carried on business in partnership as contractors for public works, and on July 19, 1865, they contracted with the Devon and Somerset Rail. Co., hereinafter called "the company," pursuant to certain articles of contract, to make the Devon and Somerset railway in the manner appearing by certain articles of contract. The defendants, on Feb. 9, 1866, obtained a judgment in an action against the company, for the sum of £10,500, and such judgment was still subsisting and unsatisfied. On May 12 the plaintiffs received from the company's chief engineer a certificate or memorandum that £96,200 was then due to the plaintiffs for work done and materials supplied under the articles of contract, such certificate or memorandum being in the form agreed upon between the plaintiffs and the company's chief engineer at the commencement of the undertaking as being the best adapted for such certificate or memorandum, having regard to the provisions of the contract with respect to mileage rates and division between classes of work. The number of miles completed of each class of work shown therein was obtained by estimating in money the amount due in respect of each class of work, and reducing it into miles at the rate per mile specified in a schedule of prices annexed to the articles of contract. At the time when this certificate or memorandum was given, no part of the railway was finished. Of the materials included therein, being rails, sleepers, and materials of a similar character, a portion of about £11,000 in value had not been attached in any way to the soil, but was piled up in stacks on and near the railway for the purposes of its construction. At the same time, further work had been done by the plaintiffs in excavations and work of a similar kind beyond what was included in such certificate or memorandum to an amount of

A about £17,000, the reason being that the certificate or memorandum showed the amount of work done and materials provided at a date of about a month previous to the date of the certificate or memorandum. On the same May 12, 1866, the company's chief engineer delivered to the secretary of the company a certificate that £96,200 was then due to the plaintiffs for work done and materials provided under the articles of contract.

B On June 4, 1866, the company, at the request of the plaintiffs, made in pursuance of the articles of contract, issued to the plaintiffs fully paid-up shares to the amount of £56,200, in part satisfaction of the sum so certified to be due, leaving £10,000 balance thereof. The plaintiffs applied to the company for payment of this balance of £40,000. They had up to this time received from the company, under the articles of contract, cash to the amount of £3,000 only.

C This amount of cash had been received under the company's chief engineer's certificates for work done and materials provided. On certificates given to the company's solicitors for sums paid by the plaintiffs in respect of the purchase of land in pursuance of the provisions of the articles of contract, the plaintiffs had received payment in shares to an amount exceeding £3,000. At meetings of

D the directors of the company held on June 8 and 11, 1866, the plaintiffs' application, and the best mode of securing payment to them, was discussed, and it was decided that a call should be made and assigned to the plaintiffs by way of security for the discharge of the claim. At the meeting of June 11, a call of £5 per share, payable on July 16, 1866, being the call mentioned in the issue, was made, and the company's solicitor was instructed to do what was necessary

E for the purpose of a valid assignment of the call to the plaintiffs by way of security. The company at this time had no money in hand with which the plaintiffs' demand could be satisfied. In pursuance of the instructions to the company's solicitor, the indenture of July 13, 1866, was prepared by him, and the seal of the company was affixed thereto on July 13, 1866. Notice of the assignment was given to the company's bankers, at whose bank the call was made

F payable, and they were directed to hold the money received by them in respect of the call for the plaintiffs.

In July, 1866, Lord Poltimore was the holder of 200 shares in the capital of the company, and on July 31, 1866, a garnishee order nisi was obtained, whereby it was ordered that all debts due and owing (or accruing due) from Lord Poltimore to the company, should be attached to answer the judgment recovered by the

G defendants against the company, and at the date of the order Lord Poltimore had not paid the call of June 11, 1866, in respect of his shares, and there was due and owing from him to the company the sum of £1,000 in respect thereof. Before the garnishee order nisi was made absolute, the plaintiffs claimed the debt of £1,000 due from Lord Poltimore to the company, and on Sept. 18, 1866,

H it was ordered by a judge at chambers that the issue should be tried, and that Lord Poltimore should pay the amount due for the call into court within a fortnight and that thereupon he should be discharged from the claim. Lord Poltimore had accordingly paid the said sum of £1,000 into court. At the time when the garnishee order nisi was served on Lord Poltimore, he had received no express notice that the indenture of July 13, 1866, had been sealed with the company's seal, but he had been present at both of the meetings of the directors of

I the company held on June 8 and 11, 1866, and had presided as chairman at the latter of the two meetings. Before July 31, 1866, when the garnishee order nisi was obtained, the plaintiffs had received from the company debenture bonds of the company to the amount of £35,000 in further satisfaction of their claim of £40,000.

The question for the opinion of the court was whether the plaintiffs were entitled as against the defendants to the sum of £1,000 less £2 2s.

Mellish, Q.C. (with him *M. White*) for the plaintiffs.

Keane, Q.C. (with him *Bridge*) for the defendants.

BOVILL, C.J.—The plaintiffs are entitled to judgment. The question arises A
on an interpleader issue and turns on the validity of a deed executed on July
13, 1866, whereby the Devon and Somerset Rail. Co. assigned to the plaintiffs
a call of £5 per share made on the shareholders on June 11, 1866, which was not
payable until July 14.

The first objection taken to the deed was that there was no debt actually B
due to the plaintiffs, for which the deed could be security. On the statements in
the Case, it clearly appears that a certain amount was payable by the company
to the plaintiffs. The question resolves itself into this, whether a sum of £11,000
worth of rails, sleepers and other materials mentioned in the case was to be
considered and treated as part of the debt. The defendants urged that the
engineer had no power under the articles of contract to certify in respect of C
materials not actually used. Considering the nature of the contract, I come to
the conclusion that the engineer was to certify, not only for permanent work
completed on the line, but also for materials provided for its construction. If the
engineer had power to certify for materials he has done so and consequently the
objection fails. Independently, however, of that, supposing there was no clause
in the contract empowering the engineer to certify for any other than work D
actually completed, it seems perfectly competent to the parties to agree that the
value of rails and other materials brought upon the line and intended to be used
in its construction, should form part of the sum to be certified as due.

The next objection to the deed is that the company had no power to assign the E
call in question. It is said that it purports to assign a future call. The call
had been made, but the time for payment had not arrived. It was properly
described by counsel for the plaintiffs as a debt due but not payable. The primary
object for the application of the company's property is the payment of its
debts, and I cannot understand why an assignment for that purpose of a debt
due to the company should be held to be invalid. There is no authority that
I am aware of for such a proposition. It clearly is not contrary to the powers
of the company. Our attention has been called to the clauses in the general F
Act and in the Devon and Somerset Railway Act regulating the borrowing powers
of the company and it was contended that the assignment of the call is contrary
to the policy of the Acts. The Company Clauses Consolidation Act, 1845, how-
ever, by s. 43, expressly provides that, in certain cases, a future call may be
assigned. This is not a case of borrowing and there is no pretence for saying
that there is any prohibition against the assignment of a call for the payment of G
debts. There are no special provisions as to the mode in which the company
shall pay its debts. Why are we to imply a prohibition to the company to
assign one debt due to them for the bona fide purpose of paying a debt due from
them? I see no reason for it.

Then it is said that the assignment was invalid because it contains a power H
for the assignees to sell the call at any time after Oct. 13. If this call was
property of the company which they had power to assign I do not see why
the assignees might not sell it. It may be that this was an improvident contract
for the directors to enter into and might involve them in responsibility; or it
may be that the assignees will render themselves liable to an action if they sell
for less than a fair and reasonable sum. At all events, however, assuming the
power of sale to be valid, it seems that the only result would be that the deed, I
as to this part of it, would become inoperative. But that would not interfere
with the rest of it.

The last objection urged by counsel for the defendants was that notice of the
objection must be given to the person whose debt is assigned, in order to make
the assignment available as against a creditor. The validity of this objection
turns on the doctrine of the courts of equity. As between assignor and assignee,
no notice is necessary. As to third persons, there have been some differences of
opinion; the majority of the court in *Watts v. Porter* (1), holding that the

A assignment without notice was inoperative as against a subsequent-creditor; but LORD CRANWORTH, L.C., and KNIGHT-BRUCE and TURNER, L.JJ., in *Beavan v. Earl of Oxford* (2) and SIR JOHN ROMILLY, M.R., in *Kinderley v. Jervis* (3), holding the contrary doctrine. It is unnecessary to raise that question here because Lord Poltimore was a party assenting to the deed; he was acting as chairman at the board at which the company's seal was directed to be put

B to it. It must be assumed that what was done was done with his assent. If it were necessary to decide between the conflict of authority I should have no hesitation in agreeing with the opinions of ERLE, C.J., in *Watts v. Porter* (1), and of LORD CRANWORTH, L.C., the lords justices and the Master of the Rolls in the two Chancery cases. I am, therefore, of opinion that all objections fail

C and that the plaintiffs are entitled to judgment.

WILLES, J.—I am of the same opinion. As to the first point, that this was an assignment to the plaintiffs without consideration or on a consideration that had failed, that turns on a question of fact, namely, whether the value of the materials, £11,000, was within the deed, or whether the contract as to

D that might not have been a mere arrangement that the company were to have a lien on the materials. I am of opinion that, on the true construction of the deed, it was quite competent for the engineer to certify for materials brought on the line to be used there.

Then it was said that the assignment of a call was beyond the powers of the company and, therefore, void because it was to secure a debt which the company

E had incurred. I see no reason why a debt due from the company should not be secured or why they should not pay their creditors out of moneys arising from calls when received.

Next it is said that the deed contains a power so repugnant and wasteful that it is impossible that the legislature should have intended that the company should have entered into such a bargain. I am not satisfied that the assignment

F would not be void if the power of sale could not be severed from the rest of the deed. Any attempt, however, to act on that power in a manner which might be detrimental to the company would be controlled by the Court of Chancery, who would expunge so much as is beyond the powers of the company, leaving the useful part of the deed untainted by the unavailing part. A distinction

G has been taken in this respect between a deed which is in part void by statute and in part void by the common law. In *Maleverer v. Redshaw* (4), a sheriff's bond having been taken in a form other than that prescribed by the statute 23 Hen. 6, c. 9 [repealed by Sheriffs Act, 1887], it was objected that it was altogether void, the statute enacting that "bonds taken in any other form should be void." TWISDEN, J., said (1 Mod. Rep. at p. 35):

H "I have heard LORD HOBART say upon this occasion, that, because the statute would make sure work, and not leave it to exposition what bonds should be taken, therefore, it was added that bonds taken in any other form should be void; for, said he, the statute is like a tyrant; where he comes he makes all void: but the common law is like a nursing father,

I makes void only that part where the fault is, and preserves the rest."

After a long series of decisions on the subject it is too late to make that distinction now. In truth, as was said by WILMOT, C.J., in *Collins v. Blantern* (5), "the common law is nothing else but statutes worn out." The distinction now applies only where the statute makes the deed void altogether. The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by common law you may reject the bad part and retain the good. One of the series of cases of that sort is *Gaskell v. King*

(6), where a covenant to pay rent and taxes was held not to be avoided by A including property tax. Other authorities are *Payne v. Brecon Corpn.* (7) and *Bateman v. Ashton-under-Lyne Corpn.* (8).

The last point is that notice to Lord Poltimore was necessary and none was given. That turns on whether the Common Law Procedure Act, 1854, s. 61, intended to give the garnishee something more than the debtor himself was entitled to. However, as counsel pointed out, there is no such language in the Act. I think that on the construction of the Common Law Procedure Act, 1854, the defendants have failed to show that any such exception was intended to apply to this case. Further, I think the fact fails for Lord Poltimore had notice.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment for plaintiffs.

BICKETT v. MORRIS

[HOUSE OF LORDS (Lord Chelmsford, L.C., Lord Cranworth and Lord Westbury),
May 1, 3, 4, July 13, 1866]

[Reported L.R. 1 Sc. & Div. 47; 14 L.T. 835; 30 J.P. 532;
12 Jur.N.S. 802]

Water—Riparian rights—Right of riparian owner to build on alveus—Remedy of ex adverso owner—No proof of damage.

A riparian owner of a running stream, although the owner in severalty of his half of the alveus, has no right to build on the alveus even though no damage is occasioned or is likely to be occasioned thereby. An action, therefore, lies at the suit of an adjacent or ex adverso owner without proof of actual or prospective damage against one who so builds.

Notes. Applied: *Crossley v. Lightowler* (1866), L.R. 3 Eq. 279; *Norbury v. Kitchin* (1866), 15 L.T. 501; *A.-G. v. Lonsdale* (1868), L.R. 7 Eq. 377; *A.-G. v. Terry* (1873), 9 Ch. App. 425, n. Considered: *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C.P.D. 380. Distinguished: *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839. Explained: *Kensit v. Great Eastern Rail. Co.* (1884), 27 Ch.D. 122. Distinguished: *Ridge v. Midland Rail. Co.* (1888), 53 J.P. 55. Applied: *Withers v. Purchase* (1889), 60 L.T. 819; *Lawes v. Turner and Frere* (1892), 8 T.L.R. 584. Considered: *Ambler v. Bradford Corpn.* (1902), 87 L.T. 217. Explained: *Gerrard v. Crowe*, [1920] All E.R. Rep. 266. Referred to: *Edleston v. Crossley* (1868), 18 L.T. 15; *Sutherland v. Ross* (1878), 3 App. Cas. 736; *Cooper v. Crabtree* (1882), 51 L.J.Ch. 544; *Marriage v. East Norfolk Rivers Catchment Board*, [1949] 2 All E.R. 1021.

As to riparian rights, see 39 HALSBURY'S LAWS (3rd Edn.) 514-529; and for cases see 44 DIGEST 14 et seq.

Cases referred to:

(1) *Town of Aberdeen v. Menzies*, Mor. Dict. 12, 787.

(2) *Farquharson v. Farquharson* (1741), cited in 3 Bli. N.S. at p. 421; 4 E.R. 1389, H.L.; 44 Digest 27, 201.

Appeal by the defendant from a judgment of the Court of Session.

The appellant Bicket was the owner in fee of certain tenements abutting on the water of Kilmarnock in the town of Kilmarnock. At that place the river was about fifty-eight feet wide and very shallow. In 1860 Bicket resolved to

A re-build his premises, and he was desirous of building the wall on the river side farther into the river. He applied to his neighbour, the respondent Morris, the owner of premises directly opposite, on the other bank of the river, for permission to build the new wall according to a red line drawn on the ordnance map, and it was finally agreed that, in consideration of receiving £10 from Bicket, Morris would make no objection to the wall being built farther into the river. The parties signed a copy of the map as relative to their agreement and the money was paid. After the building had proceeded, Morris discovered that Bicket, instead of adhering to the red line agreed on, advanced his wall still farther into the river by a distance of three feet at one place. He complained and requested Bicket to desist, but he refused, as he contended that he had kept to the line agreed on. Morris thereupon commenced an action. He did not allege any actual damage from the appellant's operations, but alleged that such operations were injurious, inasmuch as they had the effect of narrowing the channel, altering the flow of the river, and diverting the course of the stream. He also prayed an injunction to stop the appellant's proceedings, and a decree ordering him to take down his building so far as it transgressed the red line agreed on between the parties. D The appellant denied that he had transgressed the red line; but even if he had done so, yet that no injury was caused to the respondent. The evidence produced was conflicting. The Court of Session held, (i) that the appellant had in point of fact encroached; (ii) that he was liable to an action for such encroachment, although no injury was alleged by the respondent. *INGLIS, L.J.C.*, held that the general rule of law was that a proprietor on the banks of a stream of this kind was not entitled to make any erection whatever in alveo, even for the purpose of defence of his property; and that even though he had suffered no damage, the respondent was entitled to have the appellant's erection removed. E The appellant appealed.

Rolt, Q.C., Anderson, Q.C., and Blair for the appellant.

F *Sir Roundell Palmer, Q.C., and W. Paterson* for the respondent.

Their Lordships took time for consideration.

July 13, 1866. The following opinions were read.

G **LORD CHELMSFORD, L.C.**—The important question in the case is whether the respondent was entitled to a declaration that the appellant had no right or title to erect any building, or otherwise to encroach on or to interfere with that part of the solum of the river called the water of Kilmarnock which is immediately opposite the respondent's property, beyond a certain line, and to a decree ordering the appellant to take down and remove the buildings or other erections, in so far as these extend into or encroach on the solum of the river beyond the said line, and interdicting him from erecting "any building or otherwise encroaching upon the solum of the river beyond the line in question." There is a general statement in the pleas in law of the encroachments complained of being "injurious to the [respondent's] property," but no proof was given by him of any actual injury from the building being advanced farther into the river than the line agreed on. H

I The result of the opinions of the judges of the Second Division appears to be, that a riparian proprietor has no right to erect any building in alveo fluminis, and that if he does so, although the opposite proprietor may be unable to prove that any damage has actually happened to him by the erection, yet, if the encroachment is not of a slight and trivial but of a substantial description, it must always involve some risk of injury. **LORD BENHOLME** said :

"Without my consent [i.e., the consent of the proprietor of the other side of the river] you are not to put up your building in the channel of the river, for that in some degree must affect the natural flow of the water. What may

be the result no human being with certainty knows, but it is my right to prevent your doing it, and when you do it, you do me an injury whether I can prove damage or not."

LORD NEAVES said :

"Neither can any of the proprietors occupy the alveus with solid erections without the consent of the other, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question."

These views appear to me to be perfectly sound in principle, and to be supported by authority. The proprietors on the opposite banks of a river have a common interest in the stream, and although each has a property in the alveus from his own side to the *medium filum fluminis*, neither is entitled to use the alveus in such a manner as to interfere with the natural flow of the water.

The late Lord Chancellor, LORD CRANWORTH, during the argument put this question :

"If a riparian proprietor has a right to build upon the stream, how far can this right be supposed to extend? Certainly not *ad medium filum*, for, if so, the opposite proprietor must have a legal right to build to the same extent from his side."

It seems to be clear that neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular course, but anything done in alveo which produces no sensible effect on the stream is allowable. It was asked by counsel in argument, whether a proprietor on the banks of a river might not build a boathouse on it? Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course; but if the erection produced this effect, the answer would be, that, essential as it might be to his full enjoyment of the use of the river, it could not be permitted; *à fortiori* when the act done is the advancing solid buildings into the stream, not in any way for the use of it, but merely for the enlargement of the riparian proprietor's premises, it must be an infringement on the right and interest of the proprietor on the opposite bank. On principle, then, the respondent had a cause of action in respect of the appellant's building, and was entitled to a declaration against the encroachment and a decree to have the obstruction removed.

The authorities cited in the argument at the Bar support the principle and establish a satisfactory distinction. The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark, *ripæ muniendi causa*; but even in this necessary defence of themselves, they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite side of the river. In this case mere apprehension of danger will not be sufficient to found a complaint of the acts done by the opposite proprietor, because, being on the party's own ground, they were lawful in themselves, and only became unlawful in their consequences on the principle of *sic utere tuo ut alienum non lædas*. However, any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor and, therefore, the act being *prima facie* an encroachment, the onus seems properly to be cast on the party doing it to show that it is not an injurious obstruction.

There only remains the question of acquiescence to be considered. There is no doubt as to the principle of the cases of persons standing by and permitting acts to be done which they are entitled to prevent. It is only just that a person who has been encouraged to continue expensive operations by the seeming consent

A of him who might have stopped them, should be able to defend himself against any subsequent attempt to treat them as an encroachment on the rights of the party who has so misled the other into the confidence that his acts were sanctioned. However, in all such cases knowledge of the acts done is essential to stop the party who has suffered the encroachment on his rights from afterwards objecting to it. In this case there was an agreement between the parties, and
 B it does not appear that the respondent knew at first that the appellant was exceeding the limits prescribed by the agreement. As soon as he was aware of the fact he objected to it. The appellant, however, chose to go on in the face of the respondent's objection. His proper course would have been to have suspended his works until it could be ascertained whether he had kept to the permitted line or not. If he determined to proceed, in spite of the objection,
 C it is difficult to understand how he can now claim the benefit of the principle of acquiescence, or how he can reasonably complain that he is compelled to reduce his building within the limits agreed on. For these reasons I think that the decree of the Second Division ought to be affirmed.

D **LORD CRANWORTH.**—There is no doubt that the respondent agreed with the appellant that to a certain extent he would not object to his advancing his building into the bed of the river, so that if the limit to which that agreement extended has not been transgressed, there can be no ground of complaint on the part of the respondent. If the limit has been transgressed, then there arises
 E a second question, namely, whether independently of any agreement the appellant had not by the law of Scotland a right to erect the buildings which he has erected in the alveus of the river. In the hearing of this case at your Lordships' Bar the two questions were argued in the order in which I have just stated them; that is, first, whether the appellant's buildings had been carried farther into the river than the line agreed to by the respondent; and secondly, whether by the law of Scotland there was anything to prevent the appellant, independently of consent, from erecting the buildings in question. I will take a different
 F course, and consider first what rights the appellant had independently of contract or consent.

By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the soil of the alveus or bed
 G of the river *ad medium filum aquæ*. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that, if from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus each of them up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land. The appellant contended
 H that, as a consequence of this right, every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the alveus, so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned. I do not think that this is a true exposition of the law. Rivers are liable at times to swell enormously from sudden floods and rain, and in these cases there is danger
 I to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting any building in the stream so as to divert or obstruct its natural course. If a building should be carried out to the middle of the stream, that is, to the whole extent of the proprietor's right in the alveus, no one can fail to see there might be great danger in case of floods. If the proprietor on one side can make an erection far into the stream, what is there to prevent his opposite neighbour from doing the same? The most that can be said in favour of the appellant's argument is, that the question of the probabilities of damage is a question of degree, and

so, if the building occupies only a very small portion of the alveus, the chance of damage is so little that it may be disregarded. A

However, this is an argument to which your Lordships cannot listen. LORD BENHOLME says truly that what may be the result of any building in the alveus no human being knows with certainty. The owners of the land on the banks are not bound to obtain or to be guided by the opinions of engineers or other scientific persons as to what is likely to be the consequence of any obstruction set up in waters in which they all have a common interest. There is in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say, "We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it." This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure. It was asked in argument, whether, if I put a stake in the river, I am interfering with the rights of the riparian proprietors. To this I should answer, *de minimis non curat prætor*. Further, it might be demonstrated in such a case, not that there was an extreme improbability, but that there was an impossibility of any damage resulting to anyone from the act. It is, however, unnecessary for us to speculate on any such infinitesimal obstruction. No one can say that in this case the extent to which the appellant has built into the river is so small as to be, like the case of a stake driven into the soil, inappreciable. C

I will only add, that I find nothing in the cases or text-books to which we were referred at variance with the view I have taken of the law; and *Town of Aberdeen v. Menzies* (1), and *Farquharson v. Farquharson* (2), cited by the Lord Justice Clerk, are in exact conformity with it. I, therefore, come without hesitation to the conclusion that the appellant had no right, independently of contract or consent, to build as he has built into the bed of the river. D

LORD WESTBURY.—This is a case of very considerable importance, because, as far as I know, it will be the first decision establishing the important principle that a material encroachment on the alveus of a running stream may be complained of by an adjacent or an *ex adverso* proprietor without the necessity of proving either that damage has been sustained, or that it is likely to be sustained, from that cause. The examination that has been given at the Bar to the cases cited on that point of law certainly had led me to the conclusion that it has not yet been clearly established by decisions. I have felt much difficulty on it, because undoubtedly a proposition of that nature is somewhat at variance with the principles and rules established on the subject by the civil law. I am, however, convinced that the proposition as it has been laid down in the court below, and it has received the sanction of your Lordships in your judgments, is one that is founded in good sense, and ought to be established as matter of law. When it is said that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow that the property is capable of being used in the ordinary way in which so much land uncovered by water might be used, but it must be used in such a manner as not to affect the interests of riparian proprietors in the stream. E

The interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor. If we attend to the subject for a moment, it will occur to everyone that in the bed of a river there may possibly be a difference in the level of the ground, which, as we know, has the effect of directing the F

A tide or current of the river in a particular direction. Suppose the ordinary current flows in a manner which has created for itself, by attrition, a bay in a particular part of the bank; if that were obstructed by a building, the effect might be to alter the course of the current so as to direct the flow with a greater degree of violence on the opposite bank, or on some other portion of the same bank; and then it will immediately occur to your Lordships that if, at that part
 B of the bank to which the accelerated flow of the water in greater force is thus directed, there happens to be a building erected, the flow of the water thus produced by the artificial obstruction would have the effect possibly of wearing away the foundation of that building at some remote period, and would thereby be productive of very considerable damage.

C It is wise, therefore, in a matter of that description, to lay down the general rule that, even though immediate damage cannot be alleged, even though the actual loss cannot be predicted, yet, if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury in the sense that it is a matter the court will take notice of as an encroachment which adjacent proprietors have a right to have removed. In this sense the maxim has been applied to the law of Scotland that *melior est conditio prohibentis*,
 D namely, that where you have an interest in preserving a certain state of things in common with others, and one of the persons who have that interest in common with you desires to alter it, *melior est conditio prohibentis*, that is to say, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest. On these grounds I entirely concur with
 E your Lordships.

Appeal dismissed.

F

MILROY^{v.} LORD

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), July 1, 2, 3, 4, 26, 1862]

G

[Reported 4 De G.F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178;
 8 Jur.N.S. 806; 45 E.R. 1185]

Gift—Incomplete gift—Voluntary settlement—Need for settlor to have done every-
 thing necessary to transfer property—Shares—Need for transfer—Gift
 incomplete although share certificate handed over, and power of attorney given
 to execute transfer—Resulting trust.

H

I

By a voluntary deed poll a settlor stated that, out of the love and affection he bore to his niece, the plaintiff, he transferred to the defendant, S.L., fifty bank shares then belonging to him, together with the certificate or scrip thereof and the dividends upon the same, upon trust during his life or until the plaintiff's marriage to apply the dividends for the plaintiff's use and benefit, and in the event of his death before her marriage to transfer the shares to her, with trusts for her issue in the event of her marrying in the settlor's lifetime. S.L. already held a general power of attorney from the settlor to transfer the stock of any incorporated company which might be standing in his name, and soon after the date of the deed the settlor gave him the certificate of a large number of shares he held in the same bank, including the shares mentioned in the deed poll, and executed a special power authorising him to receive the dividends on all of the shares in the bank then in his name. The shares of the bank were

transferable in the books of the company, but no transfer to S.L. of the fifty shares was ever made, and the power of attorney was never left with the bank as its constitution required in the case of a transfer by power of attorney. Under the special power S.L. received the dividends and paid them sometimes to the plaintiff and sometimes to the settlor himself, who then handed them to her. With certain of the dividends on the fifty bank shares received by the plaintiff through the hands of the settlor or with his knowledge, some fire insurance shares were purchased in the name of the settlor, and the dividends upon these were paid to the plaintiff.

Held: in order to render a voluntary settlement valid and effectual the settlor must have done everything which, according to the nature of the property, was necessary to transfer the property and render the settlement binding upon himself; that might be done by an actual transfer either to the persons intended to be benefited or to a trustee for them, or by a declaration that the settlor himself held on trust for them; the settlor had continued up to his death the legal and beneficial proprietor of the shares, and had not by the deed conferred the ownership on any other person, nor did that instrument constitute the settlor himself a trustee for the plaintiff, or contain a contract specifically enforceable against him or his estate; (dubitante KNIGHT-BRUCE, L.J.) the settlor had made a perfect gift to the plaintiff of the dividends upon the bank shares so far as they were handed over to her, and there was a resulting trust for her benefit as to the fire insurance shares purchased with those dividends.

Notes. Followed: *Warriner v. Rogers* (1873), L.R. 16 Eq. 340. Applied: *Moore v. Moore* (1874), L.R. 18 Eq. 474. Considered: *Richards v. Delbridge* (1874), L.R. 18 Eq. 11; *Hearley v. Nicholson* (1875), L.R. 19 Eq. 233. Applied: *Bottle v. Knockner* (1876), 46 L.J.Ch. 159. Approved: *Re King, Sewell v. King* (1879), 14 Ch.D. 179. Followed: *Re Breton's Estate, Breton v. Woollven* (1881), 17 Ch.D. 416. Applied: *Re Shield, Pethybridge v. Burrow* (1885), 53 L.T. 5; *Re Ashcroft* (1887), 19 Q.B.D. 186. Considered: *Re Patrick, Bills v. Tatham* (1890), 63 L.T. 752; *Johnstone v. Mappin* (1891), 60 L.J.Ch. 241; *Coleman v. North* (1898), 47 W.R. 57. Applied: *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408; *Re Smith, Bull v. Smith* (1901), 84 L.T. 835; *Re Williams, Williams v. Ball*, [1917] 1 Ch. 1; *Macedo v. Stroud*, [1922] 2 A.C. 330; *I.R. Comrs. v. Allan* (1925), 9 Tax Cas. 234. Distinguished: *Royal Exchange Assurance v. Hope*, [1927] All E.R. Rep. 67. Applied: *Re Fry, Chase National Executors and Trustees Corp., Ltd. v. Fry*, [1946] 2 All E.R. 106. Distinguished: *Re Rose, Midland Bank Executor and Trustee Co. v. Rose*, [1948] 2 All E.R. 971; *Re Rose, Rose v. I.R. Comrs.*, [1952] 1 All E.R. 1217. Applied: *Re Wale, Wale v. Harris*, [1956] 3 All E.R. 280. Referred to: *Bizzey v. Flight* (1876), 45 L.J.Ch. 852; *Mallott v. Wilson*, [1900-3] All E.R. Rep. 326; *Carter v. Hungerford*, [1917] 1 Ch. 260; *Timpson's Executors v. Yerbury*, [1936] 1 All E.R. 186; *Letts v. I.R. Comrs.*, [1956] 3 All E.R. 588; *Grey v. I.R. Comrs.*, [1958] 2 All E.R. 428; *Spellman v. Spellman*, [1961] 2 All E.R. 498.

As to imperfect gifts, see 14 HALSBURY'S LAWS (3rd Edn.) 557-558, and *ibid.* vol. 18, pp. 396-400; as to incomplete trusts, see 38 HALSBURY'S LAWS (3rd Edn.) 838-839; and for cases see 25 DIGEST (Repl.) 581-582.

Cases referred to:

- (1) *Kekewich v. Manning* (1851), 1 De G.M. & G. 176; 21 L.J.Ch. 577; 18 L.T.O.S. 263; 16 Jur. 625; 42 E.R. 519, L.J.J.; 25 Digest (Repl.) 588, 280.
- (2) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; 34 E.R. 271, L.C.; 25 Digest (Repl.) 585, 251.

Also referred to in argument:

Donaldson v. Donaldson (1854), Kay, 711; 23 L.J.Ch. 788; 23 L.T.O.S. 306; 1 Jur.N.S. 10; 2 W.R. 691; 69 E.R. 303; 40 Digest (Repl.) 576, 811.

A **Appeal** by Mr. Jacob Augustus Otto, one of the defendants, in the suit, and the executor of the settlor Thomas Sands Medley, from a decision of STUART, V.-C., holding that fifty shares in the Bank of Louisiana were bound by the trusts declared in a deed-poll dated April 2, 1852, and that the plaintiff Eleanor Rainey Milroy, a niece of the settlor, was entitled to thirteen shares in the North American Fire Insurance Co.

B The bill in this case was filed by Andrew Row M'Taggart Milroy and Eleanor Rainey his wife (formerly Eleanor Rainey Dudgeon, spinster), for the purpose of having new trustees appointed to a voluntary settlement by the late Thomas Sands Medley, who was the testator in the cause, and for recovering fifty shares of the Bank of the State of Louisiana, which formed the subject of the settlement, and thirteen North American fire insurance shares, which were purchased with the income of the bank shares, together with the dividends upon all those bank shares, so far as they had not been paid over to the plaintiffs or one of them; and the bill also prayed that the defendant Samuel Lord, the trustee named in the settlement, might be decreed to make compensation to the plaintiffs and other persons, being the parties interested under the settlement, in respect of his having given up the certificates for the shares to the defendant appealing, Jacob Augustus Otto, the executor of Thomas Sands Medley.

D The settlement upon which the bill was founded was made by a deed-poll, dated April 2, 1852, and was as follows:

E "Know all men by these presents, that I, Thomas Medley, of the city of New Orleans, on account of the love and affection I have for my niece Eleanor Rainey Dudgeon, daughter of Daniel Dudgeon, of England, and in consideration of one dollar to me in hand paid, have conveyed, transferred, set over and delivered, and by these presents do convey, transfer, set over and deliver unto Samuel Lord, of the city and county of New York, fifty shares of the capital stock of the Bank of Louisiana, now standing in my name in the books of the said bank, together with the certificate or scrip thereof, numbered 3457, and dated Mar. 6, 1852, under the corporate seal of the said bank, signed by W. W. Montgomery, president, and attested by R. M. Davis, cashier, and the dividends and profits thereof, to have and to hold to the said Samuel Lord and his legal representatives, upon the trusts and conditions following, to wit, in trust to collect and receive the dividends and profits of the said stock, and apply them to the use and benefit of the said Eleanor Rainey Dudgeon, if I be living until the time of the marriage of the said Eleanor; and upon the further trust, in case I die before the marriage of the said Eleanor, leaving her surviving me, then to transfer the said shares of stock, or the proceeds thereof, to the said Eleanor for her own use and benefit; and upon the further trust, in case the said Eleanor should, during my lifetime, marry, with my previous consent and approbation, then to apply the said dividends and profits to the use of the said Eleanor for life, and after her death to convey and transfer the said stocks, or the proceeds thereof, to her issue, if she leave any her surviving, and in default of such issue, to convey and transfer the said stock, or its proceeds, to my next of kin; and upon the further trust, if the said Eleanor shall have died before me without having married, or shall during my lifetime marry without my consent, then to re-convey and re-transfer the said stock or its proceeds to me; and upon the further trust, on my direction, at any time during my lifetime, or in his discretion after my death, to convert the said stock into money, by sale thereof, and after such conversion to invest the proceeds thereof, in his discretion, in other stocks, or upon a bond or mortgage at interest to be held on the like trusts, and subject to the like powers of conversion, as the stock hereby transferred, and the dividends and profits thereof, reserving to myself the power at any time in

writing, by will or otherwise, to direct and compel the said Samuel Lord to transfer the said stock, or the proceeds thereof, to the said Eleanor, for her own use and benefit absolutely; and also reserving to myself the power, in case of the death of the said Samuel Lord before me, of appointing another or other trustee or trustees in his place and stead. And I, the said Samuel Lord, do consent and agree to accept this transfer; and I hereby covenant and agree to and with the said Thomas Medley and the said Eleanor Rainey Dudgeon, severally and respectively, and their several and respective legal representatives, that I will observe, perform, fulfil, and keep the trusts and conditions hereinbefore declared."

This deed-poll was under the hand and seal of both Thomas Medley and of the defendant Samuel Lord.

At the time of the execution of the deed-poll, Samuel Lord held a power of attorney from Thomas Medley, whereby he was empowered, among other things, by a general power of attorney, to transfer the stock of any incorporated company which might be standing in the testator's name. He appointed him his attorney

"to take possession, charge and control of all his goods, chattels, books of account, evidences of debt, choses in action, and claims of every kind; to buy and to sell and to transfer the stock of any incorporated company now belonging to him, or which might thereafter belong to him, and to collect and receive the dividends."

Thomas Medley gave him general authority to act on his behalf. Soon after the execution of the deed-poll, Thomas Medley delivered to the defendant Samuel Lord the scrip for 162 shares which he held in the bank of Louisiana, including the scrip for the fifty shares comprised in the deed of settlement. About the same time Thomas Medley seems to have given to the defendant Samuel Lord a further power of attorney

"to receive the dividends then due and payable, and which might thereafter become due and payable on all or any shares of the capital stock of the Bank of Louisiana then standing, or which might thereafter be placed, in his name in the books of the said Bank of Louisiana, and to give receipts, discharges and acquittances for the same, with power to the said attorney to substitute an attorney or attorneys under him for all or any of the purposes aforesaid, and to do all lawful acts requisite for effecting the premises."

According to the constitution of the Bank of Louisiana the shares in the bank were transferable in the books of the company, and all transfers were to be made by the proprietor or his lawful attorney; the certificates of stock to be surrendered at the time the transfer was made. The evidence in this case showed that, where a transfer was made by power of attorney, the power of attorney must be left with the bank; that no transfer was made, into the name of the defendant Samuel Lord, of the fifty shares comprised in the settlement, but the dividends upon the shares had been received by the defendant Lord, and remitted by him to the plaintiff Mrs. Milroy (then Eleanor Rainey Dudgeon), sometimes directly, sometimes through the medium of the settlor, Thomas Medley, by whom they were paid over to her, except as to one dividend, which appeared not to have been so paid over. The thirteen North American fire insurance shares were purchased, at the suggestion of Thomas Medley, out of the dividends of the bank shares; and a bonus declared by the bank upon those shares, and the dividends upon the fire insurance shares, were paid to Mrs. Milroy (then Eleanor Rainey Dudgeon), with the dividends upon the bank shares; but the insurance shares were purchased in the name of Thomas Medley. In 1855 the plaintiffs inter-married, with the consent and approbation of Thomas Medley. In the month of November

A in that year Thomas Medley died, having, by his will bequeathed to the plaintiff Eleanor Rainey Milroy a legacy of £4,000, and appointed the defendant Jacob Augustus Otto his executor, who duly proved his will. After his death the defendant Samuel Lord delivered to the defendant Jacob Augustus Otto the certificates for the fifty Louisiana Bank shares, and for the thirteen North American fire insurance shares. The plaintiff Eleanor Rainey Milroy was the **B** niece of Thomas Medley; she was educated at his expense, and lived with him after she was grown up, until the summer of the year 1852, in which year he married the daughter of Samuel Lord. The settlement which the bill sought to enforce was made in consequence of that marriage, and of the plaintiff Eleanor Rainey Milroy then ceasing to live with him, and as a provision for her; **C** and she was told by Thomas Medley that he had made the settlement on that account and for that purpose.

On the hearing of the cause, STUART, V.-C., made the following decree :

“This court doth declare that the fifty shares in the Bank of Louisiana, in the plaintiffs’ bill mentioned, are bound by the trusts declared by the said deed-poll of April 2, 1852, in the bill mentioned; and that the thirteen shares **D** in the North American Fire Insurance Company, in the bill mentioned, belong to the plaintiffs in right of the plaintiff Eleanor Rainey Milroy, the same having been purchased before her marriage with moneys belonging to her; and, pursuant to the Trustee Act, 1850, it is ordered that George Washington Taylor, in the petition named, be appointed a trustee of the said deed-poll, dated April 2, 1852, jointly with the defendant Samuel Lord; and it is **E** ordered that the defendant Jacob Augustus Otto, an executor of the will of Thomas Sands Medley, the settlor, in the plaintiffs’ bill named, do transfer, or cause to be transferred, the said fifty shares in the Bank of Louisiana into the joint names of the defendants Samuel Lord and George Washington Taylor, to be held by them upon the trusts of the said deed-poll; and it is ordered that the defendant Jacob Augustus Otto do also transfer or cause to be transferred **F** the said thirteen shares in the North American Fire Insurance Company into the name of Andrew Row M’Taggart Milroy, for his own use; and it is ordered that the amount of the dividends accrued since the decease of Thomas Sands Medley, the amount to be verified by affidavit, upon the said fifty shares in the Bank of Louisiana up to the time of the transfer of such shares hereinbefore directed to be paid by the said Jacob Augustus Otto to **G** the said Samuel Lord and George Washington Taylor, be also held by them upon the trusts of the said deed-poll; and it is ordered that the amount of the dividends accrued since the decease of Thomas Sands Medley, the amount to be verified by affidavit, upon the said thirteen shares hereinbefore directed to be paid by the said Jacob Augustus Otto, be paid to the **H** said plaintiff Andrew Row M’Taggart Milroy, for his own use; and it is ordered that the costs of the plaintiffs of this suit (to be taxed by the taxing master) be paid by the defendant Jacob Augustus Otto, out of the assets of the said Thomas Sands Medley, the said defendant admitting assets for the purpose; and it is ordered that the costs of the defendant (to be also taxed by the taxing-master) be also paid out of the assets of the said Thomas Sands **I** Medley, or any of the parties are to be at liberty to apply.”

The defendant Jacob Augustus Otto appealed.

Craig, Q.C., and Charles Hall for the plaintiffs.

Bacon, Q.C., and Cotton for the defendant Otto.

Malins Q.C., and Kekewich for the defendant Lord.

Hawkins for the children of the settlor.

Cur. adv. vult.

July 26, 1862. The following judgments were read.

KNIGHT-BRUCE, L.J.—This is an appeal by the defendant Mr. Otto, the personal representative of Mr. Medley (the testator in the cause), against the decree in this suit pronounced by STUART, V.-C., on Mar. 8 last, a decree declaring and establishing against Mr. Otto, as Mr. Medley's executor, a title in the plaintiffs to, and interest in, fifty shares in the Bank of Louisiana, and interest also in thirteen shares in the North American Fire Insurance Co. [His LORDSHIP here read the decree as above stated, and continued:] It is insisted by Mr. Otto, that neither of the plaintiffs had or has any interest, recognisable by a court of justice, in either set of shares, or any part of them. The state of circumstances in which we find one part of the shares is not exactly the same as that in which the other is placed.

First, then, with regard to the bank shares. They are claimed by the plaintiffs under and by force of the instrument of April 2, 1852, executed by Mr. Medley and the defendant Mr. Lord, which is set forth in the bill, and is mentioned also in the decree. They stood in Mr. Medley's name before and at the time of his execution of that instrument, and continued so to stand until his death. He was during the whole time, and when he died, the legal proprietor of them, and unless so far, if at all, as the beneficial title was affected by the instrument, the absolute proprietor of them, and interested beneficially in them likewise. He might, however, have affected the legal title. It was in his power to make the transfer of the shares, so as to confer the legal proprietorship on another person or other persons. But, as I have said, no such thing was done. The instrument of April 2, 1852, was not founded on valuable consideration—it was merely gratuitous and voluntary; and the principal question for our decision is whether, in such a state of things, it is the duty of the court to enforce it specifically against Mr. Medley's executors, either on the ground that by it Mr. Medley constituted himself a trustee of the shares for the purposes mentioned concerning them in the instrument, or on the ground of contract, or otherwise. It seems plain enough that the law of Louisiana, if applicable to the case, does not assist the plaintiffs; and that the law and rules governing the courts of New York, where the instrument appears to have been executed, are for many purposes now materially and substantially the same as the laws and rules governing the courts here. I am of opinion, that, according to our law, the instrument of April 2, 1852, was not sufficient to constitute, and did not constitute, Mr. Medley a trustee of the bank shares; and in saying this I do not forget the design appearing on the face of it, that Mr. Lord should become a trustee under it for the purpose it mentions. Nor do I think that, voluntary as that instrument was, it contained a contract specifically enforceable against Mr. Medley or his estate—a transaction, or intended transaction, left by him imperfect and incomplete. He might have completed or perfected it by transfer; and thinking the plaintiffs' case not helped by any of the circumstances respectively in the two answers of Mr. Lord, or by any of the authorities mentioned in *Kekewich v. Manning* (1), or by that decision, I find myself, though almost or altogether with regret, unable to agree with the decree as to bank shares, and I believe my learned brother's view to be in effect, so far, the same as mine; but though not satisfied that the instrument, if a deed, contained a covenant on Mr. Medley's part, I do not wish to prevent or prejudice any action which the plaintiffs may wish to bring, in their own names, or the name of Mr. Lord, against Mr. Otto.

Then, with respect to the fire insurance shares. As to these, I have a doubt—a doubt immaterial, because, as I have stated, I find my learned brother is, as to them, of opinion with the decree, in favour of the plaintiffs. That being so, I have not the least objection to the addition in the plaintiffs' favour as to the certificate of the fire insurance shares which my learned brother proposes, and will state. The circumstances are such that we need not, I think, alter, and I am not for altering, what the decree has done as to the costs of the suit,

A although, in the opinion of both of us, the plaintiffs' case partly fails; and although I doubt, as I said, with regard to the fire insurance shares, I am for dealing with the costs of the appeal in the same way.

B **TURNER, L.J.**, stated the facts to the effect already set forth, and continued: The defendant Jacob Augustus Otto has appealed from the decree of the vice-chancellor, and we have now to dispose of that appeal. Under the circumstances of this case, it would be difficult not to feel a strong disposition to give effect to this settlement to the fullest extent; and certainly I have spared no pains to find the means of doing so, consistently with what I apprehend to be the law of the court; but after full and anxious consideration, I find myself unable to support the settlement.

C I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon himself. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provisions will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol. But in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to protect an imperfect gift. The cases, I think, go further, to this extent, that if the settlement is intended to be effectual by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

F Those are the principles by which, as I conceive, this case must be tried. Applying then those principles to the present case, there has not been any transfer either of the one class of shares or of the other to the objects of the settlement, and the question, therefore, must be, whether a valid and effectual trust in favour of those objects was created in the defendant Samuel Lord, or in the settlor himself, as to all or any of these shares. It is plain that it was not the purpose of this settlement or the intention of the settlor to constitute himself a trustee of the bank shares. The intention was, that the trust should be vested in the defendant Samuel Lord, and I think, therefore, that we should not be justified in holding, that by the settlement, or by any parol declaration made by the settlor, he himself became a trustee of these shares for the purposes of the settlement. By doing so we should be perverting the settlement or the parol declaration to a purpose wholly different from that which was intended to be effected by it, and, as I have said, creating an imperfect transaction.

H **STUART, V.-C.**, seems to have considered that *Ex parte Pye* (2) warranted the conclusion that the settlor himself became a trustee by virtue of the power of attorney which he had given to the defendant Samuel Lord; but in *Ex parte Pye* (2), the power of attorney was given by the settlor for the express purpose of enabling the annuity to be transferred to the object of the settlor's bounty. The settlor had, it appears, already directed the annuity to be purchased for the benefit of that object, and had even paid over the money for the purpose of its being applied to the purchase of the annuity; and then when the annuity was, from the necessity of the case, purchased in the settlor's name, the object of the settlement having become the same, all that possibly could be wanted was to show that the original purpose was not changed. The annuity, though purchased in the settlor's name, was still intended for the benefit of the same

object of the settlor's bounty, and the power of attorney proved, beyond all doubt, that this was the case. Those facts appear to me wholly to distinguish this case from that of *Ex parte Pye* (2). In my opinion, therefore, this decree cannot be supported on the authority of *Ex parte Pye* (2), and there does not appear to me to be any sufficient ground to warrant us in holding that the settlor himself became a trustee of these bank shares for the purposes of the settlement.

The more difficult question is whether the defendant Samuel Lord did not become a trustee of these shares? Upon that question I have considerable doubt; but I have come to the conclusion that no perfect trust was ever created in him. The shares, it is clear, were never legally vested in him, and the only ground upon which he can be held to have become a trustee of them is, that he held a power of attorney under which he might have transferred them into his own name; but he held that power of attorney as the agent of the settlor, and if he had been sued by the plaintiffs as trustee of the settlement for an account under the trust, and to compel him to transfer the shares into his own name as trustee, I think he might well have said: "These shares are not vested in me. I have no power over them except as the agent of the settlor, and without his express directions I cannot be justified in making the proposed transfer, in converting an intended into an actual settlement." A court of equity could not, I think, decree the agent of the settlor to make the transfer unless it could decree the settlor himself to do so, and it is plain that no such decree could have been made against the settlor. I am of opinion, therefore, that this decree cannot be maintained as to the fifty Louisiana Bank shares.

As to the thirteen North American Fire Insurance shares, the case appears to me to stand upon a different footing. Although the plaintiffs' case fails as to the capital of the bank shares, there can, I think, be no doubt that the settlor made a perfect gift to Mrs. Milroy, then Miss Dudgeon, of the dividends upon those shares, as far as they were handed over or treated by him as belonging to her, and those insurance shares were purchased with dividends which were so handed over or treated.

The transaction is thus stated in the affidavit of Mrs. Milroy the plaintiff:

"In the spring of the year 1853 I was on a visit to my uncle, and he then informed me that he had received from Samuel Lord the dividends on the bank shares which had accrued since I last received them, and he then handed over to me what I supposed was a bill or order for the same, and which I also signed upon the back at his suggestion. The amount of this remittance was about £50, and which I afterwards duly received. In the autumn of the same year I was also on a visit to my uncle, when he informed me that he had received a further remittance on account of the said dividends, and which included, as he stated, an extra dividend on the shares, remarking at the same time that I was very lucky in getting this extra amount. The amount of this remittance was about £100, and was handed to me by him in the form of a bill or order like the former, and which I also signed upon the back at his suggestion. My uncle subsequently received the amount for me, and about Christmas following he asked me if I was in want of cash, and suggested that, if not, I had better invest it. My reply was that I did not want it. Then, and upon which, he asked me if I should like Samuel Lord to invest it for me in New York, and to which I assented. He very shortly afterwards informed me that he had written to the said Samuel Lord upon the subject, and some time subsequently he further told me that he had heard from Samuel Lord, and that the latter had invested the money for me in the purchase of thirteen shares in the North American Fire Insurance Co. He also informed me at that time that the thirteen shares in the fire insurance company had cost more

A than the amount of the dividends received by me, and it was arranged between us that he should be repaid the amount advanced by him to complete the purchase out of my next dividends."

Then she goes on to state that, when these next dividends became due, the settlor deducted the extra payments on account of the thirteen fire insurance shares from those dividends.

B It seems to me, therefore, that those shares were purchased with the money of Mrs. Milroy, then Miss Dudgeon, and that the purchase having been made in Thomas Medley's name, there would be a resulting trust for Miss Dudgeon. I think, therefore, that as to those shares the decree is right, the value of the shares being, as I presume, under £200, so that the case does not fall within C the ordinary rule of the court as to the wife's equity to a settlement. The case being thus disposed of as to the title to the shares, I see no ground for the claim to compensation made by this bill. The certificates for the shares would follow the legal title, and as to the fifty bank shares, they would, therefore, belong to the defendant Jacob Augustus Otto; and as to the thirteen fire insurance shares, the plaintiffs recovering those shares must recover the certificates D also; but that not being provided for by the decree, a direction for the delivery of those certificates should, I think, be added.

Upon the hearing of this appeal it was contended for the plaintiffs, that so far as they might fail in recovering any of the shares in question, they were entitled to recover the value of them as against the estate of Thomas Medley. I am not sure that this point can be properly considered to be open E upon these pleadings; but whether it be so or not, I agree with my learned brother that the plaintiffs' claim in that respect cannot be maintained. There is no express covenant in the settlement, and whatever might be done as to implying a covenant to do no act in derogation of the settlement, it would, I think, be going too far to imply a covenant to perfect it. If there be a breach of any implied covenant by the delivery of the certificate to the defendant Jacob Augustus F Otto, the plaintiffs' remedy is in damages, and they may pursue that remedy at law, for which purpose the plaintiffs desire that there should be inserted in the decree a direction that they may be at liberty to use the name of the defendant Lord, and of course on the usual terms of indemnifying him.

I have not adverted to the point which was raised as to this case being G governed by Spanish law, for I think that if that law was more favourable to the plaintiffs the onus was upon them to allege and prove it.

As to the costs of the suit, my learned brother being of opinion that they should be paid out of the settlor's estate, I do not dissent. The decree must be altered as to the several points to which I have referred.

Appeal allowed in part.

H

R. v. BARRATT

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Kelly, C.B., Pollock, B., Blackburn, Lush and Honyman, JJ.), November 15, 1873]

[Reported L.R. 2 C.C.R. 81; 43 L.J.M.C. 7; 29 L.T. 409;
22 W.R. 136; 12 Cox, C.C. 498]

Criminal Law—Rape—Idiot girl—Consent—Direction to jury.

On the trial of an indictment for rape it was proved that the prosecutrix, who was aged fourteen and a half years, had been blind and wrong in her mind ever since she was six weeks old. In summing-up the case to the jury the learned judge directed them that, if the prisoner had connection with the prosecutrix by force and if she was in such an idiotic state that she did not know what he was doing, and he was aware of her being in that state, they might find him guilty of rape, but if, from animal instinct, she yielded to him without resistance, or if he, from her state and condition, had reason to think that she was consenting, they ought to acquit him. The jury found the prisoner guilty of an attempt to rape.

Held: the prisoner had been rightly convicted.

Notes. By s. 7 of the Sexual Offences Act, 1956 (36 HALSBURY'S STATUTES (2nd Edn.) 220), it is an offence for a man to have unlawful sexual intercourse with a woman whom he knows to be an idiot or imbecile; see also ss. 8 and 9 of the Act (ibid. p. 221).

Referred to: *R. v. Flattery* (1877), 46 L.J.M.C. 130.

As to rape, see 10 HALSBURY'S LAWS (3rd Edn.) 746 et seq.; and for cases see 15 DIGEST (Repl.) 1009 et seq.

Cases referred to:

- (1) *R. v. Fletcher* (1859), Bell, C.C. 63; 28 L.J.M.C. 85; 32 L.T.O.S. 338; 23 J.P. 70; 5 Jur.N.S. 179; 7 W.R. 204; 8 Cox, C.C. 131, C.C.R.; 15 Digest (Repl.) 1009, 9941.
- (2) *R. v. Fletcher* (1866), L.R. 1 C.C.R. 39; 35 L.J.M.C. 172; 14 L.T. 573; 12 Jur.N.S. 505; 14 W.R. 774; 10 Cox, C.C. 248, C.C.R.; 15 Digest (Repl.) 1013, 9988.

Also referred to in argument:

R. v. Barrow (1868), L.R. 1 C.C.R. 156; 38 L.J.M.C. 20; 19 L.T. 293; 17 W.R. 102; 11 Cox, C.C. 191, C.C.R.; 15 Digest (Repl.) 1013, 9986.

R. v. Jock (1872), L.R. 2 C.C.R. 10; 42 L.J.M.C. 5; 27 L.T. 661; 21 W.R. 144; 12 Cox, C.C. 244, C.C.R.; 15 Digest (Repl.) 901, 8689.

Case Stated by HONYMAN, J.

The prisoner, Robert Barratt, was tried at the Leeds Summer Assizes, 1873, for a rape on Mary Redman. It was proved by the relatives of Mary Redman that she was fourteen and a half years old, and that ever since she was six weeks old she had been blind and wrong in her mind; that she was hardly capable of understanding anything that was said to her, but that she could go up and down stairs by herself; that if placed in a chair by anyone she would remain there till night; that if told to lie down she would do so; that she could not communicate to her friends what she wanted; that she could feed herself a little, but that she was obliged to be dressed and undressed, and that she was unable to do any work; that the prisoner had known Mary Redman and her family about two years, and knew that she was not right in her mind. It was proved by a surgeon that there were no external marks of violence, but that, in his opinion, there had been recent connection, and he thought she had been in the habit of having connection.

A Mary Redman was brought into court, but not sworn. She was evidently idiotic, and the trial judge found it impossible to communicate with her. When he spoke to her she evidently heard a sound and grinned, but made no reply except a vacant laugh, and played with her handkerchief, which she had dressed up in the shape of a doll, and mumbled in her mouth. It was proved by the evidence of her father that, on returning home one day, he looked through the window of the sitting room and saw the prisoner lying on Mary Redman on a couch in the room on which she had been previously placed by her sister (whom the prisoner then sent on an errand to a distance), and who desired Mary Redman to lie on the couch till her return, and that, on going into the room, he found the prisoner standing up at the end of the couch buttoning up his trousers, while Mary Redman was lying quietly on the couch. The prisoner asked the father not to say anything about it. Beyond this there was no evidence to show under what circumstances the prisoner had or attempted to have connection with the girl.

B For the prisoner, it was submitted that there was no sufficient evidence of penetration, or that what took place was without the girl's consent, or against her will.

C The trial judge declined to stop the case, but reserved for the Court of Criminal Appeal the question whether he ought, under the circumstances, to have directed the jury to acquit the prisoner. He told the jury that if the prisoner had connection with the girl by force, and the girl was in such an idiotic state that she did not know what the prisoner was doing, and the prisoner was aware of her being in that state, they might find him guilty of rape, but if the girl, from animal instinct, yielded to the prisoner without resistance, or if the prisoner, from the girl's state and condition, had reason to think that the girl was consenting, they ought to acquit him. The jury found the prisoner guilty of an attempt to rape, and the learned judge admitted him to bail.

E The question for the opinion of the Court for the Consideration of Crown Cases Reserved was whether the judge ought to have directed the jury to acquit the prisoner.

F The prisoner did not appear and was not represented.

Forbes for the prosecution.

G **KELLY, C.B.**—I am of opinion that the prisoner, in point of law, was guilty of the crime of rape in this case. I entirely concur in the definition of the crime of rape, as given by WILLES, J., in his direction to the jury in *R. v. Fletcher* (1) (Bell, C.C. at p. 70):

H "that if the jury were satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty."

In the present case the prosecutrix was not capable of giving her consent. As to the second case of *R. v. Fletcher* (2), I cannot see the distinction between it and the earlier case.

I **BLACKBURN, J.**—I am of the same opinion. I agree with the decision in the first case of *R. v. Fletcher* (1), and think that the correct rule was laid down in that case. I do not think that the court in the second case of *R. v. Fletcher* (2) intended to differ from the decision in the first case. In all these cases the question is whether the prosecutrix is an imbecile to such an extent as to render her incapable of giving consent or exercising any judgment on the matter, or, in other words, is there sufficient evidence of such an extent of idiocy or want of capacity? In the first case of *R. v. Fletcher* (1), and also in the present case,

there was evidence of such an extent of idiocy in the girl as to lead the jury A to believe that she was incapable of giving assent, and that, therefore, the connection was without her consent. In the second case of *R. v. Fletcher* (2), the evidence of that was much less strong, and the point reserved for the court was whether the case ought to have been left to the jury at all, there being no evidence except the fact of connection and the imbecile state of the girl; and all that the court said was that some evidence of its being against her will and B without her consent ought to be given in these cases, and that there was not in that case that sort of testimony on which a judge would be justified in leaving it to a jury to find a verdict. On the authority of the decision in the first case of *R. v. Fletcher* (1), it is enough to say in this case that the evidence here was that the connection was without the girl's consent.

LUSH, J.—I am of the same opinion. I do not collect from the decision in the second case of *R. v. Fletcher* (2) that it was intended to overrule, but only to distinguish it from the first case of *R. v. Fletcher* (1), and to uphold the first case.

POLLOCK, B.—I am of the same opinion.

HONYMAN, J.—I am of the same opinion. The decision in the second case of *R. v. Fletcher* (2) that there was not the proper sort of testimony requisite in these cases, brings it within the principle acted on in the first case of *R. v. Fletcher* (1), where there was the proper testimony. This case seems to me the same as when a man has connection with a drunken woman whom he finds lying in a road, quite incapable of giving consent, in which case LORD CAMPBELL said that it would be monstrous to say that the man would not be guilty of rape.

Conviction affirmed.

MORGAN v. ROWLANDS AND ANOTHER

[COURT OF QUEEN'S BENCH (Blackburn and Hannen, JJ.), May 7, 1872]

[Reported L.R. 7 Q.B. 493; 41 L.J.Q.B. 187; 26 L.T. 855;
20 W.R. 726]

Limitation of Action—Acknowledgment—Promissory note—Payment by promisor under compulsion of law—Judgment recovered for interest only—Subsequent action for principal.

In an action, by writ dated Aug. 20, 1870, against the defendants, the executors of the maker of a promissory note, dated April 14, 1856, payable to the plaintiff, for £32 with interest, the defendants pleaded, inter alia, the Statute of Limitations and a judgment recovered against them in a county court for £4 4s. 6d. for the same cause of action and costs. The action was transferred to the county court, and the plaintiff there proved that on Oct. 1, 1868, he had brought an action against the defendants for £3 4s. for two years' interest on the note, that the defendants had then set up the Statute of Limitations, but that he had sworn that the maker had paid him money on account in time to prevent the debt being barred, and that he had obtained judgment for £3 4s. and £1 0s. 6d. costs, which sums were paid to him on Oct. 20, 1868. The jury having found that the £3 4s. recovered in the previous action was on account of interest on

A the promissory note, the judge ruled that the judgment recovered was no bar to the action and directed a verdict for the plaintiff for £36 5s. 2d. the full amount claimed.

Held: the payment made by the defendants under compulsion of law afforded no evidence of any acknowledgment of the debt from which a promise to pay the remainder could be inferred so as to take the case out of the Statute of Limitations.

B **Semble:** Judgment recovered for interest alone, the principal sum being left outstanding, did not make the matter *res judicata* and a subsequent action to recover the principal was maintainable.

Notes. Section 3 of the Limitation Act, 1623, and the Statute of Frauds Amendment Act, 1828, have been repealed by s. 34 and Schedule of the Limitation Act, 1939 (13 HALSBURY'S STATUTES (2nd Edn.) 1196). Acknowledgment and part payment (not dealt with by the Act of 1623 but introduced by judge made rule, and enacted by the Act of 1828, and subsequent Acts) is now dealt with by s. 23 to s. 25 of the Limitation Act, 1939 (13 HALSBURY'S STATUTES (2nd Edn.) 1184-1186). The periods of limitation set out in the Act of 1939 have been amended by the Law Reform (Limitation of Actions, etc.) Act, 1954 (34 HALSBURY'S STATUTES (2nd Edn.) 463 et seq.).

Considered: *Green v. Humphreys* (1884), 26 Ch.D. 474; *Firth v. Slingsby* (1888), 58 L.T. 481; *Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Re Wilson and Wilson, Ex parte Wilson v. Trustee of Deed of Arrangement*, [1937] Ch. 675. Referred to: *Re Fountaine, Fountaine v. Amherst* (1909), 78 L.J.Ch. 648; *Fettes v. Robertson* (1921), 37 T.L.R. 581; *Spencer v. Hemmerde*, [1922] 2 A.C. 507; *Re Wilson, Wilson v. Bland*, [1937] 3 All E.R. 297.

E As to payment by compulsion of law being sufficient to prevent the Statute of Limitations from running, see 24 HALSBURY'S LAWS (3rd Edn.) 308; and for cases see 32 DIGEST (Repl.) 444 et seq.

F Cases referred to:

- (1) *Tanner v. Smart* (1827), 6 B. & C. 603; 9 Dow. & Ry.K.B. 549; 5 L.J.O.S.K.B. 218; 108 E.R. 573; 32 Digest (Repl.) 427, 519.
- (2) *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822; 25 L.T. 319; 19 W.R. 1130, L.J.J.; 32 Digest (Repl.) 420, 440.
- (3) *Davies v. Edwards* (1851), 7 Exch. 22; 21 L.J.Ex. 4; 18 L.T.O.S. 64; 15 Jur. 1014; 155 E.R. 839; 32 Digest (Repl.) 444, 659.
- (4) *Wainman v. Kynman* (1847), 1 Exch. 118; 16 L.J.Ex. 232; 154 E.R. 49; 32 Digest (Repl.) 444, 658.
- (5) *Tippets v. Heane* (1834), 1 Cr. M. & R. 252; 4 Tyr. 772; 3 L.J.Ex. 281; 149 E.R. 1074; 32 Digest (Repl.) 444, 655.

H Also referred to in argument:

- Tulloch v. Dunn, etc. (Executors of Hanley)* (1826), Ry. & M. 416, N.P.; 23 Digest (Repl.) 364, 4327.
- Bamfield v. Tupper* (1851), 7 Exch. 27; 155 E.R. 841; sub nom. *Bradfield v. Tupper*, 21 L.J.Ex. 6; 18 L.T.O.S. 78; 32 Digest (Repl.) 450, 710.

I **Rule Nisi** obtained by the defendants calling on the plaintiff to show cause why the verdict should not be set aside and for a new trial, in an action by the plaintiff against the defendants, the executors of Isaac Rowlands, deceased, the maker of a promissory note, dated April 14, 1856, payable to the plaintiff for £32 with interest at 5 per cent. which was unpaid and due, alleging that the defendants, in consideration thereof, as executors, had after the death of the deceased promised to pay the sum due which now remained unpaid.

The defendants pleaded that the cause of action did not accrue within six years within the Limitation Act, 1623; that the plaintiff had brought an action in the Cardiganshire County Court against them for the same cause of action,

and had recovered judgment for £4 4s. 6d.; and that such sum had been paid into court. The present action, commenced by writ on Aug. 20, 1870, was transferred to the Aberystwyth County Court and tried before a jury on Jan. 16, 1872. At the trial the promissory note sued on was put in evidence and admitted by the defendants. The plaintiff proved that an action had been brought by him against the defendants on Oct. 1, 1868, to recover £3 4s. for two years' interest on the note and that the defendants had then set up the Statute of Limitations, in answer but that the plaintiff had sworn that the deceased had paid him money on account to save the debt from the effect of the statute; and that the plaintiff had recovered judgment for £3 4s. and £1 0s. 6d. costs which sums the defendants had paid on Oct. 29, 1868. The judge then put the question to the jury, whether payment of the £3 4s. under the above circumstances, was payment on account of interest on the promissory note. The jury answered the question in the affirmative and the county court judge ruled that in point of law the judgment for interest only, in the previous action, was no bar to a second action to recover the principal sum and gave judgment for the plaintiff for £36 5s. 2d., the full sum claimed.

The defendants obtained a rule nisi to set aside the verdict and for a new trial, on the ground of misdirection of the judge; first, that recovery of judgment for interest only, was no bar to a second action for the principal sum due; and secondly, that there was evidence to take the case out of the Statute of Limitations.

Lumley Smith showed cause against the rule.

Bosanquet supported the rule.

BLACKBURN, J.—It is only necessary to decide the second question; that there was really no evidence before the county court judge to take the case out of the Statute of Limitations. I do not think that there is the least foundation for the first question; that if a creditor allows the principal debt to remain outstanding, but takes legal proceedings for the interest, it at all merges or discharges the debt. But on the second question I think the objection that there was no evidence to take the case out of the Statute of Limitations good. The Limitation Act, 1623, did not extinguish the debt, but only put an end to the remedy, and in the subtlety of pleading it was said that an express promise to pay the debt barred the statute being made for a good consideration would, therefore, support an action from the time when it was made, just as if that was the first time the debt was contracted. On that the former opinion was that when one was sued on an original cause of action, pleaded the Statute of Limitations, and the plaintiff proved such subsequent promise made within six years, the effect of the statute was taken away.

Many of the cases are not reconcilable with that doctrine. But in *Tanner v. Smart* (1), where the matter was much considered, it was reduced to that ground, and held that the acknowledgment or promise to suspend the Statute of Limitations, must be an acknowledgment or promise amounting either to an absolute unqualified promise to pay the old debt, or a conditional promise, which, on the condition being fulfilled, became absolute, but that it must be a promise in fact to pay the money. There is a recent case, *Re River Steamer Co., Mitchell's Claim* (2), where MELLISH, L.J., quite bears out this by a passage he cites from JERVIS'S NEW RULES, p. 350 (6 Ch. App. at p. 828):

"Before this statute [Statute of Frauds Amendment Act, 1828], not only a verbal promise to pay a debt more than six years old, but a bare unconditional acknowledgment of its subsistence, made within six years before action brought, had been held sufficient to take that case out of s. 3 of the Limitation Act, 1623. But now, in order to revive the liability of the debtor after the expiration of the six years, by subsequent acknowledgment

A or promise, there must be proof of some writing, signed by himself, either containing an express promise to pay the debt, or being in terms from which an unconditional promise to pay it is necessarily to be implied."

The lord justice says (*ibid* at p. 828) that is right, and that to take the debt out of the statute

B "either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, an unconditional promise to pay the debt; or, thirdly, a conditional promise to pay the debt, and evidence that the condition has been performed."

C I apprehend that that is quite clear, and settled by numerous cases, to be the law as to what is the nature of the promise to take the debt out of the operation of the statute.

Then in the present case there is not a written promise, but under the exceptions in the Statute of Frauds Amendment Act, 1828, as to the full force of part payment, the part payment must be such a payment as amounts to an acknowledgment or promise to pay the debt in respect of which such part payment is made. I think that when we look at the authorities and cases, and especially *Davies v. Edwards* (3), they show that from the time of *Tanner v. Smart* (1) downwards. LORD WENSLEYDALE said a promise must be made under such circumstances as that there must be an inference from it that it is a promise that the promisor will pay the principal, and if it were not so it would not bar the Statute of Limitations. *Wainman v. Kynman* (4) and *Tippets v. Heane* (5) are to the same effect, and it is impossible to say that was not LORD WENSLEYDALE's opinion. Seeing here that there was a plaint in the county court which the defendants resisted to the utmost and were defeated, and the county court judge gave judgment against them; and then having resisted to the utmost, they paid the money because they could not help doing so, it is impossible to say that they meant in fact to promise to pay the principal in respect of which the interest was due. If counsel showing cause against the rule were right in his view, such a promise would arise by implication of law. But I think that it appears in all the cases from *Tanner v. Smart* (1) downwards that the promise must be a promise necessarily to be inferred and implied from the payment relied on. Consequently, I think the county court judge was wrong, and that the rule for G a new trial must be made absolute.

H **HANNEN, J.**—I am of the same opinion. I say nothing on the first point, because it is not necessary to say anything upon it, nor do I intend to express any kind of dissent from what has been said by BLACKBURN, J., thereon. With respect, however, to the Statute of Limitations, in the first place, I think there is no distinction to be properly drawn between part payment, and part payment of interest. Counsel showing cause against the rule has argued there is, but I cannot find any authority for that.

I With regard to the effect of the payment whether as part of a larger sum, or as interest due on a debt remaining unpaid, the question is whether part payment within six years is sufficient. It is not sufficient unless the circumstances are such that a jury might fairly infer from it a promise to pay the larger sum in the first case, or the principal in the other. No doubt very slight circumstances will be sufficient to warrant a jury in drawing such an inference in aid of the legal obligation on a man to pay his debt; but if there are no such circumstances, but on the contrary, facts which tend to negative any such inference, then probably a jury would not be warranted in drawing any such inference. In the case cited of *Wainman v. Kynman* (4) where a sovereign was paid, accompanied by words, it was supposed that the words were uttered in jest, and, therefore, there was something to be left fairly to the jury to say whether the act done did import

a promise to pay the larger sum. But in the present case there is a total absence of any circumstances from which a jury could properly infer any such promise, because, as counsel supporting the rule pointed out, the defendants, when before the county court judge, were denying all liability whatsoever, and their position at the utmost was this: "We deny we owe anything, but in obedience to the court we pay you what we are compelled to pay." Can it be fairly said that that was an acknowledgment or expression of an intention to pay the larger sum? I think not, and, therefore, that there was no evidence for the jury on the facts before the judge, and that he assumed wrongly in point of law. There was a mistake and must be a new trial.

Rule absolute.

GIBBS AND OTHERS v. DANIEL AND ANOTHER

[VICE-CHANCELLOR'S COURT (Stuart, V.-C.), January 18, 20-25, 27, 28, May 3, 1862]

[Reported 4 Giff. 1; 7 L.T. 27; 9 Jur.N.S. 636; 10 W.R. 688;
66 E.R. 595]

Solicitor—Duty to client—Former client—Sale of property to solicitor—Client advised by new solicitor—Duty of old solicitor not to withhold information from new solicitor—Impropriety of using for own benefit against former client information obtained while acting for that client—Value of property—Profit derived by solicitor's subsequent dealing with it.

Where property is purchased by a solicitor from a person who has lately been his client, and the transaction is defended on the ground that a new solicitor has been in a position to give independent advice to the vendor it must be shown that the new adviser had proper opportunity of discharging his duty. If it appears that the solicitor purchasing from his late client was aware of any neglect of duty on the part of the new adviser, and especially if he has withheld or suppressed from the new adviser any information of importance, the transaction is vitiated. The intervention of one who is known to neglect his duty is no protection. It is improper that a solicitor should use for his own benefit against a former client information which he obtained while acting as that client's professional adviser. The profit which a solicitor derives from his dealing with property which he has purchased from a client is the best proof of the value of that property. A purchase of mortgaged property by the solicitor of the mortgagee at the time of a temporary depreciation, without instructions from, or any, apparent benefit to, the mortgagee, is a transaction which, *prima facie*, cannot be supported.

Notes. As to transactions between solicitor and client, see 36 HALSBURY'S LAWS (3rd Edn.) 85-106; and for cases see 42 DIGEST 91 et seq.

Cases referred to in argument :

- (1) *Holman v. Loynes* (1854), 4 De G.M. & G. 270; 2 Eq. Rep. 715; 23 L.J.Ch. 529; 22 L.T.O.S. 296; 18 Jur. 839; 2 W.R. 205; 43 E.R. 510; 42 Digest 83, 745.
- (2) *Gresley v. Mousley* (1859), 4 De G. & J. 78; 28 L.J.Ch. 620; 33 L.T.O.S. 154; 5 Jur.N.S. 583; 7 W.R. 427; 45 E.R. 31; 40 Digest (Repl.) 394, 3150.
- (3) *Gibson v. Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044; 42 Digest 81, 724.
- (4) *Lawless v. Mansfield* (1841), 4 I. Eq. R. 113; 1 Dr. & War. 557; 42 Digest 190, 1996if.

- A (5) *Jones v. Thomas* (1837), 2 Y. & C.Ex. 498; 160 E.R. 493; 42 Digest 82, 740.
 (6) *Nokes v. Warton* (1842), 5 Beav. 448; 49 E.R. 651; 42 Digest 194, 2116.
 (7) *Austin v. Chambers* (1838), 6 Cl. & Fin. 1; 7 E.R. 598, H.L.; 42 Digest 85, 762.
 (8) *Edwards v. Meyrick* (1842), 2 Hare, 60; 12 L.J.Ch. 49; 6 Jur. 924; 67 E.R. 25; 42 Digest 82, 738.
- B **Action** by the plaintiffs, Thomas Washer Gibbs, his three daughters, Mary Bryant Gibbs, Ann Gibbs, and Florence Elizabeth Robjent, and Richard Drewett Robjent, who sought an order against the defendants, Edward Daniel and Alfred Cox, solicitors, setting aside a purchase of property belonging to the plaintiffs made by the defendants.
- C *Malins, Q.C.*, and *W. W. Mackeson* for the plaintiffs.—The defendants have been guilty of the following derelictions of duty. First, they inserted in the mortgage-deeds a power of sale without notice, contrary to the custom of the profession where, as in the present case, the same solicitor was acting for both parties. Then, having been for years the professional advisers of Mr. Gibbs, finding him in difficulties, they allowed those difficulties to prey upon him to such an extent that he became of unsound mind. While he was concealing himself from his creditors, they put pressure upon the daughters, making representations that the mortgagees were pressing for their money, and that they (the daughters) were liable for the building materials which had been laid out upon the land. The defendants then called in Mr. Crosby [another solicitor] to represent the daughters. He alarmed them by telling them that their father owed £1,200, and that, as they were the owners of the fee, they could be called upon for payment. The defendants then urged the sale of the property. Either the defendants believed Mr. Gibbs to be the owner of the property and urged on the sale when he was in a state of incapacity, or they thought that the Misses Gibbs were the owners and forced the contracts upon them in the absence of their natural adviser. They stated that the property was depreciated owing to the Russian war, but the contract was executed on Jan 8, 1856, Sebastopol was taken on Sept. 8, 1855, and the treaty of peace was signed on Mar. 30. The defendants themselves were negotiating for a further advance on the property of £300 when Mr. Gibbs fell ill. In March, 1856, they began to advertise the sale, as they said, to raise money to pay the interest, which only amounted to £218, while they had a deed engrossed for securing a loan of £300 for this very purpose. By the terms of the agreement for the sale of the equity of redemption the defendants gave the plaintiffs what they called a clearance for bills of costs which they admitted had never been presented either to the father or to the daughters. Then, although the original drafts of bills of costs showed that the costs were owing from the father, the defendants charged the daughters with them. Previously to the purchase the defendants called a meeting of creditors to the amount of £1,200, and offered them the property at the price at which they were buying it, but so clogged with conditions that they could not accept the offer. As to the value, it was proved that the defendants had knowledge of a valuation which had been made at £6,000. They admitted that they had sold parts of the property for £2,160, and ground-rents to the amount of £1,020, making together £3,180, and they valued the unsold property at £3,000. Even taking a lower valuation of £2,400, the defendants had made a large profit. Under these circumstances the question was whether the plaintiffs, as clients, had been sufficiently protected by the defendants, their solicitors, to admit of this transaction being supported. [*Holman v. Loynes* (1), and *Gresley v. Mousley* (2), were cited, and a decree was asked in the terms of the order made in the latter case.] No charges of fraud had been made in the bill, but the onus of proving that the transaction was a fair and just one lay upon the solicitor. The defendants had failed in their duty in not communicating to Mr. Crosby, the new solicitor, the value of the property, and in not showing him their books, wherein up to November, 1855,

Mr. Gibbs had been treated as their client, according to the doctrine in *Holman v. Loynes* (1). [*Gibson v. Jeyes* (3), *Lawless v. Mansfield* (4), *Jones v. Thomas* (5), and *Nokes v. Warton* (6), were cited.]

Sir Hugh Cairns, Q.C., C. Hall and Stiffe-Everitt for the defendants.—The defendants had no knowledge of Mr. Gibbs's difficulties at any material time. At the time of the contract the defendants were not the solicitors of the plaintiffs or of any of them. As soon as the plaintiffs saw that their solicitors Daniel and Cox were in the position of solicitors to the mortgagees, they called in their own solicitor Mr. Crosby. Thereafter the Misses Gibbs were in almost daily communication with him. The only foundation for the charge that the defendants' statement respecting the mortgagees' pressure was false was the defendants' own statement in their answer that their clients had left the conduct of the mortgages wholly in their hands. As to the question of value, it was contended that information on this point could not be said to have been withheld, inasmuch as the defendants were no longer in the relation of solicitors. Messrs. Horwood had stated their reasons for valuing the property at the sum of £6,000. It was because they considered it good for building purposes. It was not till after the proclamation of peace with Russia that property began to improve. On the other hand, there was the valuation of £2,400 by Messrs. Pope, the district surveyors of Bristol, well qualified to give a good and impartial estimate. It was, moreover, supported by other independent estimates. The transaction was perfectly fair and honest, and such a one as the court would support. The defendants, therefore, ask that the bill be dismissed with costs. [*Austin v. Chambers* (7), and *Edwards v. Meyrick* (8), were cited.]

May 3, 1862. **STUART, V.-C.**, read the following judgment.—The object of this suit is to set aside a purchase by the defendants of the equity of redemption of certain property of the plaintiffs.

It appears that the defendants had acted as the solicitors of the plaintiffs and also of the mortgagees. It is a material part of the defendants' case, that about twenty-one days before the agreement for the purchase they had ceased to act as solicitors for the plaintiffs, and that another solicitor was called in, who acted in their behalf and sanctioned the purchase. There is no doubt that the intervention of other adequate assistance and advice, so as to remove all that presumption of pressure and influence which arises from the relation of solicitor and client, may give validity to the transaction of a purchase by a solicitor from his client. In the present case there is the peculiarity that there is the clearest evidence of actual pressure by the defendants themselves, and the question is not to be dealt with on the mere presumption of influence or pressure. What the defendants have laboured to show is that the affairs of the plaintiffs were in a state of embarrassment and difficulty which made the sale inevitable; that before the contract another solicitor was called in and acted for the plaintiffs; that an adequate price was paid; and that even after the contract was made the defendants, so far from being eager in the transaction, were desirous of inducing any person to take the purchase off their hands, and actually offered it to the plaintiffs' creditors, who refused to take it.

There is a great deal of evidence on both sides on these grounds of defence. When fairly weighed the evidence does not remove the difficulties in the defendants' case. As to the intervention of Crosby, who was the person called in to act and to succeed the defendants as solicitor for the plaintiffs, its importance must depend on the way in which he performed his duty. He has been examined as a witness on behalf of the defendants, but it does not appear that he had sufficient information as to the state of the plaintiffs' affairs, or the circumstances or value of the property, to make his intervention or approbation of the sale of much value. He made no adequate exertion and took no proper pains to inquire into and ascertain the value of the property, and made no attempt to procure any other

A person to purchase. The pretext for the sale was, the pressure of the mortgagees, who were the defendants' clients, and whose interest was in arrear. If Crosby had made proper inquiry of the defendants, and they had told him the truth, he would have ascertained that they had in their hands a sum of money advanced to them for the purpose of being lent to the plaintiffs, which, if the defendants had chosen, would have relieved the pretended pressure, and he might also have discovered that the mortgagees had not instructed the defendants to threaten to sell the property.

The proposal of the defendants to become purchasers appears to have been contemporaneous with their ceasing to act themselves as solicitors for the plaintiffs and with the employment of Crosby on Nov. 23, 1855. On the following day there occurred an interview between the defendants and Crosby, the particulars of which were stated in the answer. They say that Mr. Crosby requested to be informed of the state of the mortgage and other transactions between them and his clients; that they gave him such information, and (among other things) they stated the impossibility of their clients remaining any longer unpaid, and requested him to see if any means could be found to pay the interest and prevent the necessity of a sale, which they said was inevitable unless this could be done. The proposition that the defendants should become purchasers was, they say, started by Crosby. In a previous passage they say that the proposition was started after several interviews with Crosby. Upon that proposition they offered to purchase, and the defendants admitted that they

"had intimated to him that unless the plaintiffs Mary Bryant Gibbs and Ann Gibbs, on or before the 11th day of December, but not otherwise, immediately accepted our offer we would instantly advertise the property for sale."

It appears, however, that all this urgency and all these threats proceeded entirely from the defendants themselves, and had no foundation in any instructions or wish of their clients, the mortgagees. This is clearly established by their own evidence. They admit that no written notice was given to any of them by the mortgagees to sell, that the mortgagees left the entire management of the mortgage securities in their hands, and that the statement that they would proceed instantly to advertise the property for sale was made solely because no means could be found whereby the interest due on the mortgages could be paid or secured. This last statement has been displaced by documentary evidence, and by the viva voce examination of the defendant Cox as to the moneys in the defendants' hands, received by them in respect of a loan negotiated in July for the plaintiffs, and left incomplete for some reason incompatible with their duty to the plaintiffs, then their clients. It is thus clearly proved that while the non-payment of interest was the pretext for compelling an instant sale, they had in their hands moneys which their duty to the plaintiffs, as their clients, required them to make available for that purpose. When Crosby was called in to act in their stead as the plaintiffs' confidential adviser they withheld from him the knowledge of this and other facts essential to enable him to discharge his duty with effect.

Where a purchase of this kind is defended on the ground of the intervention of other professional assistance, it must be shown that the new adviser had a proper opportunity of discharging his duty. If it appears that the solicitor purchasing from his late client is aware of a neglect of duty, or takes advantage of any neglect of duty in the new adviser, but especially if he withholds or suppresses from the new adviser any information of importance, the transaction is vitiated. The intervention of one who is seen or known to neglect his duty is no protection. In the present case the defendants used for their own benefit against their former clients information obtained by them while acting as their professional advisers. The defendants are shown to be purchasers of the property

of their late clients, under a forced sale, forced under a pressure created by themselves. They only ceased to act as solicitors for the plaintiffs at the time when they offered to purchase their estate, and they continued the pressure under a power which they themselves created till they completed the purchase, and they completed it at the time when they had secured to themselves a large profit from a transaction of which the negotiation was commenced while their confidential relation with the plaintiffs existed, and concluded, not for the benefit of the plaintiffs, but of themselves. Throughout the transaction the plaintiffs were placed wholly at the mercy of the defendants. The threats and pressure and alarm were all the work of the defendants, and the means by which they procured the plaintiffs to make the contract. Except for the purpose of procuring a sale to themselves, there appears to be no reason at all for their assertion that a sale was inevitable, and no other reason why they threatened that they would instantly advertise the property for sale unless their offer to purchase was accepted.

The profit which the defendants have derived from their subsequent dealing with the property is the best proof of value. Evidence of a great depreciation of the property from temporary causes at the time of the contract affords little assistance to the defendants' case. A purchase of mortgaged property by the solicitor of the mortgagee at a time of temporary depreciation of the property without any instructions from the mortgagee or any purpose of apparent benefit to him can scarcely be a valid transaction. Objections have been taken as to the state of the plaintiffs' title to the property, but these objections are of no material importance on the main question in the cause. It sufficiently appears that the trust-funds in which all the plaintiffs were interested had been irregularly dealt with as to the investment in the property in question; but the nature of the dealing was such as to give to all the plaintiffs such an interest in the property as entitles them to maintain the suit.

It is sufficiently proved that the defendants before their purchase were well aware that there was an opportunity of selling a small portion of the ground for a large sum, and they so managed as to prevent the plaintiffs from having the benefit of this advantageous proposal, and reserved that benefit to themselves. Throughout the whole of the transaction the conduct of the defendants was a series of pretexts. The urgency of the mortgagees was a pretext; the insufficiency of the security was a pretext; the threat of advertising the property for immediate sale at the instance of the mortgagees was a pretext; and all these pretexts were used before their confidential relation with the plaintiffs was dissolved. Upon the whole case the plaintiffs have established a right to set aside the transaction, and have a decree against the defendants with costs.

A

BOARD v. BOARD

[COURT OF QUEEN'S BENCH (Blackburn, Mellor and Quain, JJ.), November 18, 1873]

B

[Reported L.R. 9 Q.B. 48; 43 L.J.Q.B. 4; 29 L.T. 459;
22 W.R. 206]

*Estoppel—Estoppel by conduct—Entry into possession of premises under will—
Provisions of will carried out—Right to question validity of will.*

C

A person who has entered into possession of premises under a will, remains in possession, and carries out the provisions of the will, is estopped from questioning the validity of the will. Nor can a person claiming under him set up that the will was void.

Notes. The doctrine of this case applies to instruments other than wills: *Dalton v. Fitzgerald*, [1897] 2 Ch. 86, per RIGBY, L.J., at p. 95.

D

Considered: *Paine v. Jones* (1874), L.R. 18 Eq. 320. Approved and Followed: *Dalton v. Fitzgerald*, [1897] 2 Ch. 86. Explained: *Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70. Referred to: *Re Coole, Coole v. Flight*, [1920] 2 Ch. 536.

As to estoppel by conduct, see 15 HALSBURY'S LAWS (3rd Edn.) 235-243; and for cases see 21 DIGEST (Repl.) 411 et seq.

Case referred to:

E

(1) *Anstee v. Nelms* (1856), 1 H. & N. 225; 26 L.J.Ex. 5; 27 L.T.O.S. 190; 4 W.R. 612; 156 E.R. 1186; 32 Digest (Repl.) 566, 1574.

Also referred to in argument:

Hawksbee v. Hawksbee (1853), 11 Hare, 230; 23 L.J.Ch. 521; 68 E.R. 1259; 21 Digest (Repl.) 413, 1334.

F

Asher v. Whitlock (1865), L.R. 1 Q.B. 1; 35 L.J.Q.B. 17; 13 L.T. 254; 30 J.P. 6; 11 Jur.N.S. 925; 14 W.R. 26; 32 Digest (Repl.) 565, 1562.

Action of ejectment brought to recover possession of a dwelling house and premises situate in the parish of Burnham, Somerset.

The case came on to be tried before GROVE, J., at the spring assizes held at Taunton in 1873, when a verdict was found by consent for the plaintiff

G

subject to the opinion of the court upon a Case which stated the following facts.

In 1820, Robert Amesbury was seised and possessed, as tenant by the curtesy, of the premises hereinafter called "the disputed premises." He was twice married. By his first wife, Hannah, who died intestate about the year 1812, and was seised and possessed of the freehold of inheritance in the disputed premises, he had issue four daughters, first Rebecca, second Fanny, third Lydia, fourth Maria, and one son Joseph. His second wife, Mary Locke, was a sister of his first wife. On April 15, 1800, Fanny Amesbury married one William Board, and by him had issue three sons, first William, second Robert (the plaintiff), and third Joseph. Fanny Board died a few years afterwards, and William Board, about the year 1818, married her sister, Rebecca. The defendant, Thomas Board, was the son of William Board and Rebecca. Robert Amesbury died in the year 1820, having previously made a will (whereof Joseph Amesbury was sole executor), dated May 24, 1819, and a codicil to the will, dated Aug. 23, 1820.

H

I

By his will, Robert Amesbury (hereinafter called the testator) devised to William Adams and John Buncombe, as trustees, the disputed premises in trust for his daughter Rebecca, for her life and the life of William Board to live in, provided they or one of them should pay to the testator's three grandsons, William, Robert (the plaintiff) and Joseph the annual sum of £3 each, and after the decease of Rebecca, the testator devised the disputed premises to his grandson

William, charged with two annuities of £7 each, payable to Robert Board (the plaintiff) and Joseph Board, for their lives. The three annuities of £3 each were duly paid until 1826 to William, Robert, and Joseph Board, respectively, by Rebecca Board, and after 1826 to Joseph Amesbury and Robert Board.

At the death of the testator, Rebecca and William Board were residing with him upon the disputed premises, and upon the death of the testator they continued to remain in the actual enjoyment and occupation of the same. In 1837, William Board died, leaving Rebecca Board in the occupation of the disputed premises. In 1849 the plaintiff bought of his brother, William Board, all William's remainder in the disputed premises. In April, 1863, Rebecca Board sold the disputed premises by auction to her son, Thomas Board, the defendant. The plaintiff, with his legal adviser, attended the sale, and the latter publicly stated on behalf of the plaintiff that Rebecca Board had no right to sell the disputed premises, but the defendant persisted in purchasing the premises, and the same in pursuance of the sale were purported to be conveyed by Rebecca Board to the defendant. For many years prior to the sale, and down to May, 1872, Rebecca Board and her son, the defendant, resided together on the disputed premises, the land being farmed and managed by the defendant. On June 13, 1872, the plaintiff, as and being the assignee of the interest and remainder of his brother, William Board, demanded possession. Possession was refused, and this action was commenced.

The question submitted for the opinion of the court was whether the plaintiff was entitled to the disputed premises, or to any and what part of them.

Charles for the plaintiff.

T. W. Saunders for the defendant.

BLACKBURN, J.—I think the plaintiff is entitled to our judgment. [His LORDSHIP stated the facts.] The plaintiff now claims in right of William Board, the remainderman under the will of Robert Amesbury, and the question arises whether the defendant, whose title depends upon Rebecca's rights, can now set up that the will under which she took was altogether void, and that Joseph Amesbury was entitled to the premises, although Rebecca by her possession had ousted him.

No doubt the heir, Joseph Amesbury, cannot now meddle with any of the parties; his power to enter the premises ceased after twenty years from the end of his father's estate by curtesy. I think the defendant cannot claim the premises except under the title by which Rebecca entered into possession. She having entered under the will, and carried out the provisions of the will, is estopped from questioning the validity of the will, and persons claiming through her must submit to the limitations of her estate imposed by the will. Just in the same way a tenant cannot deny his landlord's title; and the greater number of cases of that kind are those in which the landlord's title is a merely equitable interest, which in law is nothing. The defendant's objection, therefore, that this will, being a nullity, the case is not subject to the established rule concerning estoppels, is not borne out by the analogous cases of landlord and tenant. It would be a great hardship, and obviously unjust, and, as it seems to me, contrary to the principle of all estoppels, if the defendant could establish his right here.

As for authority, MARTIN, B., has said that the statute of limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such possession was unlawful so as to give to his heir a right against the remainderman. That dictum in *Anstee v. Nelms* (1), although not the point of the case, seems to be directly in point here, and to be good sense and correct law. The plaintiff, therefore, has a right to say that the defendant is estopped from denying the title under which Rebecca entered into possession.

A MELLOR, J.—I am of the same opinion. The only person who could dispute this will was the heir-at-law, who, having acquiesced in it for twenty years, was barred by the statute. The widow took her life estate under the will, but afterwards affected to sell adversely to her remainderman under the same will. This she could not do, as it would be contrary to the wholesome doctrine of estoppel. Not only would such a proceeding be contrary to law, but it would
B be most dangerous to well-established rights if she could convert her interest under the will at her own discretion into an absolute title against all the world.

QUAIN, J.—I am of the same opinion. I decide upon the simple point that when a person enters into possession of premises under a will, acts under the will, and continues in possession for twenty years under the will, he cannot turn
C round and say the will was bad, and possession had given him an absolute title against the other devisees of the will.

Judgment for plaintiff.

D

E

RHODES v. BATE AND OTHERS

[COURT OF APPEAL IN CHANCERY (Turner and Knight-Bruce, L.JJ.), November 7, 8, 9, 10, 11, 13, 14, January 18, 1866]

[Reported 1 Ch. App. 252; 35 L.J.Ch. 267; 13 L.T. 778;
F 12 Jur.N.S. 178; 14 W.R. 292]

Undue Influence—Presumption—Benefit conferred on person in confidential relation—Validity—Need to prove receipt of competent and independent advice—Relevance of age and capacity—Application of principle to case of trifling gift—Termination of confidential relation—Evidence—Positive act or complete abandonment—Agent in confidential relation to person conferring benefit on principal—Validity of gift to principal—Proof of action by agent independent of principal.

G

Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others have conferred on them unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. Neither the age nor the capacity of the person conferring the benefit, nor the nature of the benefit conferred, affect this principle. Age and capacity may afford a sufficient protection in some cases, but they can afford little protection in cases of influence founded on confidence, and as to the nature of the benefit the injury to the party by whom the benefit is conferred
H cannot depend on its nature.

I

This general principle must, however, admit of some limitation. It cannot be said that a mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favour of such a person, ought to stand in the same position as that in which a gift of a man's whole property, or a liability involving it, would stand. In such cases the court, before it would undo the benefit conferred, would require further proof, not merely of influence derived from the relation, but of mala fides or of undue or unfair exercise of the influence.

Where the person standing in a confidential relation to a person conferring a benefit is the agent of a principal who receives the benefit, if the principal is to be acquitted of liability the court must be satisfied by the strongest possible evidence that the agent intended to act, and in fact acted, independently of the principal. A

When a relation of confidence is once established either some positive act or some complete abandonment must be shown in order to determine it. The mere fact that the relation is not called into action is not sufficient of itself to determine it, for this may well have arisen from there having been no occasion to resort to it. B

Notes. Distinguished: *Bainbridge v. Browne* (1881), 44 L.T. 705. Considered: *Mitchell v. Homfray* (1881), 8 Q.B.D. 587; *Allcard v. Skinner*, [1886-90] All E.R. Rep. 90. Applied: *Liles v. Terry*, [1895-9] All E.R. Rep. 1018. Considered: *Barron v. Willes*, [1900] 2 Ch. 121; *Wright v. Carter* (1902), 86 L.T. 110. Applied: *Cavendish v. Strutt* (1903), 19 T.L.R. 483. Distinguished: *Re Coomber, Coomber v. Coomber* (1911), 80 L.J.Ch. 399. Considered: *Inche Noria v. Shaik Allie Bin Omar*, [1929] A.C. 127. Referred to: *King v. Anderson* (1874), 23 W.R. 196; *Taylor v. Johnston* (1882), 19 Ch.D. 603; *Lancashire Loans, Ltd. v. Black*, [1933] All E.R. Rep. 201. C D

As to undue influence, see 17 HALSBURY'S LAWS (3rd Edn.) 672-681; and for cases see 25 DIGEST (Repl.) 277 et seq.

Cases referred to in argument:

Anderson v. Elsworth (1861), 3 Giff. 154; 30 L.J.Ch. 922; 4 L.T. 822; 7 Jur.N.S. 1047; 9 W.R. 888; 66 E.R. 363; 25 Digest (Repl.) 275, 841. E

Maitland v. Irving (1846), 15 Sim. 437; 16 L.J.Ch. 95; 8 L.T.O.S. 312; 10 Jur. 1025; 60 E.R. 688; 12 Digest (Repl.) 119, 706.

Archer v. Hudson (1844), 7 Beav. 551; 13 L.J.Ch. 380; 3 L.T.O.S. 320; 8 Jur. 701; 49 E.R. 1180; affirmed (1846), 15 L.J.Ch. 211; 12 Digest (Repl.) 113, 666. F

Maitland v. Backhouse (1848), 16 Sim. 58; 17 L.J.Ch. 121; 10 L.T.O.S. 243; 11 L.T.O.S. 237; 11 Jur. 1000; 60 E.R. 794; 12 Digest (Repl.) 119, 707.

Huguenin v. Baseley (1807), 14 Ves. 273; 33 E.R. 526; 12 Digest (Repl.) 111, 657.

Nottidge v. Prince (1860), 2 Giff. 246; 29 L.J.Ch. 857; 2 L.T. 720; 24 J.P. 726; 6 Jur.N.S. 1066; 8 W.R. 742; 66 E.R. 103; 12 Digest (Repl.) 118, 696.

Harvey v. Mount (1845), 8 Beav. 439; 14 L.J.Ch. 233; 9 Jur. 741; 50 E.R. 172; 12 Digest (Repl.) 117, 689. G

Gresley v. Mousley (1858), 1 Giff. 450; 27 L.J.Ch. 779; 31 L.T.O.S. 311; 4 Jur.N.S. 728; 6 W.R. 807; 65 E.R. 995; on appeal (1859), 4 De G. & J. 78; 28 L.J.Ch. 620; 33 L.T.O.S. 154; 5 Jur.N.S. 583; 7 W.R. 427; 45 E.R. 31, L.J.J.; 32 Digest (Repl.) 601, 1858.

Espey v. Lake (1852), 10 Hare. 260; 22 L.J.Ch. 336; 20 L.T.O.S. 203; 16 Jur. 1106; 1 W.R. 59; 68 E.R. 923; 35 Digest (Repl.) 73, 664. H

Dent v. Bennett (1839), 4 My. & Cr. 269; 8 L.J.Ch. 125; 3 Jur. 99; 41 E.R. 105, L.C.; 25 Digest (Repl.) 285, 906.

Gibson v. Jeyes (1801), 6 Ves. 266; 31 E.R. 1044; 39 Digest (Repl.) 218, 931.

Hunter v. Atkins (1834), 3 My. & K. 113; Coop. Temp. Brough. 464; 40 E.R. 43; 25 Digest (Repl.) 286, 914. I

Blackie v. Clark, Cock v. Clark (1852), 15 Beav. 595; 51 E.R. 669; sub nom. *Blaikie v. Clark, Cock v. Clark*, 22 L.J.Ch. 377; 12 Digest (Repl.) 121, 718.

Blaggrave v. Routh (1856), 2 K. & J. 509; on appeal, 8 De G.M. & G. 620; 26 L.J.Ch. 86; 28 L.T.O.S. 111; 3 Jur.N.S. 399; 5 W.R. 95; 44 E.R. 529; 35 Digest (Repl.) 721, 3876.

Appeal by the defendant, Robert Bate, from a decision of STUART, V.-C., in an action brought by the plaintiff, Miss Sophia Rhodes, against Bate, Henry

A Codrington, Francis Brice and William Brice, to recover from the defendant Bate repayment of a sum of £3,856 12s. 6d. which she alleged he had improperly obtained from her in discharge of debts to a similar amount claimed by Bate to have been due to him.

In 1847 the plaintiff, a maiden lady, went to reside with her brother-in-law the defendant Codrington, to whose wife and family she was much attached.
B The plaintiff was entitled to one-seventh part of the residuary estate of her father, Samuel Rhodes deceased. Of this share £200 was paid to her in cash in April, 1853, and £600 more in the latter part of the same year. In the early part of 1854 a further sum of £1,200 in cash was paid to her, and the balance amounting to £3,880 was, in the year 1854, with her sanction, invested in the mortgage of leasehold property at Islington.

C The plaintiff alleged that in December, 1853, she first employed as her professional adviser the defendant Bate, who was a certificated conveyancer and scrivener, with reference to making a new will. In March, 1854, acting under the advice of the defendants Bate and Codrington, she refused to execute a release to the trustees of her father's will in respect of the property thereby left to her,
D and on that occasion Bate entered into an examination of her accounts, and became fully acquainted with the state of her fortune and affairs. In 1851 Codrington, at the suggestion and under the professional advice of Bate, commenced a system of speculation in the purchase and sale of land, which continued down to the year 1861, and Bate acted as the conveyancer of Codrington in the matter of all those sales and mortgages of land. The result of the transactions
E was, that Codrington became indebted to Bate in various sums of money. On Nov. 8, 1854, a bill of exchange for £221 10s., which had been drawn by Bate and accepted by Codrington, fell due and was dishonoured, and on that day Codrington requested the plaintiff to accompany him to Bate's office for the purpose of signing a document. The plaintiff, who was in the habit of obeying the will of Codrington in everything, went with him, and at Bate's office, without
F inquiry, she filled up a printed form, which was a bond whereby Codrington and she became bound in the sum of £643, to secure payment of £321 10s. and interest at 5 per cent. The plaintiff alleged that at this time she was wholly under the control of Codrington, and that at the time the sum of £221 10s. only was due from Codrington, and nothing from her to Bate. Again, on Mar. 31, 1855, Codrington, and the plaintiff as his surety, accepted a bill of exchange of
G that date drawn upon them by Bate at three months, for the sum of £525, by way of securing part of a balance of £1,033 0s. 4d., then alleged to be due from Codrington to Bate. The plaintiff alleged that no consideration was ever given to her for accepting this bill, and that she accepted the same under pressure.

In July, 1855, a new will was made for the plaintiff by Bate, and he was thereby appointed one of the trustees of the will. In July, 1857, the investigation
H into the accounts being closed, the plaintiff executed the release required by the trustees of her father's will, and the execution was attested by Bate and his clerk.

On Oct. 15, 1857, the plaintiff, at the request of Codrington, and being, as she alleged, wholly under his control, was induced to accompany him to the office of Bate, and there to sign and deliver a bill of exchange drawn by Bate upon and accepted by Codrington and herself for £1,259 17s. 8d., and also a joint
I and several promissory note of the same date, signed by Codrington and herself for £800 and interest at 5 per cent. At the same place and on the same occasion the plaintiff was induced to deposit with Bate her mortgage of the Islington property for £3,880 and the title-deeds, and to sign a memorandum whereby, after reciting that she was indebted jointly with Codrington to Bate in the sum of £321 10s., secured by bond, £800 secured by promissory note, and £1,259 17s. 8d. secured by acceptance, and that she was also indebted to Messrs. Sealy in the sum of £862 18s. 5d., or thereabouts, and to William Turner, yeoman, and George Richard Turner, as surety for the defendant Codrington, in several

sums of money, and it was expressed that the mortgage had been deposited on behalf of Bate, and the several other parties. The plaintiff thereby declared that the mortgage and title-deeds should be held by Bate as a security for him and to the several other parties, and should not be redeemable by her until all money due jointly from Codrington and herself should be fully paid and satisfied. The plaintiff alleged that she never owed, either to Messrs. Sealy, who were bankers, or to the Turners, any sum of money whatever, and charged that her signature to the above documents was obtained by undue influence, and at a time when Bate was her professional adviser, and ought to be declared not binding on her. It was also alleged that Bate claimed (among other debts) a sum of £327 paid to the West of England and South Wales Banking Co. in satisfaction of an action brought upon a joint promissory note of Codrington and the plaintiff for £317 and costs, and charged that Bate ought to have advised the plaintiff to resist any such action, and that he paid the said sum with knowledge of all the circumstances, and full notice that the same was not binding on her in equity. There was a similar charge with respect to a sum of £973 3s. 1d. paid by the defendant Bate to the Messrs. Sealy in another action, brought under similar circumstances. Finally, on April 24, 1860, the plaintiff was induced by Codrington to sign with him a joint and several promissory note to Bate for the sum of £1,488 5s., with interest at 5 per cent., and on the same day she was induced to sign an agreement charging her property with the further sum of £1,488 5s., in addition to the previous sums of £321 10s., £800 and £1,259 17s. 8d.

The plaintiff alleged that, under these circumstances, Bate, in collusion with Codrington and William Brice, contrived the plan, which Bate afterwards carried into effect, of obtaining payment to himself of the sum of £3,880 secured by the plaintiff's mortgage, and of paying himself out of the plaintiff's fortune the sum of £3,769 12s. 8d., which he alleged to be secured as above mentioned. The charge against the defendant William Brice (a solicitor practising at Bridgwater) was, that being a friend of Bate, he undertook to obtain the money required to pay off Bate, upon having a transfer of the plaintiff's mortgage, and that the title-deeds of the property were thereupon submitted to William Brice, who approved of the same on behalf of Francis Brice, who, as the bill alleged, not being privy to the improper conduct of the other defendants, advanced the sum of £3,880, and a transfer of the mortgage-debt and securities was made to the defendant William in trust for Francis Brice. This part of the transaction the plaintiff did not seek to impeach. The plaintiff alleged that she executed the transfer in ignorance of the meaning of the transaction, without having had any explanation given to her, and under the influence and control of Codrington. Bate retained the sum of £3,856 12s. 2d. in payment of the above-mentioned sum of £3,769 12s. 8d. and interest, and caused the balance of her fortune of £3,880 to the amount of £23 7s. 10d. to be paid to the plaintiff. The plaintiff proceeded to allege that Codrington was in January, 1862, and still was, hopelessly insolvent, and only in May, 1863, the plaintiff became reconciled to her brother and left Codrington's house.

The plaintiff prayed for a declaration that her execution of the bond of Nov. 8, 1854, her signature of the promissory notes and memorandums of Oct. 15, 1857, and April 24, 1860, were obtained from her by the undue influence and control of Codrington and by the undue influence and improper conduct of Bate, and that they were not binding upon her in equity; for a declaration that Bate obtained the sum of £3,856 12s. 2d. by coercion, undue influence and misrepresentation, and that he might be decreed to repay the said sum to the plaintiff, with interest at 5 per cent.; and that William and Francis Brice might be ordered to deliver up to be cancelled the two memorandums of Oct. 15, 1857, and April 24, 1860; and that the bill of exchange and promissory notes might be amended by striking out the name of the plaintiff therein respectively; and for other consequential relief.

A Bate, by his answer denied that Codrington had made any purchase of land at his suggestion, or under his advice, or even consulted him about the advisability of such purchases. He admitted that he had advanced money to him, and obtained money from clients for him. He stated that in November, 1854, Codrington, being unable to pay a bill at maturity, proposed to give his bond, and that the plaintiff should join with him by way of additional security. The
 B answer then stated the circumstances under which the bond was executed, and alleged that the effect of the bond was explained to the plaintiff, and that she fully comprehended it. The defendant denied that he had ever acted for the plaintiff professionally, with the exception of making her will in 1855, and in the investigation of her accounts, on which occasions no complaint was made, and submitted that the bill ought to be dismissed with costs as against him.
 C Codrington did not appear.

STUART, V.-C., made a decree ordering Bate and Codrington to pay to the plaintiff the sum of £3,856 12s. 2d., with interest at 4 per cent. from Jan. 14, 1862, until payment; that the costs of the defendants William and Francis Brice should be paid by the plaintiff, the same to be repaid to her by Bate; and that
 D Bate and Codrington should pay to the plaintiff her costs of the suit. Bate appealed.

Bacon, Q.C., and Freeling for Bate.

Rolt, Q.C., Greene, Q.C., and W. W. Karlake for the plaintiff.

Cur. adv. vult.

E Jan. 18, 1866. The following judgments were read.

TURNER, L.J., stated the facts, and continued: I take it to be a well-established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court
 F that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affect this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply, but I think they are but of little,
 G if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence, and as to the nature of the benefit, the injury to the party by whom the benefit is conferred cannot depend upon its nature.

This general principle, however, must, as it seems to me, admit of some
 H limitation. It cannot, I think, reasonably be said that a mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favour of such a person, ought to stand in the same position as that in which a gift of a man's whole property, or a liability involving it, would stand. To carry the principle to this extent would, I think, interfere too much with the rights of property and disposition, and would be repugnant to the feelings and
 I practice of mankind. In these cases, therefore, of merely trifling benefits, I think this court would not interfere to set them aside upon the mere fact of the proof of a confidential relation, and the absence of proof of competent and independent advice. In such cases the court, before it would undo the benefit conferred, would, I think, require some further proof, not merely of influence derived from the relation, but of mala fides, or of undue or unfair exercise of the influence. These are the principles by which, in my opinion, this case must be tried.

It was argued on the part of the plaintiff, that there was another general principle of this court applicable to the case, namely, that a volunteer can

take no benefit derived under the fraud of another person, but I think that the defendant Bate cannot be considered to stand in the position of a mere volunteer, and that this principle, therefore, has no application to the case. A

Not much was said in the course of the argument on the part of Bate as to the law upon the subject to which I have been referring. The case was distinguished from the authorities on which the plaintiff relied, but these authorities are merely instances of the application of the general principle; they do not limit the principle. The distinctions drawn between this case and the authorities referred to do not, therefore, seem to me to afford any material assistance to Bate's case. The facts of the case were, and I think very judiciously, mainly relied upon on the part of Bate. B

I proceed, therefore, to consider how far the facts of the case bring it within the principles which I have stated. It was insisted on the part of Bate that he never stood in any confidential relation towards the plaintiff, or, at all events, that he did not stand in any such relation at the time when the transactions in question took place. As to his never having stood in a confidential relation to the plaintiff, it was argued that Stephens, and Stephens alone, was her professional adviser, but I think Stephens was the general agent of Bate, and without going the length of saying that Bate could in no case and under no circumstances have acquitted himself of the liability to be considered the plaintiff's confidential agent by having placed the plaintiff in the hands of his agent, the danger of allowing a principal to escape from liability under the pretence that business was entrusted to his agent, and not to him, is so great, that it may, I think, safely be said that, under such circumstances, the strongest possible evidence that the agent was intended to act, and in fact acted, independently of the principal, would be required to acquit the principal of the liability; and in this case, not only is there no such evidence, but the evidence fully satisfies me that Bate so acted and interfered in the examination of the accounts of the trustees of the will of the plaintiff's father, not only as the principal of Stephens, but even independently of Stephens, as to constitute a relation of confidence between him and the plaintiff. I am of opinion, therefore, that the plaintiff has established that a confidential relation for some time subsisted between her and Bate, and it is to be considered whether this relation subsisted at the time when the transactions in question took place. For this purpose it is necessary to consider each of these transactions separately. C D E F

[His LORDSHIP dealt with a transaction between plaintiff and Bate on Nov. 8, and said that the plaintiff had failed to establish the existence of any confidential relation between her and Bate when that transaction took place; and continued:] As to the transactions of Oct. 15, 1857, and April 24, 1860, it was argued for Bate that at the dates of these transactions the relation of confidence between him and the plaintiff had ceased, the examination of the accounts of the trustees of the father's will having been closed in July, 1857; but I think that when a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The mere fact that the relation is not called into action is not, I think, sufficient of itself to determine it, for this may well have arisen from there having been no occasion to resort to it. Besides, in this case the evidence shows that the relation was continuing in the month of July, 1858, when the debt of the West of England and South Wales Bank was paid, and the relation between Bate and Codrington, which had given rise to the relation between Bate and the plaintiff, continued down to the month of December, 1861. In my opinion, therefore, a confidential relation must be taken to have subsisted between Bate and the plaintiff at the times when the transactions I am now considering took place. What was the effect of these transactions? By the first of them Bate took to himself the benefit of the plaintiff's suretyship to the extent of upwards of half her fortune; by the other of them he took to himself the like benefit to the extent of G H I

A nearly the whole of the plaintiff's fortune; and this he did with knowledge that the principal debtor could not pay the debt, and that the suretyship must be resorted to for payment of it. It is true that he told the plaintiff this, and cautioned her as to it, but I do not find that he pressed the subject upon her as an independent and disinterested adviser would have done, or that he recommended her to employ an independent solicitor. Under these circumstances I think that these transactions cannot stand consistently with the general principles of the court, and that Bate has been properly ordered to pay the plaintiff the sums which he received in respect of these transactions.

C **KNIGHT-BRUCE, L.J.**—I have thought, and still think, that this is a case of considerable importance with respect to the principles, and the application of the principles, on which this court ought to act concerning transactions between persons one of whom stands in a professional, or other confidential relation to the other. I acknowledge that at the conclusion of the arguments my impression was wholly against the plaintiff, and in favour of the proposition that the bill wholly failed, and ought to be dismissed. It, however, was not a clear impression, and subsequent reflection and consideration, combined with communications with my learned brother, at last brought me round to his view of the case, which I have since adopted, and now declare myself to adopt. My present view of the case, a view that I have for some time entertained, although it differs from my original view of it, is one agreeing with his. I accede, therefore, to his proposal, as to the mode of dealing with the case.

F

BETHELL v. ABRAHAM

[ROLLS COURT (Sir George Jessel, M.R.), November 24, 1873]

G

[Reported L.R. 17 Eq. 24; 43 L.J.Ch. 180; 29 L.T. 715;
22 W.R. 179]

Administration of Estates—Investment—Control by court.

Trust—Investment—Power of investment under will—Order for administration—Exercise subject to control of court.

H

After an administration decree has been made the discretion given to the trustees under the will as to the investment of the trust funds is subject to the control of the court. The court will not allow any investment to be made unless it is satisfied of its propriety.

Notes. Followed: *Re Viscount Furness, Wilson v. Kenmare*, [1943] Ch. 415. Referred to: *Tempest v. Lord Camoys* (1882), 21 Ch.D. 571.

I

As to the order for administration and its effect on the powers of the trustees, see 16 HALSBURY'S LAWS (3rd Edn.) 443; and for cases see 24 DIGEST (Repl.) 862. As to the exercise of discretionary powers of trustees when trust administered by court, see 38 HALSBURY'S LAWS (3rd Edn.) 981; and for cases see 43 DIGEST 881, 882.

Cases referred to in argument :

Webb v. Earl of Shaftesbury (1802), 7 Ves. 480; 32 E.R. 194; 24 Digest (Repl.) 742, 7281.

Cafe v. Bent (1843), 3 Hare, 245; 13 L.J.Ch. 169; 8 Jur. 141; 67 E.R. 374; 43 Digest 673, 1036.

Widdowson v. Duck (1817), 2 Mer. 494; 35 E.R. 1029; 24 Digest (Repl.) 863, 8579. A
Sillibourne v. Newport (1855), 1 K. & J. 602; 1 Jur.N.S. 608; 3 W.R. 653;
69 E.R. 600.

Summons by the trustees of the will of the testator, Richard, Lord Westbury, deceased, for liberty to sell certain securities, and to invest the proceeds and the moneys received on the testator's policies of insurance in the purchase of American government and railway securities, the testator at the time of his death being possessed of securities of a like nature to a considerable amount. B

By his will dated Jan. 13, 1860, the testator, after giving all his property to trustees, and directing certain annuities to be paid for the period of five years after his death, proceeded as follows :

"All the residue of the income of my estate shall be accumulated and invested at the discretion of my trustees during such five years, and the money also receivable on my policies shall be invested at their discretion. My trustees shall not be obliged to alter any investment, or convert perishable into permanent securities, but may continue or change securities from time to time as to the majority shall seem meet."

After the expiration of the period of five years from his death the testator directed several legacies to be paid or set apart, in some of which infants and persons not in esse were interested. The testator died on July 28, 1873, and in August, 1873, a decree was made for the administration of his estate. D

Fry, Q.C., and *Everitt* for the trustees.

Sir Richard Baggallay, Q.C., *Southgate, Q.C.*, *F. Harrison* and *Rowcliffe* for other parties. E

SIR GEORGE JESSEL, M.R.—On the construction of the testator's will I am not satisfied that the trustees have the power they claim; but even if they have, I am not sure I ought to exercise the power which I have of controlling their actions in allowing them to change existing investments for securities which in the eye of the court are improper investments, however good they may really be. The rule of the court is, that as long as an estate remains under administration the court does not allow any investment to be made unless the court is satisfied of its propriety, for it is the duty of the court to protect property under its control for all claimants. It is a matter in which I am bound to exercise my individual judgment, and in the exercise of that individual judgment, I shall decline to sanction the proposed investment, even if I was satisfied the trustees had power to make it. F

Application dismissed.

HARRISON v. GOOD

[VICE-CHANCELLOR'S COURT (Bacon, V.-C.), January 17, 18, 20, 1871]

[Reported L.R. 11 Eq. 338; 40 L.J.Ch. 294; 24 L.T. 263;
35 J.P. 612; 19 W.R. 346]

Sale of Land—Restrictive covenant—Enforcement—Enforcement by person claiming under one original purchaser against person claiming under another.

Where land is sold in lots and each purchaser enters into a restrictive covenant with the vendor which is required by the conditions of sale, a person who claims under one purchaser can enforce the covenant against another person who claims under another purchaser with notice of the covenant.

Injunction—Covenant—Refusal—Breach of covenant unsubstantial.

Although the Court of Chancery interferes where it thinks right by way of injunction to prevent the violation of a covenant, yet, if the violation is so slight, formal and unsubstantial, that the plaintiff could have no proper reason in conscience to complain of it, the court will not grant an injunction.

Sale of Land—Restrictive covenant—Nuisance—Need to prove nuisance in law—Effect of depreciation in neighbouring property.

In 1824 land was sold in lots, and, as required by the conditions of sale, each purchaser covenanted for himself and his assigns with the vendor not to do or suffer to be done on the premises anything which would or might be a nuisance to the vendor or any of his tenants or the occupiers or proprietors for the time being of the adjoining property. G. became possessed of two plots, with notice of the covenant which had been entered into by T., the original purchaser of the plots. Subsequently G. offered the plots to a school committee as a site for a parochial school. The owners of the adjoining lots sought to enforce the covenant by injunction.

Held: (i) the adjoining owners were entitled to the benefit of the covenant against nuisance only in so far as they proved a nuisance as defined in law, and, as the establishment of the school would not amount to a nuisance in law, there was no breach of the covenant; (ii) although, as a result of the school, depreciation would be caused to the property of adjoining owners, the adjoining owners who suffered thereby could not claim to call that a nuisance which they failed to prove otherwise to be a nuisance.

Notes. Applied: *Sharp v. Harrison*, [1922] 1 Ch. 502. Doubted: *Tod-Heatly v. Benham* (1888), 40 Ch.D. 80. Referred to: *Nottingham Patent Brick and Tile Co. v. Butler*, [1886-90] All E.R. Rep. 1075; *Re Davis and Cavey* (1888), 40 Ch.D. 601; *Christie v. Davey*, [1893] 1 Ch. 316.

As to covenants affecting adjoining property where land sold in lots, see 34 HALSBURY'S LAWS (3rd Edn.) 367 et seq.; and for cases see 40 DIGEST (Repl.) 358. As to when an injunction will be granted, see 21 HALSBURY'S LAWS (3rd Edn.) 352 et seq.; and for cases see 28 DIGEST (Repl.) 816 et seq. As to covenants against nuisance, see 23 HALSBURY'S LAWS (3rd Edn.) 621 et seq.; and for cases see 36 DIGEST (Repl.) 247 et seq.

Cases referred to:

- (1) *Doe d. Bish v. Keeling* (1813), 1 M. & S. 95; 105 E.R. 36; 31 Digest (Repl.) 169, 3038.
- (2) *Kemp v. Sober* (1851), 1 Sim. N.S. 517; 20 L.J.Ch. 602; 17 L.T.O.S. 117; 15 Jur. 458; 61 E.R. 200; affirmed (1852), 19 L.T.O.S. 308, L.C.; 40 Digest (Repl.) 352, 2835.
- (3) *Soltau v. De Held* (1851), 2 Sim. N.S. 133; 21 L.J.Ch. 153; 16 Jur. 326; 61 E.R. 291; 36 Digest (Repl.) 256, 68.

Also referred to in argument :

Western v. MacDermott (1866), 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 40 Digest (Repl.) 360, 2886.

Mann v. Stephens (1846), 15 Sim. 377; 10 Jur. 650; 60 E.R. 665, L.C.; 40 Digest (Repl.) 344, 2784.

Cavey v. Ledbitter (1863), 13 C.B.N.S. 470; 32 L.J.C.P. 104; 9 Jur.N.S. 798; 143 E.R. 187; 36 Digest (Repl.) 263, 125.

Bamford v. Turnley (1862), 3 B. & S. 66; 31 L.J.Q.B. 286; 6 L.T. 721; 9 Jur.N.S. 377; 10 W.R. 803; 122 E.R. 27, Ex. Ch.; 36 Digest (Repl.) 262, 123.

Walter v. Selfe (1851), 4 De G. & Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; affirmed (1852), 19 L.T.O.S. 308, L.C.; 36 Digest (Repl.) 247, 1.

Gauntlett v. Whitworth (1849), 2 Car. & Kir. 720; 36 Digest (Repl.) 332, 758.

Child v. Douglas (1856), 2 Jur.N.S. 950; 40 Digest (Repl.) 340, 2767.

Keates v. Lyon (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.JJ.; 40 Digest (Repl.) 343, 2780.

R. v. Moore (1832), 3 B. & Ad. 184; 1 L.J.M.C. 30; 110 E.R. 68; 36 Digest (Repl.) 345, 856.

Inchbald v. Robinson, Inchbald v. Barrington (1869), 4 Ch. App. 388; 20 L.T. 359; 33 J.P. 484; 17 W.R. 459, L.JJ.; 36 Digest (Repl.) 280, 308.

Biddulph v. St. George's Vestry (1863), 3 De G.J. & Sm. 493; 2 New Rep. 212; 33 L.J.Ch. 411; 8 L.T. 558; 27 J.P. 579; 9 Jur.N.S. 953; 11 W.R. 739; 46 E.R. 726, L.JJ.; 28 Digest (Repl.) 845, 804.

Action for an injunction by the plaintiffs, John Dangerfield and his trustees, Frederick Grey and others, owners of several houses in Abbey Place, St. John's Wood, London, against the defendants, John Henry Good, owner of a piece of land therein, and the members of the school committee of the parish of St. Mark, to restrain the defendants from establishing a school in Abbey Place on the land belonging to the defendant, Good, and from doing or suffering anything to be done on the premises which should be a nuisance to the plaintiffs or any of the tenants or occupiers of the adjoining property.

In 1824 part of an estate, known as the Eyre estate, which included the plot in question, was contracted to be sold to Chandless. The conveyance which was executed in June, 1824, contained a covenant on the part of Chandless, his heirs, executors, administrators, and assigns, with Walpole Eyre, his heirs and assigns, that Chandless, his heirs or assigns, would not do, or suffer to be done, on any of the hereditaments thereby granted, anything which should be a nuisance to Henry Samuel Eyre, or any of his tenants, or the occupiers or owners of the adjoining property, or of the houses to be built thereon. In May, 1824, Chandless put up the land which he had contracted to purchase for sale by auction, in thirty-four lots. The fifth condition of sale was, so far as material, as follows :

"The purchaser of each lot shall, so as to bind the owners for the time being, enter into a covenant with the vendor . . . not to do or suffer to be done on the ground anything which will be a nuisance to Henry Samuel Eyre, Esq., or any of his tenants, or the occupiers of the adjoining property . . ."

All the thirty-four lots were sold at the auction. Of these lots, Nos. 5 and 6 and 7 lay on one side of part of the intended new road, and Nos. 26, 27, and 28 lay immediately opposite them on the other. Lots 26, 27 and 28 were purchased by John Barry, and became ultimately vested in the plaintiffs, Charles Harrison and Abraham Dangerfield, as trustees for the plaintiff, John Dangerfield. Lot 5 was purchased by George Vipond, and became ultimately vested in the plaintiff Grey. Lots 6 and 7 were purchased by John Thurlow, and became ultimately

A vested in the defendant, J. H. Good. In pursuance of the fifth condition of sale, the conveyance to John Thurlow, dated July 24, 1824, contained the following covenant:

B "The said John Thurlow doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said Henry Gore Chandless, his heirs and assigns, that he, the said John Thurlow, his heirs or assigns . . . shall not do, or suffer to be done on any of the premises hereby granted, appointed, etc., or any part thereof, anything which shall, will, or may be deemed a nuisance to Henry Samuel Eyre, or any of his tenants or the occupiers or proprietors for the time being of the adjoining property or the houses to be built thereon . . ."

C The conveyances to the predecessors in title of the plaintiffs Dangerfield and Grey contained covenants substantially the same as that contained in the conveyance to John Thurlow. It was admitted that Good purchased lots 6 and 7, with notice of the covenant entered into by John Thurlow. After the purchase of lots 26, 27, and 28 by the plaintiff John Dangerfield, he erected a valuable house thereon, and a house was also erected by the plaintiff Grey upon lot 5.

D In 1869 lots 6 and 7 (which were then a vacant space) were offered by the defendant Good to the school committee of St. Mark's parish as a site for national parochial schools. The parish of St. Mark was a district which in 1847 had been separated from the parish of Marylebone, and from 1847 to 1869 the schools of the district were situate in Marlborough Place. In 1867 the erection of new schools was contemplated. The site at first proposed was a piece of ground immediately adjoining St. Mark's Church, and plans for the erection of the new schools on that site were prepared by the defendant Good, who was an architect. This proposal was, however, abandoned after the offer of the site in Abbey Place had been made by the defendant Good. When the plaintiff E John Dangerfield became acquainted with this offer, he addressed a written statement to the school committee, protesting against the scheme for erecting the schools upon the site in Abbey Place. He took the opinion of counsel as to the site adjoining the church, and was advised there was no legal difficulty to prevent the erection of the schools there. He further obtained the consent of the church trustees to that site being used for the purpose. On Jan. 28, 1870, a meeting of the school committee was held, at which the offer of the defendant G Good was accepted; and preparations were made for laying the foundations of the schools on the site in Abbey Place. Evidence was produced on the part of the plaintiffs to prove the annoyance which these schools had caused to the inhabitants of Marlborough Place, and the consequent depreciation in value which property had suffered in that locality. The defendants' evidence tended to show that in certain other localities schools of this nature had neither caused annoyance H nor depreciated property. The plaintiff, John Dangerfield, had offered to purchase the piece of ground in question from the defendant Good at the price he had given for it; but this offer was refused.

Eddis, Q.C., and Lindley for the plaintiffs.

Kay, Q.C., and Marten for the defendants.

I

BACON, V.-C.—I have no doubt whatever that the plaintiff is entitled to the full benefit of the covenant, and entitled to it against the defendant the owner of the land, and the other defendants associated with him. It appears that Mr. Eyre sold his land to Mr. Chandless, and took a restrictive covenant from him. At a subsequent period Chandless sold the land which he had bought, and sold it under certain conditions of sale. The fifth of these conditions is in substance, and nearly in words the same as the covenant which was afterwards introduced into the conveyance to Thurlow. [His Honour read the covenant

and continued:] The deed containing that covenant forms part of the title of the defendant Good, and in my opinion no question can be raised as to the title of the plaintiffs to sue upon it. A

It only remains to be considered whether that which the plaintiffs complain of is an infraction of the covenant. The covenant is in very limited terms. Probably the conveyancer thought that he had sufficiently guarded against the possibility of anything which could be even distasteful to the owners of the adjoining property. If that was his meaning, he has not expressed it; and it is not competent to me to enlarge the meaning of the words which he has employed, and which form the contract between the parties. B

The word "nuisance" is a word perfectly well known to the law, and in the law it only means one thing. In common parlance no doubt nuisance is applied to a great many things wholly different from, and to others not at all like the definition which the law gives; but if it does not bear that signification, and that signification only which the law has put upon it, I am at a loss to know what it does mean. I do not know how I could stop if I were to substitute the popular word "annoyance" for the legal word "nuisance." I do not know how I could stop if a person entitled to the benefit of this covenant alleged to me that something which was being done was disagreeable to him. It might, I think, be carried so far as to include mere matters of personal antipathy, which might be odious and almost intolerable to one man, but which another would not care the least about. I say therefore that I am confined entirely to the meaning of the word "nuisance" as I find it used in, and applied by the law. C D

The cases which have been referred to still limit the word to that meaning. The cases about brickburning amount to this—a man who burns bricks to the nuisance of his neighbour is liable to be restrained by this court, and to an action on the case in a court of common law; but the present case does not approach that at all. It is said that this will be disagreeable to the plaintiff; no doubt it will. It is said also that it will depreciate his property. I think there is abundant evidence in support of that fact. But that is not enough. The common law case of *Doe d. Bish v. Keeling* (1) establishes nothing to show that the thing itself is a nuisance. That was a case of a covenant not to carry on a trade; and it was there pointed out to the jury who were to assess the damages that they were not to consider a trifling matter—not a mere infraction of the covenant—which might bring with it no substantial injury, but they were to consider that the carrying on the trade of a school in a place where a man had contracted to carry on no trade at all might be a great inconvenience to the persons interested, and might be doing the very thing which the covenant was intended to prevent. E F

Kemp v. Sober (2) is open, in my opinion, to the same observation. We all know that although the Court of Chancery interferes where it thinks right by way of injunction to prevent the violation of a covenant; yet, if the violation is so slight, so formal, so unsubstantial, that the plaintiff could have no proper reason in conscience to complain of it, the court will grant no injunction. How can I say that this is a nuisance? The building of a house is no nuisance. The establishment of a school is no nuisance in itself. No doubt a number of boys may be collected coming out of school at the end of school hours, but they would be the Queen's subjects walking along the Queen's highway; and I do not see by what kind of reasoning this can be turned into a nuisance. I do not forget that there was a school in Marlborough Place, which the evidence, it is said, proves to have been what is called a nuisance; but the inconvenience complained of there was, that the boys, on coming out of school, misbehaved themselves. But that it is not a necessary consequence of their being in school, or of their coming out of school. The common police regulations of the metropolis, if the inhabitants think fit to put the law in force, prevent the possibility of any such nuisance. G H I

A Throughout the whole of this case I have been trying, and trying in vain, to discover where the legal nuisance is. Unless the nuisance complained of is one for which an indictment would lie or an action could be maintained, in my opinion it is no nuisance within the terms of this covenant. I would not have it supposed that I am not perfectly sensible of the great disadvantage it will be to the plaintiff, Dangerfield, if the school is established in the place where it is proposed. I have no doubt that the value of his property will be depreciated. But *Soltau v. De Held* (3) does not prove that because a depreciation in value would take place, the owners of adjoining property suffering depreciation have, therefore, a right to call that a nuisance, which they fail to prove otherwise to be a nuisance. I am obliged, therefore, to come to the conclusion that there will be no nuisance committed. I will go further and say (though it is somewhat extra-judicial) that I do not believe that by any possibility anything can happen which can be called a nuisance in the legal definition or in fair ordinary speech. An inconvenience, a loss to the plaintiff, Dangerfield, unquestionably it is. All the hopes that he formed when he spent £6,000 in building his house will be disappointed. His residence will be made much less agreeable than it was; but I cannot enlarge the terms of the covenant to give him a right which has not been stipulated for.

D I am obliged, therefore, to dismiss the action, but I cannot order the plaintiff to pay costs, and for this reason. There is near the church a suitable site which might be had gratis for the establishment of these schools, and I am satisfied that the defendants knew this. If they had been actuated by the ordinary motives which may be imputed to neighbours, they might have accomplished that most useful object which they have in view, without committing any wrong to the plaintiff, Dangerfield. Therefore, I dismiss this action without costs.

Judgment for defendants.

F

G

IBBOTSON v. ELAM

H [ROLLS COURT (Sir John Romilly, M.R.), December 19, 22, 1865]

[Reported L.R. 1 Eq. 188; 35 Beav. 594; 12 Jur.N.S. 114;
14 W.R. 241; 55 E.R. 1027]

Administration of Estates—Partner—Profits of partnership in respect of period partly before and partly after partner's death—Interest on capital.

I *Partnership—Death of partner—Continuance of partnership—Administration of partner's estate—Profits of partnership in respect of period partly before and partly after partner's death—Interest on capital.*

Partnership articles provided that the partnership should continue for five years notwithstanding the death of any partner before the expiration of the term, that the profits should be divided annually, and that before any division of profits each partner should, at the end of each year, be credited with interest at five per cent. on his capital in the business at the beginning of the year. One of the partners died before the expiration of the five years.

Held: the whole of the deceased partner's share of the profits divided at the annual division next after his death was income of his estate, but the interest on his share capital was apportionable, so much of such interest as accrued in his lifetime being corpus, and the remainder being income of his estate.

Notes. Under the Apportionment Act, 1870, s. 2, all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time. However, it has been held that the profits of a partnership are not within the Apportionment Act, 1870 (*Jones v. Ogle* (1872), L.R. 14 Eq. 419; *Re Cox's Trusts* (1878), 9 Ch.D. 159), and the decision here reported appears, therefore, to be good law; and see *Browne v. Collins* (1871), L.R. 12 Eq. 586 and *Lambert v. Lambert* (1874), 29 L.T. 878.

Applied: *Browne v. Collins* (1871), L.R. 12 Eq. 586. Followed: *Lambert v. Lambert* (1874), 29 L.T. 878. Referred to: *Cooper v. Laroche* (1869), 38 L.J.Ch. 591; *Re Lynch-White, Smith v. Lynch-White*, [1937] 3 All E.R. 551.

As to profits made after dissolution, see 28 HALSBURY'S LAWS (3rd Edn.) 537-538; as to apportionment in respect of time between capital and income, see 34 HALSBURY'S LAWS (3rd Edn.) 634 et seq.; and for cases see 36 DIGEST (Repl.) 562-563. For the Apportionment Act, 1870, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 867.

Case referred to:

- (1) *Johnston v. Moore* (1858), 27 L.J.Ch. 453; 31 L.T.O.S. 353; 4 Jur.N.S. 356; 6 W.R. 490; 43 Digest 618, 583.

Also referred to in argument:

Bates v. Mackinley (1862), 31 Beav. 280; 31 L.J.Ch. 389; 6 L.T. 208; 8 Jur.N.S. 299; 10 W.R. 241; 54 E.R. 1146; 40 Digest (Repl.) 719, 2118.

Maclaren v. Stainton (1861), 3 De G.F. & J. 202; 30 L.J.Ch. 723; 4 L.T. 715; 7 Jur.N.S. 691; 9 W.R. 908; 45 E.R. 855; 40 Digest (Repl.) 719, 2114.

Howe v. Earl of Dartmouth, Howe v. Countess of Aylesbury (1802), 7 Ves. 137; 32 E.R. 56; 43 Digest 869, 3142.

Special Case, in which the plaintiff was the widow, and the defendants were the executors and trustees of the will, and the children, of William Frederick Ibbotson, deceased, to determine the respective rights of the parties in respect of his share of the profits of a partnership, and in respect of the interest on his share of capital.

On Jan. 11, 1860, Mary Ibbotson, William Frederick Ibbotson, and Alfred Buckingham Ibbotson, having carried on business in partnership since the beginning of the year 1853, signed two memoranda of agreement, the first of which, after providing that the profits of the business for the seven years ending Dec. 31, 1859, should be divided between the partners in certain proportions, proceeded as follows:

"It is further agreed that the balance now in the business to the credit of each of us on the above arrangement shall remain in the said business, and that a new partnership is now formed between us beginning on Jan. 2, 1860, and ending Dec. 31, 1864, which is to continue in force for the whole of the five years, even though any of us die before the expiration of the said term, on the following principle:"

Then followed five clauses, of which the first provided for the payment of a salary to William Frederick Ibbotson, and, in the event of his death, to Alfred Buckingham Ibbotson; the third and fourth were immaterial to the present case, and the second and fifth were as follows:

"Secondly. Before any division of the profits, each partner shall, at the end of each year, be duly credited with interest at the rate of 5 per cent.

- A** upon the amount of capital he or she possessed in the business at the beginning of each year.
- "Fifthly. After the first and second parts of this agreement are carried out, the profits of the business shall be annually divided in equal proportions between the said partners."
- B** The second memorandum provided that, in the event of the death of any partner or partners before the expiration of the term, it should be left to arbitration to decide at the end of the term what time should be given to the surviving partners or partner for the payment of the capital of the deceased partner or partners, and that the goodwill should, at the expiration of the partnership, belong exclusively to the surviving partners or partner.
- C** William Frederick Ibbotson by his will, dated Dec. 2, 1863, after appointing Charles Elam and Alfred Buckingham Ibbotson executors and trustees of his will, and directing payment of his debts and funeral and testamentary expenses, and giving certain specific legacies, devised and bequeathed all his real leasehold and residuary personal estate to Charles Elam and Alfred Buckingham Ibbotson, their heirs, executors, administrators, and assigns, upon trust as soon as conveniently might be after his decease to sell his real and leasehold estates, and to sell, convert, and get in his residuary personal estate, and invest the produce conformably to the clauses for the investment of moneys thereafter contained. The will then proceeded as follows :
- E** "And I direct that my trustees shall (subject to any advance that may be made to my children pursuant to the clause in that behalf hereinafter contained) permit my wife, she continuing my widow, to receive, from my death, the net annual income actually produced by my trust property howsoever constituted or invested."
- F** After directing that the testator's widow should maintain his children during their minority out of the income so to be received by her, and providing for certain advances to be made to the children, he proceeded to direct that, "subject to the preceding directions," the trustees should hold the testator's trust property upon certain trusts for the benefit of his children and their issue, and in default of children or issue attaining a vested interest, in trust for his statutory next of kin at the time of the failure of the prior objects of the trust.
- G** The trusts were followed by a clause directing that all investments of money thereinbefore authorized or directed to be made by the trustees should be made in their names in the public stocks or funds, or in government, real, or leasehold securities, or in bonds, debenture stock, or preference stock of railway or canal companies.
- H** William Frederick Ibbotson died on Mar. 26, 1864, leaving his wife and three children surviving. After his death the business was carried on by the surviving partners in conjunction with Elam, as one of his executors, until Dec. 31, 1864. During the partnership, stock was taken, and statements of accounts and balance sheets were made out annually, showing the interests of the respective partners up to July 1 in each year. Such stock-takings were made on July 1, 1863, July 1, 1864, and finally on the winding up of the partnership on Dec. 31, 1864.
- I** Doubts being raised as to the rights of parties under the will of William Frederick Ibbotson in respect of his share in the profits of the business from July 1, 1863, to Dec. 31, 1864, and the interest on his capital during the same period, the following questions were submitted to the court by the Special Case: (i) Whether the plaintiff is entitled, for her own benefit, to receive the whole, or any, and what part, of the profits accrued on account of the testator's share from July 1, 1863, up to Mar. 26, 1864, from the last-mentioned day up to July 1, 1864, and from the last-mentioned day up to Dec. 31, 1864, or how the executors ought to apply the same sums when received by them? (ii) Whether the plaintiff

is entitled, for her own benefit, to receive the whole, or any, and what part, of the interest accrued due to the share of the testator between the same respective periods, or how the executors ought to apply the same when received by them? A

Selwyn, Q.C., and *Marten* for the plaintiff.

Hobhouse, Q.C., and *T. Terrell* for the defendants.

SIR JOHN ROMILLY, M.R.—The testator in this case was engaged, with his mother and brother, in a partnership, the profits of which were ascertained and divided on July 1 in each year, and the capital of each partner was in any event to remain in the business until the expiration of the partnership term on Dec. 31, 1864. The testator died on Mar. 26, 1864. The first question in the case is whether his widow is entitled to the whole of the profits of his share since July 1, 1863, the day of the last annual division of profits preceding his death, or, whether there is to be some sort of apportionment of the profits, and the widow is entitled only to such profits as were made after the testator's death. The second question is whether the widow is entitled to the whole of the interest on the testator's capital in the business from July 1, 1863, or only to so much of the interest as accrued after his death. Both questions depend partly on the articles of partnership and partly on the testator's will. C D

The first question raised in the argument was whether the trust in the will for conversion and investment must not be read as preceding the trust for the benefit of the widow. I am of opinion that the will cannot be so construed, because the testator directs that the widow shall receive the actual income from his death, and the getting in and conversion of the assets would necessarily take some considerable time. E

Then comes the question of the apportionment of profits. I am of opinion that there can be no apportionment, and that the widow is entitled to the whole of the profits made after July 1, 1863. The articles provide that the profits shall be ascertained and divided on July 1 in each year; and the business has been carried on upon that footing. If the accounts were to be taken and the profits ascertained and divided at the time of the testator's death instead of at the time for the annual division under the articles, it is obvious that very different results might have been produced. Debts might have been treated as good debts on Mar. 26, which by July 1 might have turned out bad, or vice versa, and the market value of the stock in trade might, between those days, have been materially increased or diminished by external circumstances. It is clear that as between the testator and his partners the profits could not be ascertained at any other time than July 1, and I do not think that they can be ascertained at any other time for the purpose of adding to or taking away from the capital or income of his estate. If I were to make the apportionment I might be deciding that the testator's estate was, in March, 1864, entitled to a share of profits exceeding the share of the profits for the whole year, as ascertained on July 1, 1864. I concur, therefore, in the argument that the whole of the profits must be considered as accruing at the time when under the articles they were to be ascertained and divided, and that they are consequently income of the testator's estate, and payable to the widow. I think, also, though of course in the absence of the Attorney-General I merely make the observation in reference to the argument of the defendants' counsel, that no part of these profits would be properly included in the return of the testator's estate for the purpose of assessing probate duty. F G H I

With regard to the interest, however, the case is different. Interest accrues *de die in diem*, and there is no uncertainty as to the amount of interest which has accrued up to any given day. Whatever was the state of the business the interest was a fixed and ascertainable sum independent of the profits. I think, therefore, that the interest must be apportioned, and that so much as

A accrued in the testator's lifetime is part of the corpus of his estate. I entirely concur in the reasoning of PAGE-WOOD, V.-C., in *Johnston v. Moore* (1), who decided this question in the same way. The report of the case is a little obscure upon the other question—the question of profits; but probably the decision turned upon the terms of the particular instruments in that case.

B The answer to the first question will be that the plaintiff is entitled to receive the whole of the profits accrued on account of the testator's share from July 1, 1863, to Dec. 31, 1864; and the answer to the second question will be that the plaintiff is entitled to receive the interest which accrued due on the testator's share from Mar. 26, 1864, to Dec. 31, 1864.

C

D

MARSHALL v. MURGATROYD

[COURT OF QUEEN'S BENCH (Blackburn and Lush, JJ.), November 9, 1870]

[Reported L.R. 6 Q.B. 31; 40 L.J.M.C. 7; 23 L.T. 393;
35 J.P. 153; 19 W.R. 72]

E

Bastardy—Affiliation order—Jurisdiction of justices—Child born in English ship on the high seas.

An illegitimate child having been born in an English ship on the high seas, the mother, after her arrival in England, applied for an affiliation order against the putative father.

F

Held: by the common law an English ship was part of the soil of England, and the justices, therefore, had jurisdiction to hear the application of the mother for an affiliation order.

G

Notes. The Poor Law Amendment Act, 1844, has been repealed. The law as to affiliation proceedings is now consolidated by the Affiliation Proceedings Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 36).

Referred to: *R. v. Humphrys, Ex parte Ward*, [1914-15] All E.R. Rep. 189.

As to the jurisdiction of justices in affiliation proceedings relating to children born abroad, see 3 HALSBURY'S LAWS (3rd Edn.) 110; and for cases 3 DIGEST (Repl.) 441, 442.

H

Cases referred to:

(1) *R. v. Blane* (1849), 13 Q.B. 769; 3 New Mag. Cas. 168; 3 New Sess. Cas. 597; 18 L.J.M.C. 216; 13 L.T.O.S. 257; 13 J.P. 825; 13 Jur. 854; 116 E.R. 1458; 3 Digest (Repl.) 442, 337.

(2) *R. v. Lightfoot* (1856), 6 E. & B. 822; 25 L.J.M.C. 115; 27 L.T.O.S. 235; 20 J.P. 677; 2 Jur.N.S. 786; 4 W.R. 655; 119 E.R. 1070; 3 Digest (Repl.) 451, 406.

I

Case Stated by Yorkshire (West Riding) justices upon an affiliation order made by them upon the appellant.

At a petty session held at Bradford on Dec. 9, 1869, an information or complaint was preferred by Sarah Murgatroyd, the respondent, against John Marshall, the appellant, by virtue of an application made by her to a justice of the peace for the said Riding on Nov. 8, 1869, under the Poor Law Amendment Act, 1844 (known as "the Bastardy Act"), that she had, since the passing of the Act, and

within twelve months from and previously to the date of the aforesaid application, A
been delivered of a bastard child, of which she alleged the appellant to be the father.

On the hearing of the respondent's complaint, the appellant was ordered to
pay to her the sum of 2s. per week from Nov. 8, 1869 (being the day on which
her application was made to the justice as aforesaid), until the child should
attain the age of thirteen years, or should die, or the respondent should marry,
together with the sum of £2 1s. 6d. for costs incurred in obtaining such order. B

The appellant being dissatisfied with the determination, as being erroneous in
point of law, had pursuant to s. 2 of the Summary Jurisdiction Act, 1857, duly
applied to have a Case stated for the opinion of this court, and had duly entered
into recognisance as required by the statute.

The following facts were proved before the justices. The respondent was
delivered of a bastard child on board the ship *Palmyra*, while sailing from New
York to Liverpool. That ship belonged to the Cunard line of steamers, but neither
the respondent nor any witness she called was able to prove whether the *Palmyra*
was an English or American vessel. The vessel sailed direct from New York
to Liverpool. It was admitted by the defendant's attorney that the Cunard
line was an English line of steamers. At the time of the birth of her child
the master of the vessel informed her, the respondent, that the ship was in
British waters, and further, that she sailed three days and three nights from
and after the birth of her child before the vessel reached Liverpool; but the
respondent could give no idea how far the ship was from Liverpool when she was
so delivered. C D

It was contended on behalf of the appellant that the ship, when the respondent
was delivered, was on the high seas, and at least six hundred miles from Liver-
pool; and that being so, he further contended that the justices could not under
the bastardy laws make an order upon the appellant, inasmuch as the child was
born "out of England"; and his attorney cited *R. v. Blane* (1), which, according
to the judgment of LORD DENMAN and the other judges, was, that a bastard born
out of England could not be affiliated under the provisions of the bastardy laws
before magistrates in England; and the appellant's attorney also contended that
the Act under which the information was laid only extended to England and
Wales, and that a child could not be affiliated in England if born in Scotland
or out of England and Wales, and he cited *R. v. Lightfoot* (2) to show that a
summons in bastardy could not be served in Scotland. E F

The question of law for the opinion of the court was: Were the justices justified
under the preceding circumstances in making an order upon the appellant in the
face of the objections taken by his attorney, that the child was born on the
high seas, and, therefore, out of England? If the court should be of opinion
that the order was legally and properly made, and that the appellant was liable,
then the order was to stand; but if the court should be of a different opinion
then the order was to be discharged. G H

Waddy for the appellant.

The respondent was not represented.

BLACKBURN, J.—We have come to the conclusion that there must be
judgment for the respondent, and that the proceedings were correct. The Poor
Law Amendment Act, 1844, requires that the woman shall make application for
a summons to a justice acting for the petty sessional division in which she is
residing, and the operation of the Act is confined to England. In *R. v. Blane* (1)
it was certainly held that an order could not be made in respect of a bastard child
born abroad; but here the birth took place on board a ship upon the high seas,
the ship being one of the Cunard line of ships, which is sufficient to show that
it was an English ship. An English ship is always considered to be a part of
England, and, indeed, it is a part of the common law of this country, that an I

A English ship is to be deemed to be the same as the soil of England. That being established, the mother had a right to apply to a justice of the place where she may take up her abode at the time for a summons. The justices were consequently right, and there must be judgment for the respondent.

B LUSH, J., concurred.

Judgment for respondent.

C ROWLEY v. LONDON AND NORTH WESTERN RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Blackburn, Keating, Brett, Grove, Archibald and Honyman, JJ.), May 14, June 26, 1873]

[Reported L.R. 8 Exch. 221; 42 L.J.Ex. 153; 29 L.T. 180;
21 W.R. 869]

Fatal Accident—Damages—Loss of pecuniary advantage—Annuity—Annuity payable to claimant for joint lives of claimant and deceased—Calculation of damages.

E *Fatal Accident—Damages—Evidence—Evidence of average expectation of life—Competency of accountant as witness—Possibility of default in paying annuity to be taken into account.*

The plaintiff, as executrix of R., deceased, brought an action, under the Fatal Accidents Act, 1846, against the defendant company, to recover damages from them on behalf of the mother, widow, and children of the deceased, whose death had been caused by the defendants' negligence. It appeared at the trial that the deceased's mother was entitled to an annuity of £200 a year during the joint lives of herself and the deceased which was secured by his personal covenant. The deceased was an attorney in practice, and at the time of his death was forty years old, his mother's age being then sixty-one. For the plaintiff a witness was called who stated that he was an accountant and "acquainted with the business of life insurance." Having referred to the "Carlisle Tables," which he stated were used by insurance offices for obtaining information as to the average and probable duration of human lives of all ages, he gave evidence as to the average and probable duration of the lives of two persons of the ages of the deceased and his mother, and also as to the sum of money for which an annuity of £200 a year for the life of a person of the mother's age could be purchased. Objection being taken by the defendants' counsel to the admissibility of this evidence, it was ruled by the trial judge to be admissible. In summing-up the learned judge told the jury that "they might, if they thought proper, calculate the damages to the deceased's mother by ascertaining what sum of money would purchase an annuity of £200 a year for a person sixty-one years of age, according to the average duration of human life", and that "they might also, if they thought proper, take as a guide in calculating the damages to the deceased's wife and children, that the probable duration of the life of a man forty years old, in the deceased's circumstances, was twenty-seven years and a fraction according to the Carlisle Tables."

I **Held:** (i) (per BLACKBURN, KEATING, GROVE, and ARCHIBALD, JJ., BRETT, J., dissenting, and HONYMAN, J., expressing no opinion on the point): the average and probable duration of the life of a person of the age in question was relevant to the question at issue and could not be better shown than by proving the

practice of a life insurance company, who had adopted it from experience, and, therefore, the evidence objected to was admissible; (ii) (BRETT, J., doubting) the witness, though not an actuary, was competent to give the evidence, subject to remarks on its weight.

(ii) (per totam curiam), the direction to the jury with reference to the calculation of the damages to the mother was wrong for the following reasons respectively: (per BLACKBURN, KEATING, GROVE, and ARCHIBALD, JJ.), the direction was wrong, first, because it did not notice the fact that the annuity lost by the deceased's death was for the joint lives of the mother and her son, and was, therefore, of less value than one for her own life only; and, secondly, because the annuity was secured only by the deceased's personal covenant, and was, therefore, of less value than an annuity on government or other very good security, to which latter the evidence given had reference; (per HONYMAN, J.), the direction was wrong on two grounds, first, as authorising the jury to fix the term for which an annuity was to be purchased, solely by reference to the average duration of human life, without taking into account the state of health and condition of the annuitant, and secondly, in allowing the jury to disregard the fact that the annuity lost by the defendants' negligence was secured only by the personal covenant of a professional man, and would, therefore, become practically valueless by his inability, through ill health or loss of business, to keep up the annual payments; (per BRETT, J.), the proper and only legal direction to the jury would have been to tell them that "they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation," and, therefore, the direction complained of was wrong in leaving it open to the jury to give the utmost amount which they might think to be an equivalent for the pecuniary mischief done: *Bristow v. Sequeville* (1) (1850), 5 Exch. 275; *Blake v. Midland Rail. Co.* (2) (1852), 18 Q.B. 93; *Armsworth v. South Eastern Rail. Co.* (3) (1847), 11 Jur. 758, discussed, and approved.

(iii) (per BLACKBURN, KEATING, GROVE, and ARCHIBALD, JJ., BRETT, J., dissenting, and HONYMAN, J., expressing no opinion on the point), the direction to the jury as to the mode of calculating the damages to the deceased's wife and children could not be construed as meaning more than that the probable duration of the life of a man of forty, in the deceased's circumstances, according to the "Carlisle Tables," was an element to be taken by the jury into consideration with the rest of the evidence, and, if that were so, it was unexceptionable.

(iv) (per BLACKBURN, KEATING, GROVE, and ARCHIBALD, JJ.), the jury might properly be directed to consider the lives in question as average lives, unless there was some evidence to the contrary, and, if there were such evidence, the party excepting ought to have placed it on the bill of exceptions.

Notes. The Fatal Accidents Act, 1846, has been amended by the Fatal Accidents Act, 1864, the Fatal Accidents (Damages) Act, 1908, the Law Reform (Miscellaneous Provisions) Act, 1934, the Law Reform (Contributory Negligence) Act, 1945 (for all of which see 17 HALSBURY'S STATUTES (2nd Edn.) 4-15), and by the Fatal Accidents Act, 1959 (for which see 39 HALSBURY'S STATUTES (2nd Edn.) 941).

Considered and Applied: *Phillips v. London and South Western Rail. Co.* (1879), 8 C.P.D. 280. Considered: *Roach v. Yates*, [1937] 3 All E.R. 442. Referred to: *Johnston v. Great Western Rail. Co.*, [1904] 2 K.B. 250; *Owen v. Sykes*, [1935] All E.R. Rep. 90; *Rose v. Ford*, [1936] 1 K.B. 90; *Mills v. Stanway Coaches, Ltd.*, [1940] 2 All E.R. 586; *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796; *H. West & Son, Ltd. v. Shephard*, [1963] 2 All E.R. 625.

As to damages for torts affecting the person, see generally 11 HALSBURY'S LAWS (3rd Edn.) 254-261; as to damages under the Fatal Accidents Acts, see 28 HALS-

A BURY'S LAWS (3rd Edn.) 100 et seq.; as to appeals relating to damages, see 11 HALSBURY'S LAWS (3rd Edn.) 310 et seq.; as to expert evidence, see 15 HALSBURY'S LAWS (3rd Edn.) 321 et seq.; and for cases see 36 DIGEST (Repl.) 221-225. For the Fatal Accidents Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4.

Cases referred to :

- B** (1) *Bristow v. Sequeville* (1850), 5 Exch. 275; 3 Car. & Kir. 64; 19 L.J.Ex. 289; 14 Jur. 674; 155 E.R. 118; 22 Digest (Repl.) 619, 7124.
 (2) *Blake v. Midland Rail. Co.* (1852), 18 Q.B. 93; 21 L.J.Q.B. 233; 18 L.T.O.S. 330; 16 Jur. 562; 118 E.R. 35; 36 Digest (Repl.) 221, 1176.
 (3) *Armsworth v. South Eastern Rail. Co.* (1847), 11 Jur. 758; 36 Digest (Repl.) 222, 1188.
C (4) *Carter v. Boehm* (1766), 3 Burr. 1905; 1 Wm. Bl. 593; 97 E.R. 1162; 29 Digest (Repl.) 43, 3.

Also referred to in argument :

- R. v. Dent* (1843), 1 Car. & Kir. 97; 15 Digest (Repl.) 884, 8525.
Sussex Peerage Case (1844), 11 Cl. & Fin. 85; 6 State Tr. N.S. 79; 8 Jur. 793; 8 E.R. 1034, H.L.; 22 Digest (Repl.) 96, 746.
D *Chapman v. Walton* (1833), 10 Bing. 57; 3 Moo. & S. 389; 2 L.J.C.P. 210; 131 E.R. 826; 22 Digest (Repl.) 508, 5631.
Richards v. Murdock (1830), 10 B. & C. 527; L. & Welsb. 132; 5 Man. & Ry. K.B. 418; 8 L.J.O.S.K.B. 210; 109 E.R. 546; 29 Digest (Repl.) 204, 1434.

E **Appeal** by the defendants, the London and North Western Rail. Co., from a verdict at the trial of the action before KELLY, C.B., and a jury awarding damages to the plaintiff, Maria Harriet Rowley, as executrix of James Campbell Rowley deceased, under the Fatal Accidents Act, 1846, for the benefit of the mother, wife and children of the deceased. Negligence was admitted, and the only issue at the trial was the assessment of damages. The defendants appealed by error on a bill of exceptions to the ruling of the trial judge as to the admissibility of certain evidence, and as to his direction to the jury.

The declaration stated that the plaintiff, Maria Harriet Rowley, sole executrix of the last will of James Campbell Rowley, deceased, sued the defendants, as carriers of passengers, etc., and the said J. C. Rowley in his lifetime became, and was received by them, as a passenger, to be by them safely, etc., carried upon their said railway, from London to Manchester, for reward, etc., yet the defendants did not safely, etc., carry the said J. C. Rowley, etc., but so negligently, etc., conducted themselves in that behalf that he was thereby wounded and injured, and by reason of the wounds and injuries thereby occasioned to him, he afterwards, and within twelve calendar months next before this suit, died. The plaintiff, as executrix, as aforesaid, for the benefit of Elizabeth Rowley, the mother of the said J. C. Rowley, of herself, the said M. H. Rowley, the wife of the said J. C. Rowley, and of the six children of the said J. C. Rowley, in the declaration severally mentioned, according to the statute in such case made and provided, claimed £30,000. The defendants pleaded Not Guilty, and upon that plea issue was taken and joined.

I At the trial the defendants agreed to admit, and did admit, for the purposes of the trial, that the death of the said J. C. Rowley was caused by the neglect or default of the servants of them the said defendants, and that the plaintiff was entitled to a verdict; and the jury then proceeded to inquire what damage the plaintiff, as executrix as aforesaid, was entitled to recover on occasion of the premises; and, in the course of such inquiry, the following facts were proved. The deceased, J. C. Rowley, was an attorney and solicitor practising at Manchester, and by articles of partnership made in 1853, between him and his father, Alexander Butler Rowley, deceased, J. C. Rowley, covenanted that during the joint lives of himself and his mother, Elizabeth Rowley (being one of the persons

for whom and on whose behalf this action was brought), he would pay to his mother during her life, if he, J. C. Rowley, should so long live, an annuity of £200 per annum.

J. C. Rowley, deceased, at the time of his death, was forty years old, and his mother, E. Rowley, who survived him, was at the time of his death aged sixty-one years.

Under these circumstances, one John Adamson, an accountant, was called as a witness for the plaintiff, and gave evidence for the plaintiff, as to the income of J. C. Rowley, as it appeared from his books. After such witness had been cross-examined, the Lord Chief Baron addressing the counsel for the plaintiff said: "Are you going to call an actuary?" to which the plaintiff's counsel answered, "that he had no actuary in his brief, but that he could ask Mr. Adamson." His Lordship then observed that unless there were an actuary among them it would be impossible for the jury to know what is "the value of £200 a year for the life of a lady of sixty-one, and also what is the calculated probable duration of the life of a man of forty years of age." Thereupon, the counsel for the defendants objected that such evidence was not admissible, and ought to be rejected. But the Lord Chief Baron ruled that such evidence was receivable, and thereupon, in answer to the above two questions, put by his Lordship to the witness Adamson, the witness, after having first stated that he was acquainted with the business of life insurance, and being informed by the learned judge that he might refer to certain tables, a copy of which he had with him, and which purport to show the average duration of the lives of persons of all ages, and to which life insurance companies refer for obtaining information as to the average duration of human lives, and which are called the "Carlisle Tables," deposed, after referring to the said tables, that, according to the said tables, the average and probable duration of the life of a person of the age of forty years is twenty-seven years and sixty-one hundredth parts of another year, and that the average and probable duration of the life of a person of the age of sixty-one is thirteen years and eighty-two hundredth parts of another year, and that the sum of money which would purchase an annuity of £200 a year for the life of a person of the age of sixty-one years is £2,000. The counsel on the part of the defendants then insisted that the evidence given by the said witness was not admissible in law upon the said inquiry, and prayed that it might be excluded from the consideration of the jury, upon which his Lordship ruled that it was admissible.

The learned Chief Baron in his summing-up stated to the jury that they might, if they thought proper, calculate the damages which the mother of the deceased was entitled to recover, by ascertaining what is the sum of money which would purchase an annuity of £200 a year for a person sixty-one years of age, according to the average duration of human life. His Lordship also remarked that, according to the aforesaid tables, it had been stated that the average duration of the life of a man in good health and vigour, who has arrived at the age of forty years, is twenty-seven years, and he stated to the jury that they might, if they thought proper, take as a guide in their calculation of the damages recoverable for the said wife and children of the deceased, that the probable duration of the life of a man of forty years of age, in the circumstances in which the deceased was, is twenty-seven years, according to the said Carlisle Tables.

Counsel for the defendants made the three following exceptions to the ruling and directions respectively of the learned Lord Chief Baron. First, that the matters aforesaid, so as aforesaid given in evidence, as to the duration of the life of persons, aged 61 years and 40 years respectively, taken from the said Carlisle Tables, was not admissible in law. Secondly, that the said Lord Chief Baron ought not to have directed the jury that they might, if they thought proper, calculate the damages, which the mother of the said deceased was entitled to recover, by ascertaining what is the sum of money which would purchase an

A annuity of £200 a year for a person of 61 years of age, according to the average duration of human life. Thirdly, that the Lord Chief Baron ought not to have directed the jury that they might, if they thought proper, take as a guide, in their calculation of the damages recoverable for the said wife and children of the deceased, that the probable duration of the life of a man of 40 years of age, in the circumstances in which the deceased was, is 27 years according to the said

B Carlisle Tables.

The jury, by their verdict, assessed the total damages at the sum of £6,200, and apportioned the same as follows, that is to say, £1,200 to the mother, £1,400 to the wife, and £600 to each of the said children. The bill of exceptions having been signed and sealed by the learned Judge, and error having been assigned thereon, the matter now came on before the Court of Exchequer Chamber.

C

Holker, Q.C. (with him was *Part*) for the defendants.

Edwards (with him *Grundy*) for the plaintiff.

Cur. adv. vult.

June 26, 1873. The following judgments were read.

D

BLACKBURN, J.—In this case the plaintiff, as executrix of James Campbell Rowley, sued the defendants under the Fatal Accidents Act, 1846, for the benefit of the mother, wife, and children of the deceased, for negligence occasioning the death of the deceased.

E

It appears, by the bill of exceptions, that the mother was entitled to an annuity of £200 a year during the joint lives of herself and the deceased, secured by the personal covenant of the deceased, who was an attorney practising at Manchester, and that at the time of his death he was forty years of age, and the mother sixty-one. It does not appear on the bill of exceptions that any evidence was given as to the state of health of either the deceased or his mother. Nor does it appear on the bill of exceptions whether any or what evidence was given as

F

to the means of the deceased. It is clear, on this statement, that, as the mother had actually lost the annuity of £200 a year, it was material to ascertain what was the value of that annuity—a question which must, in addition to other contingencies, depend upon the probable duration of the lives of the mother and her son.

G

With the view of ascertaining the probable duration of a particular life at a given age, it is material to know what is the average duration of the life of a person of that age. The particular life on which an annuity is secured may be unusually healthy, in which case the value of the annuity would be greater than the average; or it may be unusually bad, in which case the value would be less than the average; but it must be material to know what, according to the experience of insurance companies, the value of an annuity secured on an average life of that age would be. In the present case, with a view of enabling the jury to estimate the value of the annuity, a witness was called, who stated that he was an accountant, acquainted with the business of insurance companies, and who referred to the "Carlisle Tables," to which he said life insurance companies refer for obtaining information as to the average duration of lives.

H

He gave evidence that, "according to those tables, the average and probable duration of a life of forty years is 27·6, and of a life of sixty-one is 13·4 of a year, and that the sum which would purchase an annuity of £200 on the life of a person of sixty-one years is £2,000." It is observable that, as the mother's annuity was for the joint lives of herself and son, and not for her own life only, this last question was not relevant, but that seems to have escaped notice.

I

The first exception is as to the reception of this evidence. We think that the average and probable duration of a life of that age was material, and we do not see how that could be better shown than by proving the practice of life insurance companies, who learn it by experience. It was objected that the witness was

not an actuary but only an accountant; but, as he gave evidence that he was experienced in the business of life insurance, we think that his evidence was admissible, though subject to remarks on its weight. We, therefore, think that the first exception cannot be maintained.

The next exception is to the judge's direction to the jury, "that they might, if they thought proper, calculate the damages which the said mother of the deceased was entitled to recover, by ascertaining what is the sum which would purchase an annuity of £200 a year for a person sixty-one years of age, according to the average duration of human life." As the mother had lost an annuity for the joint lives of herself, aged sixty-one, and her son, aged forty, secured only by his personal covenant, it seems unobjectionable to direct the jury that they might estimate the damages to her by calculating what sum would buy her an equally good annuity.

But three errors are pointed out in the direction given: First that she had lost an annuity for the joint lives of herself and son, and that an annuity for her own life only would be of considerably greater value; secondly, that the value of an annuity, according to the evidence given, would be that of an annuity on an average life, and that the jury ought to have been told to make an allowance for any defect in the health of the life; thirdly, that the value of the annuity spoken to in the evidence was the value of an annuity on government or other very good security, and that the annuity lost was that secured by the personal security of the deceased, and, therefore, of much less value. We think that, as far as the second of these objections is concerned, the jury might properly be directed to consider the lives in question as average lives, unless there was some evidence to the contrary; and if there was evidence to the contrary, the party excepting ought to have placed it on the bill of exceptions. But the first and third of these objections seem well grounded. The mistake in the first is so obvious, when attention is called to it, that we can but suppose it to have been a slip; which would have been corrected at once if it had been pointed out; and if we could suppose that the counsel for the defendants had lain by to take advantage of such slip, we would not permit them to do so. But though the error occurred in taking the evidence of the witness, and again in the summing-up, it seems to have escaped the notice of every one, as well of the counsel for the defendants, as of the judge and of the counsel for the plaintiff. And though the counsel excepting to the charge of a judge is bound to point out to him what it is that he asserts is wrong in order that the judge may, if he thinks fit, withdraw or correct his direction in that respect, he is not bound to tell the judge what he conceives is right; and, indeed, it would in many cases be unnecessary to do so. On the third of these objections it is true that there might have been evidence that the circumstances of the deceased were such that an annuity secured by his personal covenant only was quite as good as a government annuity. But this is not what is ordinary and usual, and if there was evidence of this sort the plaintiff should have taken care to insert it in the bill of exceptions.

There is a further exception to the direction, "that the jury might, if they thought proper, take as a guide in the calculation of the sums recoverable for the wife and children of the deceased, that the probable duration of the life of a man of 40 years of age in the circumstances in which the deceased was, is 27 years according to the said Carlisle Tables". We think that this cannot be construed as meaning more than that this was an element to be taken into calculation by the jury with the rest of the evidence. And, if so, it was unexceptionable.

But there is one good exception. We think, therefore, that there must be in this case a *venire de novo*. In this judgment my brothers **KEATING, GROVE,** and **ARCHIBALD** concur. My brothers **BRETT** and **HONYMAN** also agree in thinking that there must be a *venire de novo*; but they will deliver their reasons for so thinking separately.

A **BRETT, J.**—In this case it seems to me that the bill of exceptions does not properly raise the point whether the evidence of the witness Adamson ought to have been rejected on the ground that he was not such a skilled witness as could properly be admitted to give evidence on the question of science proposed to him. Nor does it properly raise the point whether the subject-matter of the question was a question of science or of opinion. The objections stated to have
B been made are not that the witness was not a proper witness to give the proposed evidence, or that the proposed evidence was not a question of science, but that the evidence given by the witness was not admissible in this case. The objection taken at the trial and insisted upon in the exceptions, seems to me to be that, even if the evidence were, or assuming it to be, given by a properly competent
C witness on a proper subject-matter for skilled evidence, yet it was not admissible, because it was immaterial. It becomes, therefore, unnecessary, as it seems to me, to decide whether Adamson the accountant was such a witness as could properly be allowed to give evidence on a matter, which, if it be matter of science, is so in and according to the business of actuaries. It is sufficient to say that, having regard to what was said by POLLOCK, C.B., and by ALDERSON and
D ROLFE, BB., in *Bristow v. Sequeville* (1), I think it doubtful whether he was a competent witness.

The bill of exceptions seems to me to raise properly the question whether the evidence was rightly admitted as relevant, or ought to have been rejected as immaterial. The bill of exceptions also seems to me to raise the question, by way of alleged misdirection, whether, in this class of cases, a jury is entitled
E to assess as damages a sum of money equal to the present price or value of such an annuity as would give, for the probable duration of the life of the person on whose behalf the action is brought, or of the deceased, or of their joint lives, an annual income equal, or nearly equal, to the income which was enjoyed by the person, on whose behalf the action is brought, before and at the time of the death, or would have been enjoyed by such person during the life of the
F deceased. Disregarding the oversight, common to all parties at the trial, as to the annuity to the mother being dependent on the son's life as well as on the mother's, and even disregarding the omission to point out the many contingencies which might have rendered the son unable to pay the annuity, even if he had lived, it seems to me that the Lord Chief Baron did leave it open to the jury to suppose that they might properly assess, as the proper damages, a sum of
G money which would be the present value or price of an annuity which would give to the mother an annual income equal to that she would have received from her son, for the probable duration of time during which the covenanted annuity would have been paid to her, if her son had not been killed. That is, in other words, to hold that the damages in such cases may be "the fully calculated equivalent of the pecuniary loss sustained by the person on whose behalf the
H action is brought." Both questions, namely, that as to the admission of evidence, and that as to the direction to be given to the jury, are of the greatest practical importance. If such evidence may be given, it seems to me impossible to say that juries may not, and impossible to suppose that they will not, in many instances, act upon it. If juries do give such damages, poor defendants will be ruined, and the defendants most liable to such actions will not be able to carry
I on their business upon the same terms to the public as now.

With regard to the alleged misdirection, when the Fatal Accidents Act, 1846, was passed, it was thought for a short time by some that damages might be given "to the full extent of a perfect compensation." Such was, in substance, the direction of PARKE, B., in *Blake v. Midland Rail. Co.* (2). The jury were invited, or it was left open to them, to give an annuity equal to the money loss, and further damages by way of consolation. It was held that there must be a new trial on the ground of misdirection. The only point judicially decided was that the statute gave a right to damages only in respect of pecuniary injury. The

case did not determine what was the right rule as to the amount of damages for the pecuniary injury. But in the argument was cited, and certainly without disapproval from the court, the direction of PARKE, B., in *Armsworth v. South Eastern Rail. Co.* (3). That direction is no doubt partly pointed to the question of damages by way of consolation; but it lays down propositions also as to the amount of damages which should be given. "It would be most unjust," it is said, "if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done." And again, "Scarcely any sum could compensate a labouring man for the loss of a limb; yet you do not in such a case, give him enough to maintain him for life." "You are not to consider the value of existence as if you were bargaining with an annuity office. I advise you to take a reasonable view of the case, and give what you consider a fair compensation." This seems to be in accordance with the general rule that, in actions of tort for personal injury, the amount of damages is entirely in the disposition of the jury subject to supervision by the superior court of law, if unreasonably large or unreasonably inadequate. To the best of my belief the almost invariable direction to juries, from the time of the cases which I have cited, until now, has been "that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation." I have a clear conviction that any verdict, founded on the idea of giving damages to the utmost amount which would be an equivalent for the pecuniary injury, would be unjust. Founding my opinion on that conviction on the declaration of it by PARKE, B., and on the ordinary directions of judges, which directions have not been for years challenged, I conclude that the direction which I have enunciated is the legal, and only legal, direction. A direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost, for a period supposed to be equal to that which would have continued if there had been no accident, is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they think an equivalent for the pecuniary mischief done; and such a direction is a misdirection according to law. And such, in my opinion, was the direction in the present case of the Lord Chief Baron.

If it be wrong in a jury to give an amount founded on a calculation of the present value of an annuity, any evidence given solely for the purpose of enabling a jury to make such a calculation seems to me to be necessarily misleading, and legally irrelevant. It is irrelevant to any decision to which the jury ought to come. It is, in the words of LORD MANSFIELD, in *Carter v. Boehm* (4), "evidence to which the jury ought not to pay the least regard." Such is and must be irrelevant, and therefore is not evidence. It seems to me that the evidence in this case which was given and received, notwithstanding objection taken to it, and to which reception the first exception is pointed, was given solely for the purpose of inviting the jury to found upon it a calculation of the price of an annuity, a calculation upon which they were not legally entitled to enter. I think, therefore, that the evidence was improperly admitted; and I am of opinion that, upon both exceptions, the defendants are entitled to judgment, and that there ought to be a venire de novo.

HONYMAN, J.—I agree with the rest of the court that in this case there must be a venire de novo. It seems to me that the language used by the Lord Chief Baron, in his summing-up, with reference to the damages recoverable by the mother, amounted, substantially, to a direction to the jury that they might, if they thought fit, fix the amount payable to the mother by ascertaining merely the amount required for the purchase of an annuity for a person of the age of the mother, according to the average duration of the life of persons of that age. Without relying on the evident slip (common apparently to all parties) of omitting

A to notice that the annuity payable to his mother by the deceased was not an annuity for her life alone, but one for the joint lives of the two, I think that this direction is objectionable on two grounds: First, as authorising the jury to fix the term for which an annuity is to be purchased solely by reference to the average duration of human life, without taking into account the state of health and condition of the mother; and, secondly, in allowing the jury to disregard the admitted fact that the annuity which the mother had lost by the defendants' negligence was secured only by the personal covenant of a professional man, and would therefore become practically valueless by the inability of the covenantor, through ill health or loss of business, to keep up the annual payments. Having come to the conclusion that, on this ground, there must be a *venire de novo*, I purposely abstain from expressing any opinion on the other exceptions to the Lord Chief Baron's ruling, and to the admissibility of Mr. Adamson's evidence.

Venire de novo ordered.

CLIMIE v. WOOD

[COURT OF EXCHEQUER CHAMBER (Willes, Blackburn, Keating, Mellor, Montague Smith, Lush, Brett and Hayes, JJ.), June 21, 22, July 5, 1869]

[Reported L.R. 4 Exch. 328; 38 L.J.Ex. 223; 20 L.T. 1012]

Mortgage—Fixtures—Trade fixtures—Capable of removal without damaging freehold—Rights of parties.

Trade fixtures annexed to the freehold for the more convenient use of them and not to improve the inheritance, and capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee. The reasons supporting the rule that a tenant may remove trade fixtures are inapplicable as between mortgagor and mortgagee.

Notes. Considered and Applied: *Longbottom v. Berry* (1869), L.R. 5 Q.B. 123. Considered: *Begbie v. Fenwick*, *Fenwick v. Begbie* (1871), 8 Ch.App. 1075, n.; *Holland v. Hodgson* (1872), ante p. 237. Applied: *Cross v. Barnes* (1877), 46 L.J.Q.B. 479. Considered: *Gough v. Wood & Co.*, [1894] 1 Q.B. 713; *Hobson v. Gorringe*, [1895-9] All E.R. Rep. 1231; *Reynolds v. Ashby & Son*, [1904-7] All E.R. Rep. 401; *Re British Red Ash Collieries*, [1920] 1 Ch. 326. Referred to: *Wake v. Hall* (1880), 50 L.J.Q.B. 545; *Elwes v. Brigg Gas Co.*, [1886-90] All E.R. Rep. 559.

As to the definition and ownership of fixtures, see 23 HALSBURY'S LAWS (3rd Edn.) 489 et seq.; and for cases see 31 DIGEST (Repl.) 199 et seq. As to legal mortgage comprising fixtures without express mention, see 27 HALSBURY'S LAWS (3rd Edn.) 193; and for cases see 35 DIGEST (Repl.) 347 et seq.

Cases referred to:

- (1) *Lyde v. Russell* (1830), 1 B. & Ad. 394; 9 L.J.O.S.K.B. 26; 109 E.R. 834; 31 Digest (Repl.) 217, 3527.
- (2) *Fisher v. Dixon* (1845), 12 Cl. & Fin. 312; 9 Jur. 883; 8 E.R. 1426, H.L.; 38 Digest (Repl.) 789, 70.
- (3) *Walmsley v. Milne* (1859), 7 C.B.N.S. 115; 29 L.J.C.P. 97; 1 L.T. 62; 6 Jur.N.S. 125; 8 W.R. 138; 141 E.R. 759; 35 Digest (Repl.) 348, 555.

Also referred to in argument :

Hellawell v. Eastwood (1851), 6 Exch. 295; 20 L.J.Ex. 154; 15 J.P. 724; 155 E.R. 554; sub nom. *Halliwell v. Eastwood*, 17 L.T.O.S. 96; 18 Digest (Repl.) 285, 319.

Sumner v. Bromilow (1865), 34 L.J.Q.B. 130; 29 J.P. 564; 11 Jur.N.S. 481; 31 Digest (Repl.) 230, 3653.

Re Nutter, Ex parte Cotton (1842), 2 Mont. D. & De G. 725; 6 Jur. 1045; 35 Digest (Repl.) 347, 551.

Mather v. Fraser (1856), 2 K. & J. 536; 25 L.J.Ch. 361; 27 L.T.O.S. 41; 2 Jur.N.S. 900; 4 W.R. 387; 69 E.R. 895; 35 Digest (Repl.) 349, 563.

Cullwick v. Swindell (1846), L.R. 3 Eq. 249; 36 L.J.Ch. 173; 31 J.P. 228; 15 W.R. 216; 35 Digest (Repl.) 348, 556.

Trappes v. Harter (1833), 2 Cr. & M. 153; 3 Tyr. 603; 3 L.J.Ex. 24; 149 E.R. 712; 35 Digest (Repl.) 349, 560.

Lord Dudley v. Lord Warde (1751), Amb. 113; 27 E.R. 73; 31 Digest (Repl.) 212, 3450.

Lawton v. Salmon (1782), 1 Hy. Bl. 260, n.; 126 E.R. 151; 31 Digest (Repl.) 217, 3505.

Lawton v. Lawton (1743), 3 Atk. 13; 26 E.R. 811; 31 Digest (Repl.) 214, 3469.

Lee v. Ridsen (1816), 7 Taunt. 188; 2 Marsh. 495; 129 E.R. 76; 31 Digest (Repl.) 220, 3566.

Waterfall v. Penistone (1856), 6 E. & B. 876; 26 L.J.Q.B. 100; 27 L.T.O.S. 252; 3 Jur.N.S. 15; 4 W.R. 726; 119 E.R. 1090; 31 Digest (Repl.) 208, 3395.

Parsons v. Hinde (1866), 14 W.R. 860; 31 Digest (Repl.) 208, 3391.

Wood v. Hewett (1846), 8 Q.B. 913; 15 L.J.Q.B. 247; 7 L.T.O.S. 109; 10 J.P. 664; 10 Jur. 390; 115 E.R. 1118; 31 Digest (Repl.) 203, 3337.

Dalton v. Whittem (1842), 3 Q.B. 961; 3 Gal. & Dav. 260; 12 L.J.Q.B. 55; 6 Jur. 1063; 114 E.R. 777; 31 Digest (Repl.) 232, 3675.

Elliott v. Bishop (1854), 10 Exch. 496; 3 C.L.R. 272; 24 L.J.Ex. 33; 24 L.T.O.S. 217; 19 J.P. 71; 3 W.R. 160; 156 E.R. 534; on appeal, sub nom. *Bishop v. Elliott* (1855), 11 Exch. 113; 3 C.L.R. 1337; 24 L.J.Ex. 229; 19 J.P. 501; 1 Jur.N.S. 962; 3 W.R. 454; 156 E.R. 766; sub nom. *Elliott v. Bishop*, 25 L.T.O.S. 150, Ex. Ch.; 31 Digest (Repl.) 205, 3362.

Ex parte Quincy (1750), 1 Atk. 477; 26 E.R. 304; 31 Digest (Repl.) 217, 3503.

Pitt v. Shew (1821), 4 B. & Ald. 206, 208; 106 E.R. 913, 914; 18 Digest (Repl.) 284, 309.

Hallen v. Runder (1834), 1 Cr. M. & R. 266; 3 Tyr. 959; 3 L.J.Ex. 260; 149 E.R. 1080; 31 Digest (Repl.) 199, 3311.

Boyd v. Shorrock (1867), L.R. 5 Eq. 72; 37 L.J.Ch. 144; 17 L.T. 197; 32 J.P. 211; 16 W.R. 102; 31 Digest (Repl.) 207, 3386.

Re Gawan, Ex parte Barclay (1855), 5 De G.M. & G. 403; 25 L.J.Bcy. 1; 26 L.T.O.S. 97; 19 J.P. 804; 1 Jur.N.S. 1145; 43 E.R. 926; sub nom. *Gawan v. Barclay, Ex parte Barclay*, 4 W.R. 80, L.C. & L.J.J.; 31 Digest (Repl.) 199, 3312.

Re Maberley, Ex parte Belcher (1835), 2 Mont. & A. 160; 4 Deac. & Ch. 703; 4 L.J.Bcy. 29; 31 Digest (Repl.) 208, 3369.

Appeal by the plaintiff from a decision of the Court of Exchequer (KELLY, C.B., MARTIN and PIGOTT, BB.), reported L.R. 3 Exch. 257, making absolute a rule to enter the verdict for the defendant in an action of detinue for a steam engine and boiler; the question being whether the defendant was entitled as purchaser of the mortgagee of the land on which they stood and as to whether they passed by the mortgage as part of the land.

In 1858 the plaintiff's uncle, Daniel Climie, owned the freehold of two pieces of land (referred to as "pink" and "green" in the plan) and in that year he mortgaged the pink land to Robert Craig. In 1864 the plaintiff's uncle erected

A a steam engine and boiler partly on the pink land and partly on the green land; the land was ultimately intended for building purposes and the engine and boiler were only temporarily erected for his business as a contractor. In January, 1865, the plaintiff's uncle mortgaged the green land to his banker but there was no express mention in the mortgage of the engine and boiler. In April, 1865, he executed a deed of inspectorship and assigned all his property to the trustees
 B appointed. In July, 1866, Robert Craig sold the pink land, under a power in the mortgage deed, to Mrs. Mumford who in September, 1866, gave the trustees notice that she did not claim the engine and boiler and they were removed from her land and put on the green land which had been mortgaged to the bank and about this time the trustees sold the engine and boiler to the plaintiff. While they remained on the green land the bank, as mortgagee, sold the engine and
 C boiler to the defendant who refused to give them up to the plaintiff when he claimed them and the plaintiff brought the present action for their detention.

At the trial of the action before PIGOTT, B., the jury found that the engine and boiler were trade fixtures, affixed for their better use and not to improve the inheritance, that they were removable without appreciable damage and that the sale to the plaintiff was bona fide. Verdict was, accordingly, entered for the plaintiff, with leave reserved to move to enter verdict for the defendant. A rule nisi was subsequently obtained.

Denman, Q.C. (with him *Simpson*) for the plaintiff.

Matthews, Q.C. (with him *Channell*) for the defendant.

Cur. adv. vult.

E

July 6, 1869. **WILLES, J.**, delivered the following judgment of the court.—The question in this case turns upon whether the defendant who claims under the mortgagees or the plaintiff who is the purchaser from the mortgagor is entitled to an engine and boiler employed in a saw mill on the mortgaged premises, and as to which it is contended on the part of the plaintiff, the purchaser from the mortgagor, that when it was annexed, it remained a separate chattel, and so, that his purchase from the mortgagor prevailed; and on the part of defendant who claims under the mortgagees it is insisted that it belongs to the land, and cannot properly be disannexed. The court of Exchequer held that the claimant under the mortgagees was entitled, and we are of opinion that their judgment
 F was right, and ought to be affirmed.

G

Things annexed to land are, first, things which are as much chattels after they have become annexed as they were before, as in the case of pictures, which are annexed for the purpose of holding them up for use as chattels; secondly, things so completely made a part of the land as essential to its use that a tenant could not remove them, as, for instance, doors and windows; thirdly, things annexed
 H to the land for the purpose of use in trade or business in so permanent a manner as to be a part of it, but which, in order to encourage trade, or to enable a tenant to have the full enjoyment of the land for the purpose of domestic convenience or ornament, a tenant who has erected them is entitled to remove during his term, or it may be within a reasonable time after its expiration. The question in this case is whether, upon the literal construction of the words, this engine and boiler, taking it as explained by the evidence, belonged to the third class, and in our opinion it did, and if erected by the tenant might be removed by him and re-converted into a chattel during the term, but not afterwards, as in
 I *Lyde v. Russell* (1).

The reasons, however, for a tenant being allowed to remove trade fixtures, are inapplicable to such as are annexed by the tenant of the fee; and it was so considered in *Fisher v. Dixon* (2). That reasoning was held inapplicable between the heir and executor upon the grounds stated by LORD COTTENHAM, in the following passage (12 Cl. & Fin. at p. 328):

"The principle upon which a departure has been made from the old rule of law in favour of trade, appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land and of the personal property, which he erected and employed in carrying on the work; he might have done what he liked with it; he might have disposed of the land, he might have disposed of the machinery, he might have separated them again. It was, therefore, not at all necessary, in order to encourage him to erect these new works which are supposed to be beneficial to the public that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favour of trade as applicable, here the whole being entirely under the control of the person who erected this machinery."

So far with respect to the position of a mortgagor considered as owner in fee; but it remains to consider the erection as between him and the mortgagees, and in *Walmsley v. Milne* (3) it was pointed out in the Court of Common Pleas that the decisions which establish that a tenant may remove trade fixtures are inapplicable as between mortgagor and mortgagee. In that opinion we concur, and applying the rule as already stated the defendant who claimed under the mortgagees was entitled as against the plaintiff who was the purchaser from the mortgagor, and who had no other title than the mortgagor himself. The judgment of the court below was right, and will, therefore, be affirmed.

Appeal dismissed.

MILES v. FURBER AND OTHERS

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Mellor and Archibald, JJ.), January 17, 1873]

[Reported L.R. 8 Q.B. 77; 42 L.J.Q.B. 41; 27 L.T. 756;
37 J.P. 516; 21 W.R. 262]

Distress—For rent—Privileged goods—Goods given to carrier or warehouseman, or pawned.

When goods are received from their owner by a tenant of premises for the purpose of carrying on his trade and as an incident of that trade, as, e.g., goods given to a carrier to be carried, or left with a warehouseman for safe keeping, or pledged with a pawnbroker, the landlord of the premises cannot distrain those goods for rent. The principle on which this rule is engrafted is that the trade or business could not be carried on unless the goods were privileged from distress.

Notes. Referred to: *Clarke v. Millwall Dock Co.* (1885), 53 L.T. 316.

As to what may and what may not be distrained, see 12 HALSBURY'S LAWS (3rd Edn.) 100 et seq.; and for cases see 18 DIGEST (Repl.) 276 et seq.

Cases referred to:

- (1) *Parsons v. Gingell* (1847), 4 C.B. 545; 16 L.J.C.P. 227; 9 L.T.O.S. 222; 11 Jur. 437; 136 E.R. 621; 18 Digest (Repl.) 282, 284.
- (2) *Swire v. Leach* (1865), 18 C.B.N.S. 479; 5 New Rep. 314; 34 L.J.C.P. 150; 11 L.T. 680; 11 Jur.N.S. 179; 13 W.R. 385; 144 E.R. 531; 18 Digest (Repl.) 281, 279.

A Also referred to in argument :

Adams v. Grane (1833), 1 Cr. & M. 380; 3 Tyr. 326; 2 L.J.Ex. 105; 149 E.R. 447; 18 Digest (Repl.) 283, 297.

B **Case Stated** under an order of HANNEN, J., at nisi prius, in an action by the plaintiff to recover £500 damages sustained by him from the trespass to and conversion of his goods and chattels by the defendants who denied liability, a verdict having been found for the defendants subject to the opinion of the court on a Case.

The plaintiff, on Oct. 20, 1869, deposited various articles of household furniture, at a depository for furniture, situate at 277, Gray's Inn Road, London, and at the time of the deposit received the following receipt :

C "London Depository Co., Ltd., Gray's Inn Road, King's Cross, Oct. 20, 1869. Received from Mr. Miles furniture and goods as per inventory, No. 134. Terms 30s. per year. To be warehoused, subject to the conditions endorsed hereon. For the London Depository Co., Ltd., J. L. FOSTER, for Manager."

D Before May, 1863, one Stuckley was the occupier of the premises, 277, Gray's Inn Road, and used them as a depository for furniture, under the name of the North London Depository. In May, 1863, the London General Depository Co., Ltd., purchased Stuckley's interest in the premises and the goodwill of his business and carried on the business until July, 1866. In 1865, one, Beeson, entered into negotiations for a lease of the premises from the company, and a transfer of their business, and his proposal was submitted to the shareholders. **E** It was found on examining the articles of association, that the company had no power to transfer the premises or the business, and in order to get over the difficulty, it was agreed that the company should be dissolved, and a new company, to be called the London Depository Co., Ltd., should be formed, with articles of association, containing the necessary powers. The new company was **F** incorporated in July, 1866, and the old company was shortly afterwards dissolved. The new company carried on the business until the arrangements with Beeson were completed in April, 1867. Their name was painted conspicuously on the premises, 277, Gray's Inn Road.

In April, 1867, the arrangements with Beeson were carried out by two deeds both dated April 8, 1867. By the first deed the company granted an underlease of the premises to Beeson for sixty-one years from Sept. 29, 1863. By the **G** second deed the company assigned to Beeson all their goodwill in the business, with full power to Beeson to carry on the business in the name of the company, and further transferred to him all their book debts, and all their subsisting contracts, and all other the property in and about the premises, and used by them in carrying on the business. The deed contained a covenant from Beeson to indemnify the company from all claims and demands arising from the business **H** being carried on in the company's name. After April 8, 1867, the London Depository Co., Ltd., ceased to carry on the business, and the same was carried on for his own benefit by Beeson. The company, however, had their registered office at 277, Gray's Inn Road, and Beeson, at the company's request, had the name of the company painted over one of the doorways, where it was clearly **I** visible, though not conspicuous.

When the plaintiff deposited his goods at 277, Gray's Inn Road, in October, 1869, and obtained the receipt mentioned above, he was not aware that a new company had been formed, or that Beeson was their tenant, or that the business was being carried on by Beeson. He believed that he was dealing with the company which had been formed in 1863, with whom he had had previous transactions, and his attention was not called to the alteration in the name by the omission of the word "general." Foster who signed the deposit receipt was a servant of Beeson's, and not in the employ of the company. The company had no manager,

and were in no way interested or concerned in the business carried on at 277, A Gray's Inn Road, at the time the receipt was given. The goods deposited by the plaintiff were placed in a separate room or compartment, on which was fixed a label bearing the plaintiff's name, and so remained until they were removed, and sold by the defendants under the distress for rent mentioned below.

On Jan. 7, 1870, £1,100 for rent was due from Beeston to the company, and at a meeting of the directors of the company held on Feb. 8, 1870, it was resolved that a distress should be levied on the goods on the premises for the arrears, and, accordingly, a distress warrant was issued, signed by two of the directors. The warrant was placed in the hands of the defendants, who accordingly distrained on all goods on the premises, and afterwards sold the plaintiff's goods. B

Joyce for the plaintiff.

H. James, Q.C. (with him *Francis*) for the defendants. C

SIR ALEXANDER COCKBURN, C.J.—The principle which is applicable to a pawnbroker's business seems to me to be applicable to this case—if the goods deposited were liable to be distrained, it would affect the very existence of the business. I am inclined to think that the case of horses and carriage at livery must be taken as trenching upon this principle. At all events, if the two cases in the Court of Common Pleas, *Parsons v. Gingell* (1), *Swire v. Leach* (2), are not reconcilable, I prefer to abide by the later case, *Swire v. Leach* (2), the principle of which seems precisely applicable to the present case. D

The goods were delivered by the plaintiff to be managed by the owners of the warehouse, they carrying on a public trade in the way of that trade. The plaintiff's goods were, therefore, privileged from distress. Also I think this company was estopped from distraining on the plaintiff's goods. On the company's public representation that they carried on this business, the plaintiff deposited his goods in what turned out to be Beeston's warehouse. As the company insisted on their tenant's holding himself out as the company, they are estopped from distraining on goods intended to be entrusted to them. On both grounds I think our judgment should be for the plaintiff. E

MELLOR, J.—I am entirely of the same opinion. The true principle seems to me to be that when goods are received from the owner by a tenant of premises for the purpose of carrying on his trade and as an incident of that trade, the landlord of the premises cannot distrain those goods for rent. These goods are in that condition, and the plaintiff can recover them from the defendants. If cattle were agisted upon land kept entirely for the purpose of agisting cattle, they would probably come within this principle, although cattle upon ordinary agistment may be liable to distress. I also think the plaintiff is right on the other ground. F

ARCHIBALD, J.—The principle, on which exceptions in the case of certain trades have been engrafted on the general liability of goods to be distrained for rent when found on the demised premises appears to be that the trade or business could not be carried on, except the goods were privileged from distress. Thus, goods left with a carrier to be carried or pledged with a pawnbroker are privileged; and goods which are received to be taken care of and warehoused seem to come entirely within the same principle. The law of distress by which one man's goods are made to pay for another man's debts, is not one which should be carried beyond the limits to which it has already been confined; and I think we ought to give effect to the principle of the decision in *Swire v. Leach* (2). I

Judgment for plaintiffs.

R. v. GLYNNE AND OTHERS

[COURT OF QUEEN'S BENCH (Blackburn, Mellor and Lush, JJ.), November 16, 1871]

[Reported L.R. 7 Q.B. 16; 41 L.J.M.C. 58; 26 L.T. 61;
36 J.P. 406; 20 W.R. 94]*Bastardy—Affiliation order—Finality—Appeal to quarter sessions—Hearing on merits—Right of mother to apply for order respecting same subject-matter.*

Where an affiliation order has been quashed on appeal by quarter sessions after the merits have been gone into the decision on appeal is final and no further application can be made to the justices on the same cause of complaint.

Notes. The Bastardy Act, 1845, has been repealed by s. 12 and Schedule of the Affiliation Proceedings Act, 1957. Section 6 of the Act of 1845, which dealt with the requirement of corroborative evidence in appeals, is now dealt with by s. 8 (2) of the Act of 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 45).

Considered: *R. v. May* (1880), 5 Q.B.D. 382; *Anderson v. Collinson*, [1901] 2 K.B. 107. Followed: *R. v. Howard, Ex parte Da Costa*, [1938] 3 All E.R. 241. Referred to: *Stokes v. Stokes*, [1911] P. 195; *R. v. London Quarter Sessions, Ex parte Rossi*, [1956] 1 All E.R. 670.

As to a second application for an affiliation order, see 3 HALSBURY'S LAWS (3rd Edn.) 115; and for cases see 3 DIGEST (Repl.) 446 et seq.

Cases referred to:

- (1) *R. v. Jenkin* (1736), Cas. temp. Hard. 301; 2 Stra. 1050; 95 E.R. 194.
- (2) *R. v. Tenant* (1726), 2 Stra. 716; 2 Ld. Raym. 1423.
- (3) *Slater's Case* (1637), Cro. Car. 470; 79 E.R. 1005; 33 Digest (Repl.) 285, 1128.
- (4) *Pidgeon's Case* (1634), Cro. Car. 341, 350.
- (5) *R. v. Machen* (1849), 14 Q.B. 74; 18 L.J.M.C. 213; 117 E.R. 29; sub nom. *Jones v. Machen*, 3 New Sess. Cas. 629; 3 Digest (Repl.) 446, 373.
- (6) *R. v. Gaunt* (1867), L.R. 2 Q.B. 466; 8 B. & S. 365; 16 L.T. 379; 31 J.P. 612; 15 W.R. 1172; sub nom. *R. v. Grant*, 36 L.J.M.C. 89; 3 Digest (Repl.) 454, 436.
- (7) *R. v. Herrington* (1864), 3 New Rep. 468; 12 W.R. 420; sub nom. *R. v. Harrington*, 9 L.T. 721; 28 J.P. 485; 3 Digest (Repl.) 454, 435.

Also referred to in argument:

- R. v. Bridgman* (1846), 2 New Sess. Cas. 232; 15 L.J.M.C. 44; 6 L.T.O.S. 353; 10 J.P. 187; 10 Jur. 159, 738; 3 Digest (Repl.) 447, 383.
- R. v. Buckinghamshire Justices* (1849), 3 New Sess. Cas. 500; 18 L.J.M.C. 113; 13 Jur. 1053; 3 Digest (Repl.) 468, 509.
- Anon.* (1670), 1 Vent. 59.
- Ex parte Harrison* (1852), 19 L.T.O.S. 114; 16 J.P. 343; 16 Jur. 726; 3 Digest (Repl.) 449, 393.
- R. v. Brisby* (1849), 2 Car. & Kir. 962; 1 Den. 416; T. & M. 109; 3 New Mag. Cas. 167; 3 New Sess. Cas. 591; 18 L.J.M.C. 157; 13 L.T.O.S. 266; 13 J.P. 365; 13 Jur. 520; 3 Cox, C.C. 476, C.C.R.; 3 Digest (Repl.) 463, 468.

Rule Nisi obtained by the applicant, Louisa Jackson, the mother of an illegitimate child, calling on the justices of the county of Flint and the respondent, William Smith, the putative father, to show cause why the justices should not adjudicate on a summons dated May 5, 1871 [being a second application] issued by the applicant alleging the respondent to be the putative father of her illegitimate child.

The facts stated in the affidavits were that, on Jan. 9, 1871, the applicant gave birth to an illegitimate child and that she took out an affiliation summons

against the respondent. On Feb. 9, 1871, the summons was heard by three justices of the county of Flint, sitting at Hawarden, when evidence was given by and on behalf of the applicant and also by the respondent; and the justices made an order against the respondent for the payment of 2s. 6d. a week, together with costs. The respondent appealed against the order to quarter sessions, held at Mold. The appeal was heard on April 8, 1871, and after the applicant and two witnesses for her had been examined and cross-examined, counsel for the respondent submitted that there was not sufficient corroborative evidence to comply with s. 6 of the Bastardy Act, 1845. The justices consulted together, and the chairman then said :

"The opinion I am about to give is shared in by a majority—a large majority—of the magistrates, which of course is of great importance in a case of this kind. We are now not here to say whether the magistrates at Hawarden were right or wrong, as they had a very different class of evidence to deal with. But what we have to consider is, whether the evidence of the [mother] is corroborated, with regard to the main issue, in any material point? A large majority of us are of opinion it is not, and therefore we do not call upon [the putative father] to reply; the order is consequently quashed. We are bound to take the case as it is presented to us, and that is our decision."

After the determination of the appeal, the applicant obtained a second summons against the respondent in respect of the same subject-matter of complaint, and on May 25, 1871, the summons came on for hearing, when counsel for the respondent objected that it was *res judicata*, and the justices decided that the quashing of the first order by quarter sessions was final, and refused to hear the summons.

Sir John Duke Coleridge, Q.C., and *McIntyre* for the respondent, showed cause against the rule.

Merewether for the applicant, supported the rule.

BLACKBURN, J.—I think the rule must be discharged, and, as there were no grounds for this application, with costs. The old law, which seemed to be fairly well established by a number of cases prior to *R. v. Jenkin* (1) was, that where an order had been applied for at quarter sessions (I am not speaking of applications to justices out of sessions), and the matter had been adjudicated upon, that decision finally bound the parties, and there could be no new trial, as the adjudication was that of a final court; for interest reipublicæ ut sit finis litis. The judgment delivered in *R. v. Tenant* (2) amounts to a conclusive decision on that very question. There, quarter sessions had decided the case on the merits, and whether that makes a difference is another point to consider. Then in *R. v. Jenkin* (1), before LORD HARDWICKE, C.J., an application had been made to justices out of sessions, and they had refused it, but from the terms of the order it appears that they assumed a power to render the defendant free for ever; and on that the decision of LORD HARDWICKE, C.J., that where the matter was before magistrates not in quarter sessions the judgment was not final, proceeded. But LORD HARDWICKE, C.J., so far from overruling the previous cases, *Slater's Case* (3), *Pridgeon's Case* (4), and *R. v. Tenant* (2), expressly recognises them, and says, that although in quarter sessions an order is final, yet when the case is laid before the justices out of sessions, it is but in the nature of an application for an order, and may be renewed from time to time.

Whether that reasoning is sound or not, it is clear he does make that distinction, and his ruling was again confirmed in *R. v. Machen* (5), and that again in *R. v. Gaunt* (6); and it is now settled in this court as far as it can be

A that the application to justices out of sessions dismissed by them is not a bar to a subsequent application. In such a case as *R. v. Gaunt* (6), in which it appeared that an order adjudging a man to be the putative father of a bastard child had been obtained on evidence given before the justices by persons subsequently convicted of perjury in giving such testimony, the order was held not to be final, expressly on the ground that, as the former order was shown to have
 B been made on false testimony, much weight ought not to be attached to the former order, and to the opinion I there expressed I adhere. The judgment was solely on the ground that the justices had jurisdiction; but although the order seemed perfectly conclusive, yet when it was shown to have been granted on the evidence of perjured witnesses, they should not be concluded by it. Then the same thing, although not so clearly expressed, appears in *R. v. Harrington* (7).
 C If the former order were obtained on some slip, too, it would have less weight than if on formal hearing and proper evidence. I apprehend that is all LORD HARDWICKE, C.J., said, viz., that the hearing was not on the merits; simply that the former decision was given on evidence that was not so strong, would not be sufficient to prevent its being treated as a practical estoppel, so as to be conclusive. I apprehend that when the quarter sessions have decided on the
 D merits, then, according to all the authorities, the decision of quarter sessions would be a final bar—if it was on the real actual merits, i.e., on the facts, it would decide the matter for ever (not so if it rested on a matter of form, which would not be merits; it is, however, unnecessary to decide that).

But when the quarter sessions entered upon the present case and heard it, whether it was that the evidence offered in corroboration did not satisfy them, or that the mother did not produce any evidence of corroboration, or the evidence was otherwise deficient, their decision, which was practically a verdict, was as much on the merits as a verdict of acquittal in a criminal court. Therefore, I think the order of the quarter sessions final. I know of no case to the contrary, and there is the very strong ground of convenience for saying that it is so, for
 F I think that where the parties have gone before two justices, and there is no appeal, and they have decided, it may well be said they might go before other two justices. But where the case is before the quarter sessions on appeal, the first decision having been in favour of the mother, it is still a re-hearing before the superior tribunal, and it would be very inconvenient that where the appellate tribunal have heard the case on the merits it should be capable of being re-opened
 G before two justices, from whom there would be an appeal to the same quarter sessions. That having been the construction adopted from the time of LORD HARDWICKE, C.J., I see no reason to deviate from it, and, consequently, I am of opinion that the justices have acted rightly, and this rule must be discharged.

MELLOR, J.—I am of the same opinion. The law, as it was, is accurately
 H stated in *NOLAN ON THE POOR LAWS* (4th Edn.), vol. 2, p. 315:

“An order of filiation was made by two justices, and afterwards discharged by the sessions upon appeal, after the merits were fully heard; neither two justices, nor a subsequent sessions, can make a new order for this matter against the same person, for being legally acquitted, he cannot be drawn in
 I question again for the same fault. And it would be absurd that when two justices have power by law to make original orders, and when the sessions have power upon appeal from those orders, as well as by original application, that two justices should have power to alter their orders, when those very orders of alteration might be reversed by the sessions.”

That was the state of the law formerly. Then came the Bastardy Act, 1845, s. 6 of which declares what shall be done at the hearing of an appeal at quarter sessions, and it is necessary to determine what is a hearing on the merits. The words of the section prescribe that the justices on an appeal at quarter sessions

"shall hear the evidence of the mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant, and proceed to hear and determine the said appeal in other respects according to law, but shall not confirm the order so appealed against unless the evidence of the said mother shall have been corroborated in some material particular by other testimony to the satisfaction of the said justices in quarter sessions assembled."

I think that the counsel showing cause against the rule rightly stated the effect of that qualification to be that they were to proceed at quarter sessions as before the justices below, but that they should not confirm the order unless corroborative testimony to the satisfaction of the court were adduced. I quite agree with BLACKBURN, J., who said that on the appeal against the order either party may go into evidence, and if he fails to produce sufficient corroborative evidence, the magistrates are the judges, and, when they have heard the general merits of the case, and such other corroborative testimony as has been offered, if any be offered, then I think it is to all intents and purposes a hearing on the merits. In every case cited to the contrary it appears that the judgment was not that of quarter sessions but of petty sessions, which is a plain ground of distinction between those cases and the present. When rightly considered, therefore, I think those cases were correctly decided. I come, therefore, to the conclusion that the decision of the quarter sessions quashing the affiliation order was final, and that the matter could not be again investigated by the justices against whom this rule was obtained.

LUSH, J.—I am of the same opinion. Neither party was concluded by the decision of the petty sessions. If they decline to make an order the mother cannot appeal, and, therefore, it has, I think, been rightly held that she is entitled to renew her application. If on the other hand an order is made, the man adjudged to be the putative father of the bastard child has a right to go to quarter sessions. Then it is both reasonable and convenient to suppose that the decision of the quarter sessions, being a court of appeal, must be binding on the parties. If the argument of counsel supporting the rule were to prevail, the mother might now go before the very same magistrates who made the order, with the very same evidence she advanced at quarter sessions, and it would be competent for them to come to a different conclusion from that arrived at by the latter court, and so, in effect, to overrule the decision of the superior tribunal. It is impossible that that could be the intention of the legislature in framing the statute, and I think the judgment of the court of appeal was final and binding. If there had been no authority on the matter I should have come to the same conclusion. But this will not conflict with the other cases; it is in accordance with them. The adjudication of the quarter sessions was a decision on the merits. As to that point, I have never had a moment's hesitation in forming my opinion. It was a judicial conclusion deliberately arrived at in this matter on evidence, and on the very most important point in the case.

Rule discharged.

A

THE GLENGABER

[COURT OF ADMIRALTY (Sir Robert Phillimore), June 13, 14, 1872]

[Reported L.R. 3 A. & E. 534; 41 L.J. Adm. 84; 27 L.T. 386;
21 W.R. 160; 1 Asp. M.L.C. 401]

B

Shipping—Salvage—Remuneration—Salvor to blame for collision—Salvor partly owned by owners of ship to blame—Salvor employed by ship to blame.

A ship rendering assistance to another which she has injured in collision cannot claim salvage reward if the collision was by her default.

C

The owners, master and crew of a ship which renders assistance to another injured by collision are not deprived of their right to salvage reward by the fact that some of the owners are also owners of the ship by whose default the collision was caused.

A ship rendering salvage assistance is not deprived of her right to reward by the fact that she is employed by another ship whose default renders her employment necessary.

D

Notes. Approved: *The Kafirstan*, [1937] 3 All E.R. 747. Considered: *The Susan v. Luckenbach*, [1951] 1 All E.R. 753. Referred to: *The Duc D'Aumale*, [1904] P. 60.

As to disqualifications from claiming salvage, see 35 HALSBURY'S LAWS (3rd Edn.) 739, 740; and for cases see 41 DIGEST 843, 844.

E

Action for salvage against the steamship *Glengaber*, her cargo and freight, by the owners, masters and crews of the steamtugs, *Black Prince*, *Sir George Grey* and *Warrior*; and a similar action by the owners, master and crew of the ferryboat, *Bee*. Both actions were tried together.

F

At about 10.15 p.m. on April 8, 1872, the *Black Prince* was towing the *Strathmore* up the river Mersey and the *Glengaber*, a steamship of 658 tons, was lying to her starboard anchor in the Sloyne having arrived from Valparaiso with a cargo of wheat, the value of ship, cargo and freight being £22,200. In attempting to cross the bows of the *Glengaber*, the *Black Prince* towed the *Strathmore* into collision with the *Glengaber* and the *Strathmore* sank. The *Glengaber* dragged her anchors and drifted into collision with the *Indus* and both drifted

G

in collision for some time and the *Glengaber* was considerably damaged. The *Bee*, a double ended steamer ferryboat took hold of the *Indus* and afterwards made fast to the *Glengaber* and towed so as to take the strain off the *Indus*. The *Black Prince* then came to the assistance of the *Glengaber* and then the *Sir George Grey* and later the *Warrior* also assisted, so that ultimately by their assistance and that of the *Bee* the *Glengaber* was got clear of the *Indus* and

H

towed into the Alfred Dock at Birkenhead. In a previous action by the owners of the *Glengaber* against the *Black Prince* respecting the collision, the *Black Prince* was held to blame and in the present action the *Black Prince* being found to blame was held not to be entitled to any salvage reward, and the defendants argued that as some of the owners of the *Warrior* were also owners of the *Black Prince* and as that steamtug was found to blame, the *Warrior* was

I

not entitled to be considered as a salvor.

Aspinall, Q.C., and *Gully* for the plaintiffs, owners, etc., of the *Black Prince*, the *Warrior*, and the *Sir George Grey*.*

Pickering, Q.C., and *Potter* for the plaintiffs, owners, etc., of the *Bee*.

Milward, Q.C., and *Myburgh* for the defendants.

SIR ROBERT PHILLIMORE.—There are some points of law upon which the court must express an opinion before it proceeds to assess the quantum of

award which it thinks due to the salvors in this case. I have already decided A that the *Black Prince* failed in her defence as defendant in the suit of collision brought by the *Glengaber* against her, and I must now decide that the *Black Prince*, which was towing the vessel which ran into the *Glengaber*, and which, to some extent at least must be considered with the *Strathmore* as one vessel, and, as the cause of the collision, cannot recover in this court, as a ship rendering salvage service, the necessity of which her own misconduct has occasioned. I B must, however, remember that although the *Black Prince* is not in my judgment entitled, for the reason that I have stated, to be considered as a salvor, I must carefully bear in mind her power in rendering the services which were performed subsequently to the collision, because that power which she possessed must very much affect the judgment of the court with respect to the other salvors. I shall C dismiss the claim of the *Black Prince* with costs.

With regard to the *Warrior*, it has been contended in limine that that vessel is not entitled to be considered as a salvor because upon cross-examination it appeared that some of her owners were also owners of the *Black Prince*. I am not inclined to allow that objection to prevail. I foresee very grave consequences which might result from it, and a very great deal of expense in the conduct of D these suits. But, on principle, I do not think the objection can stand; certainly, it could only stand with regard to those owners themselves, and could not in any way affect the claim of those who were not joint owners of the *Black Prince*, and could not affect the crew who assisted as salvors; but I know of no precedent for saying that because a vessel belongs to the same owner as the E vessel which has done the mischief (being wholly unconnected with the act of mischief itself, and there being no suggestion of any conspiracy—which, of course, would create a totally different state of circumstances—no suggestion of any conspiracy between the two vessels, the one to cause the mischief and the other to assist in remedying it), such a vessel cannot recover salvage reward. I know of no case in which such a suggestion has been put forward, and, F therefore, know of no instance in which it has been sustained, therefore, I do not uphold it in the present case; and I think the *Warrior*, if entitled to salvage, is not disentitled to it because some of her owners are also owners of the *Black Prince*.

I must also say a word with regard to the *Sir George Grey*, which is said to be disentitled to be a salvor, because she was employed by the *Black Prince*, an objection I must also decline to uphold. The *Black Prince*'s misconduct cannot G extend beyond herself. The *Sir George Grey* appears to me to have reasonably supposed in these circumstances, though the communication was more directly with the *Black Prince*, that she was in fact employed on behalf of the *Glengaber*.

With respect to the *Bee*, it is admitted, and very properly admitted, that she has conducted herself from first to last in a manner which entitles her to a considerable salvage remuneration in proportion to her efforts, and also to the H value of the property which she saved. That value appears to amount to £22,000. It is quite true, as has been observed, that there was no risk of life or property in any of these services, not even in the services of the *Bee*, which seem to have extended over eleven hours, during half of which time, without entering into the details of the petition, which has been read by counsel for her owners, and which is assented to with a trifling alteration by the I defendants, her services in the opinion of the court supported by that of the Elder Brethren of the Trinity House, are to be considered as of great value in the preservation of the property. I shall award the *Bee* £300. I think, as I have already said, that the *Warrior* or the *Sir George Grey* were both salvors, but I quite assent that their services were comparatively of a trifling character. The *Sir George Grey*, I think, is entitled to a somewhat larger amount of remuneration than the *Warrior*, as she seems to have been of more service in keeping the *Black Prince* in position at the time the *Black Prince* was rendering assistance,

A therefore, I shall award to the *Sir George Grey* £60, and to the *Warrior* £50; I think they are entitled to their costs, because the case has been properly brought in this court, for various reasons; among others, the principal cause itself being here, it was more convenient to the suitors, and probably a great saving of expense, that all the other suits connected with that cause should also be dealt with by this court, and that is the award I now make.

Judgment for plaintiffs.

LONDON AND NORTH WESTERN RAIL. CO. v. BARTLETT

D [COURT OF EXCHEQUER (Pollock, C.B., Bramwell, Channell and Wilde, BB.), November 18, 1861]

[Reported 7 H. & N. 400; 31 L.J.Ex. 92; 5 L.T. 399; 26 J.P. 167;
8 Jur.N.S. 58; 10 W.R. 109; 158 E.R. 529]

E *Carriage of Goods—Common carrier—Delivery—Order by consignor to deliver goods at consignee's mill—Goods remaining at railway station on orders of consignee—Deterioration of goods—Liability of carriers for non-delivery.*

The plaintiff sold some wheat by sample to be delivered to the purchaser at his mill, and sent it by the defendants' railway. On arrival at a station near the purchaser's mill the wheat was retained there on the instructions of the purchaser that wheat arriving at the station for him should be kept there until he had given a written order for it to be forwarded to the mill. The plaintiff had no knowledge of these instructions. The purchaser, having examined the wheat, refused to accept it and it remained at the station where it deteriorated. In an action by the plaintiff against the railway company for damages for their failure to deliver at the mill and the consequent deterioration of the wheat,

G **Held:** the purchaser had a right to fix the place of delivery and the holding of the wheat at the station operated as a delivery to him; therefore, the defendants were not liable to the plaintiff for breach of contract.

Notes. Referred to: *McKean v. McIver* (1870), 24 L.T. 559; *Metcalfe v. Britannia Ironworks Co.* (1876), 1 Q.B.D. 613; *Bethell v. Clark* (1887), 19 Q.B.D. 553.

H As to delivery of goods by a carrier, see 4 HALSBURY'S LAWS (3rd Edn.) 147 et seq.; and for cases see 8 DIGEST (Repl.) 32 et seq.

Cases referred to in argument :

Foster v. Frampton (1826), 6 B. & C. 107; 9 Dow. & Ry.K.B. 108; 5 L.J.O.S.K.B. 71; 108 E.R. 392; 39 Digest (Repl.) 750, 2294.

I *Wentworth v. Outhwaite* (1842), 10 M. & W. 436; 12 L.J.Ex. 172; 152 E.R. 541; 39 Digest (Repl.) 756, 2345.

Daves v. Peck (1799), 8 Term Rep. 330; 3 Esp. 12; 101 E.R. 1417; 8 Digest (Repl.) 167, 1078.

Dutton v. Solomonson (1803), 3 Bos. & P. 582; 127 E.R. 314; 39 Digest (Repl.) 701, 1925.

Coats v. Chaplin (1842), 3 Q.B. 483; 2 Gal. & Dav. 552; 11 L.J.Q.B. 315; 6 Jur. 1123; 114 E.R. 592; 39 Digest (Repl.) 489, 368.

Freeman v. Birch (1833), 3 Q.B. 492, n.; 1 Nev. & M.K.B. 420; 114 E.R. 596; 8 Digest (Repl.) 168, 1087.

Coombs v. Bristol and Exeter Rail. Co. (1858), 3 H. & N. 510; 27 L.J.Ex. 401; A 6 W.R. 725; 157 E.R. 572; 8 Digest (Repl.) 168, 1093.

Nicholson v. Bower (1858), 1 E. & E. 172; 28 L.J.Q.B. 97; 5 Jur.N.S. 246; 120 E.R. 873; 39 Digest (Repl.) 757, 2346.

Appeal by the defendants from a decision of Northamptonshire County Court.

On Dec. 29, 1860, the plaintiff verbally sold to Badger, a miller at Birmingham, twenty-eight quarters of wheat at 54s. 8d. per quarter by sample, to be delivered to Badger at his mill in Birmingham, carriage paid on, and he sent it to the defendants' station at Brackley for that purpose. Badger's mill was about two miles from Birmingham station, and the plaintiff, on delivering the wheat to the defendants, paid them the "station to station rate" (as it was termed) of 8s. 4d. for the carriage to Birmingham, and an additional charge of 1s. 6d. for the carriage of it by van to Badger's mill. The wheat was dispatched on Jan. 1, 1861, and arrived at Birmingham in due course on the same day. Badger was in the habit of having large quantities of grain sent to the Birmingham station consigned to him, and, in consequence of deficiency of warehouse room at his mill, he had given written instructions from time to time to the defendants at Birmingham that no grain arriving for him at the station, "no matter whether paid delivered or not," was to be sent up to his mill until he had been advised of it, and had given written orders for it to be forwarded, and that, in all cases, any wheat delivered contrary to such instructions would be returned to the station. The last of such notices was given to the defendants in May, 1859, and was posted up in the office of the clerk of the department at the Birmingham station. Consequently, the usage and course of business between Badger and the defendants, was for them to advise him of the arrival of any grain for him at the station, and not to deliver it at his mill until instructed by him so to do. The plaintiff had no knowledge of these notices or usage.

The defendants having duly advised Badger of the arrival of the wheat at their station, and that it remained there at his risk, he, on Jan. 2 or 3, 1861, sent a clerk to the station, who examined the wheat, took a sample from each of the sacks, and remarked to the defendants' servant that it was "rather a roughish lot," but he gave no orders or instructions with regard to it. The wheat remained at the station until Mar. 4, the defendants making no charge on Badger, the consignee, for demurrage or warehousing. On the plaintiff finding that the consignee refused to take the wheat, a correspondence ensued between plaintiff and the defendants, in which the former claimed compensation, which the latter refused. On Feb. 19, they gave the plaintiff notice that the wheat was still at Birmingham waiting his order, and that, if not removed without further delay, warehouse rent would be charged. On Mar. 4, a person in the plaintiff's employment went to the station and saw the wheat, and found it had deteriorated from having remained so long in the sacks without having been dried.

On taking samples of it into the Birmingham market, 40s. per quarter was the highest price offered for it, whereupon he gave the defendants an order to return it to the plaintiff, and paid the carriage of it back to Brackley, where the plaintiff again received it, dried it, and worked it up with other wheat. The plaintiff said that the wheat, when it came back to him, was not worth more than 40s. a quarter. The plaintiff brought an action for damages against the defendants for £24 6s. 10d., for negligently refusing to deliver the wheat to Badger's mill.

The judge directed the jury that the defendants were the agents of the plaintiff, paid by him to carry his goods to Badger's mill at Birmingham, and that they were liable to him for their omission to deliver it, and for the damage arising from the deterioration of the wheat while in their custody; that, as between the plaintiff and the defendants, there had been no delivery of the wheat by the defendants to the consignee so as to terminate their liability; and that the

A difference between the value of the wheat when it was sold by the plaintiff, and the price that it would fetch in the market at the time when it was again returned into his hands, was the proper measure of damage that the plaintiff had sustained by the neglect of defendants to deliver the wheat at the mill on its arrival at their station in Birmingham. The jury found a verdict for the plaintiff for the full amount claimed.

B *Serjeant Hayes* (with him *A. J. S. Hill*) for the defendants.
Field for the plaintiff.

POLLOCK, C.B.—This case has been amply discussed, and I am of opinion that the judgment of the learned judge of the county court, founded on the notion that the carrier was bound to deliver at the mill notwithstanding the order of the consignee to the contrary, is wrong. It is clear that the consignee has the right to direct and fix the place of delivery, and may receive the goods at such place and at any stage of the journey. If the consignor directs goods to be delivered by the carrier at a particular place, there is no contract to deliver at that place and not elsewhere. The contract is to deliver there unless the consignee directs the delivery to be made elsewhere; and the consignee having by his order to the defendants, directed them to retain the wheat at their station, they were not bound to carry it further, and the holding the wheat by them, at the station, in conformity with the consignee's general instructions, operated as a delivery to the consignee. Our judgment must, therefore, be for the defendants.

E **BRAMWELL, B.**—I am entirely of the same opinion. As **WILDE, B.**, has said: What is the contract between the parties? It would be strange to say that it is the law that a carrier cannot deliver at any place but where the consignor has directed. The contract is to deliver at the place named by the consignor, unless the consignee shall direct otherwise; and, provided the goods reach the consignee, the contract is satisfied, wherever the place may be. If that be so, all the questions arising on the relative rights of the parties under the Statute of Frauds are immaterial, and really foreign to the question before us. They may arise between the plaintiff and Badger, but how can the carrier's liability be affected by the question whether or not there was a written contract between the vendor and the vendee? The plaintiff is no worse off than he would have been if the defendants had performed their contract; and the consignee has the same right of rejection, whatever it may be, and neither more nor less. The ruling of the county court judge was clearly wrong.

CHANNELL, B.—The contract was in terms to deliver at the consignee's mill; not that the consignee would accept, but that the carrier would deliver. H That did not disentitle the carrier to deliver short of the mill if so ordered by the consignee. The defendants were so ordered by him in the present case, and, in acting under that order, they are not liable to the plaintiff for breach of contract. Our judgment must be for the defendants.

I **WILDE, B.**—I am of the same opinion. The consignee may at any time dispense with the contract to deliver at a particular place by directing the delivery to be made elsewhere, and this was, in point of fact, done here. Suppose, instead of being delivered at the mill, the wheat had been directed by the consignee to be kept at the station, and it had been kept there for six months, and then, at his own desire, delivered to him; can it be that the carrier, who had done this at the request of the consignee, is to be answerable for any damage accruing to the wheat by the detention during the six months? It is contrary to common sense to suppose so. I see no such distinction between a prior and a subsequent act or arrangement on the consignee's part, with reference to the delivery and

acceptance of the goods, as has been contended for by counsel for the plaintiff. I think that the rights of the plaintiff are not affected, and that he is in no such difficulty as has been suggested, and if he were, it would not, in my opinion, affect the question. The contract was to deliver at the mill, unless the consignee should exercise his right to fix the place of delivery elsewhere; that he did by directing it to be kept at the station, and, in complying with that direction, the defendants are not liable to the plaintiff for breach of contract.

Judgment for defendants.

FARROW v. WILSON AND WIFE

[COURT OF COMMON PLEAS (Willes and Montague Smith, JJ.), June 26, July 5, 1869]

[Reported L.R. 4 C.P. 744; 38 L.J.C.P. 326; 20 L.T. 810;
18 W.R. 43]

Master and Servant—Contract of service—Termination—Death of master or servant.

The general rule of law is that in the case of a contract for personal service the death of either party puts an end to the contract unless there is a stipulation, express or implied, to the contrary.

Notes. Applied: *Graves v. Cohen* (1929), 46 T.L.R. 121. Considered: *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549.

As to the termination of a contract of service, see 25 HALSBURY'S LAWS (3rd Edn.) 483 et seq.; and for cases see 34 DIGEST (Repl.) 65 et seq.

Cases referred to in argument:

Tasker v. Shepherd (1861), 6 H. & N. 575; 30 L.J.Ex. 207; 4 L.T. 19; 9 W.R. 476; 158 E.R. 237; 1 Digest (Repl.) 630, 2113.

Boast v. Firth (1868), L.R. 4 C.P. 1; 38 L.J.C.P. 1; 19 L.T. 264; 17 W.R. 29; 12 Digest (Repl.) 425, 3271.

R. v. Peck (1698), 1 Salk. 66; 91 E.R. 61; 12 Digest (Repl.) 666, 5159.

Demurrer in an action brought by the plaintiff against the defendants as administrator and administratrix of Price Pugh, deceased.

The declaration stated that heretofore in the lifetime of Price Pugh, in consideration that the plaintiff would enter into the service of Price Pugh and serve him in the capacity of a farm bailiff at certain weekly wages, together with certain benefits, and of a certain residence in a farm house until the service should be determined as hereinafter mentioned, Pugh promised the plaintiff to retain him in his service in the capacity, and for the rewards aforesaid, until the expiration of six months after notice given by Pugh or the plaintiff to the other of them, to put an end to such service, or that, in case Pugh should put an end to such service without such notice, he should pay to the plaintiff such wages at the rate for the six months from the time of the end of such services. The plaintiff entered into the service and continued therein until the death of Pugh, and had always been ready and willing to continue in the service of his administrators in the capacity and on the terms aforesaid, of which the defendants always had notice. Yet the defendants wrongfully dismissed the plaintiff from the service without

A notice and without paying the plaintiff six months' wages. To this the defendants demurred, on the ground that the said promise in the declaration mentioned was in law a promise determined by the death of Pugh.

Bridge for the defendants.

Bush Cooper for the plaintiff.

B

Cur. adv. vult.

July 5, 1869. **WILLES, J.**, delivered the following judgment of the court.—It was not on account of any doubt that we had at the time of the argument that we have deferred giving judgment in this case. We are of opinion that our judgment ought to be for the defendants. The declaration alleges a contract between the plaintiff and the defendants' testator. The contract was for personal service, and it is not stated in the declaration that either party, either expressly or impliedly, contracted for his executors or administrators. The general rule of law is that, in the case of a contract for personal service, the death of either party puts an end to the contract unless there is a stipulation, express or implied, to the contrary. There being no such stipulation in the present case, the general rule must apply, and our judgment must consequently be for the defendants.

Judgment for defendants.

E

LAWRENCE v. JENKINS

F [COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Mellor and Archibald, JJ.), January 17, April 22, 1873]

[Reported L.R. 8 Q.B. 274; 42 L.J.Q.B. 147; 28 L.T. 406;
37 J.P. 357; 21 W.R. 577]

G *Boundary—Fence—Prescriptive obligation to maintain fence—Liability for damage to cattle escaping through gap.*

The defendant occupied a close of land adjoining one occupied by the plaintiff and separated from it by a fence on the defendant's land. The defendant sold the foliage of the wood on his close to H., but continued to occupy the close himself. H. felled a tree near the fence so negligently that it fell over the fence, making a gap in it. Two of the plaintiff's cows escaped through the gap in the fence into the defendant's close, and, having fed on the foliage of a yew tree which had been felled by H., died. The defendant had no notice of the fence having been broken down. There was evidence that, for more than forty years the defendant and his predecessors had repaired the fence whenever necessary, and that on several occasions during the previous nineteen years the fence had been repaired by the defendant and his predecessors on notice being given by the occupier of the plaintiff's close. Whenever the fence was so repaired, it was to prevent cattle on the plaintiff's close escaping into the defendant's close.

I

Held: the defendant was bound by prescription to maintain the fence without notice to repair and was answerable for damage sustained by cattle escaping from the plaintiff's close, act of God and vis major only excepted; accordingly, the defendant was liable to the plaintiff, notwithstanding he had no knowledge of the injury to the fence.

Notes. Applied: *Sneesby v. Lancashire and Yorkshire Rail. Co.* (1874), L.R. 9 Q.B. 263. Considered: *Crowhurst v. Amersham Burial Board*, [1874-80] All E.R. Rep. 89. Distinguished: *Corry v. Great Western Rail. Co.* (1880), 6 Q.B.D. 237. Applied: *Halestrap v. Gregory* (1895), 43 W.R. 507. Referred to: *Coaker v. Willcocks*, [1911] 2 K.B. 124; *Symons v. Southern Rail. Co.*, [1935] All E.R. Rep. 296.

As to the erection, maintenance and repair of fences, see 3 HALSBURY'S LAWS (3rd Edn.) 370 et seq.; and for cases see 7 DIGEST (Repl.) 286 et seq.

Cases referred to:

- (1) *Butler v. Hunter* (1862), 7 H. & N. 826; 31 L.J.Ex. 214; 10 W.R. 214; 158 E.R. 702; 34 Digest (Repl.) 197, 1386.
- (2) *Longmeid v. Holliday* (1851), 6 Exch. 761; 20 L.J.Ex. 430; 17 L.T.O.S. 243; 155 E.R. 752; 39 Digest (Repl.) 564, 929.
- (3) *Star v. Rookesby* (1710), 1 Salk. 335; 91 E.R. 295, Ex. Ch.; 7 Digest (Repl.) 286, 130.
- (4) *Boyle v. Tamlyn* (1827), 6 B. & C. 329; 9 Dow. & Ry. K.B. 430; 5 L.J.O.S.K.B. 134; 108 E.R. 473; 7 Digest (Repl.) 297, 186.
- (5) *Nowel v. Smith* (1599), Cro. Eliz. 709; 78 E.R. 943; 7 Digest (Repl.) 297, 184.
- (6) *Anon.* (1674), 1 Vent. 264; 86 E.R. 177; 7 Digest (Repl.) 298, 193.
- (7) *Rooth v. Wilson* (1817), 1 B. & Ald. 59; 106 E.R. 22; 2 Digest (Repl.) 303, 105.
- (8) *Powell v. Salisbury* (1828), 2 Y. & J. 391; 148 E.R. 970; 2 Digest (Repl.) 302, 101.

Also referred to in argument:

Hole v. Sittingbourne and Sheerness Rail. Co. (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest (Repl.) 202, 1424.

Appeal by the plaintiff from a decision of Newport County Court, in an action brought by the plaintiff to recover £40 damages against the defendant for the loss of two of his cows which had been killed through eating the foliage of a yew tree which had been felled in a wood of the defendant which adjoined the plaintiff's land, into which wood the cows escaped from the plaintiff's land in consequence of the neglect of the defendant to repair a fence belonging to him dividing the wood and land and which fence the defendant of right ought to maintain in repair.

The plaintiff was possessed of and occupied a close of land, being part of a farm called Ty Isha farm in the county of Monmouth, and the defendant was possessed of and occupied another close of land (being woodland) adjoining the close of the plaintiff, and separated therefrom by a fence which was situate on the defendant's close, and was the property of the defendant. In October, 1871, the defendant sold the foliage of the wood on his close to one Higgins, who, accordingly, by his servants, felled the trees and underwood growing thereon; but the defendant did not part with any portion of the soil of his close, which he continued to occupy.

A short time before Dec. 27, 1871, some servants of Higgins felled a beech tree standing near the fence in such a manner that it fell over the fence and broke down a large part thereof. The beech tree was felled in a negligent manner. While the beech tree lay on the fence, the branches of the tree filled up the gap made by its fall; but a few days afterwards those branches were removed by some servants of Higgins, and after they were so removed, until Dec. 27, there was a considerable gap or opening in the fence sufficiently large for cattle to pass from one close to the other, during all which time the fence was out of repair, but it was not brought to the knowledge of the defendant or his bailiff that the fence had been so broken. On Dec. 26, some servants of Higgins felled a yew tree, being a few yards from the fence and near the spot where the beech tree had been felled. The yew tree was allowed to remain during the night of Dec. 26 in the place where it had been felled. During the night of Dec. 26, the plaintiff's

A cows then being lawfully on the plaintiff's close, escaped through the gap or opening in the fence out of the close of the plaintiff into that of the defendant, and in the morning of Dec. 27 they were found on the close of the defendant near the yew tree. About mid-day on Dec. 27 the cows died; and the county court judge found that they died from eating some of the foliage of the yew tree, which, when eaten to excess, was destructive to cattle. At that time of the year there
B was very little verdure or green food in the fields, and the cows, from being foddered on dry food, were the more inclined to browse the green foliage.

Evidence was given that, for more than forty years, the fence had been repaired whenever repairs were necessary by the owner and occupiers of the defendant's wood, and also that, on several occasions during the last nineteen
C years, the fence had been repaired by the defendant and his predecessors in estate, on notice being given to him or his bailiff by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired, it was for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of it into the close of the defendant. It was contended for the plaintiff that (i) the facts established an obligation on the part of the defendant to repair and keep
D in repair the fence for the purposes aforesaid; (ii) the damage was not too remote to enable the plaintiff to maintain this action; (iii) the defendant was liable in this action. Each of these points was contested by or on behalf of the defendant, who also contended that the damage was attributable to the felling of the yew tree, relying on *Butler v. Hunter* (1).

The judge found as a fact that there was an obligation on the part of the
E defendant to repair, and keep in repair, the fence for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of the same into the close of the defendant. He also considered that the damage was not too remote to enable the plaintiff to maintain this action. He found as a fact that the escape of the cows from their own pasture was caused by the negligence of the servants of Higgins, either in not so felling the beech as to prevent its
F falling on the hedge, or, if that was not preventible, in not temporarily fencing round the gap until the tree could be moved and the gap be properly stopped; and he was of opinion that it was the duty of Higgins to so cut and remove the wood as not to injure the rights of the plaintiff. He also found that neither defendant nor his bailiff, to whom the management of this woodland was entrusted, received notice of the fence having been broken down, and he held, on the authority
G of *Longmeid v. Holliday* (2), and *Butler v. Hunter* (1), that Higgins, and not the defendant, was responsible for the loss of the cows, as the result of his servant's negligence, and directed a nonsuit to be entered. In case of this decision being reversed on appeal, he assessed the plaintiff's damages at £40.

Herschell, Q.C. (with him *Petheram*) for the plaintiff.

H *Michael* for defendant.

Cur. adv. vult.

April 22, 1873. **MELLOR, J.**, read the following judgment of the court.—
The only point in this case as to which we felt any degree of hesitation at the time of the argument was the question whether or not the defendant was entitled to a
I reasonable time to repair the fence after he might or ought to be taken to have had notice that it had been broken down. For, assuming that the obligation to which he was subject was to maintain at all times, and without notice to repair it, a sufficient fence for the benefit of the plaintiff's close, we had no doubt that the learned judge of the county court was wrong in holding that the defendant was not legally responsible for the loss of the plaintiff's cows.

We concur in opinion with the learned judge that the damage was not too remote, but we think that the cases cited by him: *Longmeid v. Holliday* (2), and *Butler v. Hunter* (1); are inapplicable; and, without expressing any opinion

whether an action might not also have been maintainable against Higgins, we are of opinion that, if the obligation to maintain the fence be such as we have assumed, the defendant would be liable in this action.

On further consideration we have come to the conclusion, on the evidence set forth in the Case, that the defendant was bound, at his peril, to maintain at all times, and without notice to repair it, a sufficient fence; and that, except in the case of damage by the act of God or vis major, to which different considerations would apply, he would be answerable for damage sustained by cattle escaping from the plaintiff's close by reason of the defective state of the fence, and proximately due to that cause. At common law the owners of adjoining closes are not bound to fence either against or for the benefit of each other; but, in the absence of fences, each owner is bound to prevent his cattle or other animals from trespassing on his neighbour's premises. By prescription, however, a landowner may be bound to maintain a fence on his land for the benefit of the occupier of the adjoining close. This is described by GALE in his work on EASEMENTS as in the nature of a spurious easement affecting the land of the party who is bound to maintain the fence: GALE ON EASEMENTS (4th Edn.) p. 460, *Star v. Rookesby* (3); *Boyle v. Tamlyn* (4). A party entitled by prescription to the benefit of the fence might formerly have compelled the adjoining owner to repair it by means of a writ of curia claudenda (FITZHERBERT, NATURA BREVIVM, 127), and have recovered damages as well for the non-repair; and a plea in trespass for injury done by cattle that the plaintiff is bound by prescription to fence against the defendant's cattle, is a good plea: *Nowel v. Smith* (5); the party bound by prescription to maintain the fence being answerable to the owner for whose benefit it is maintained for all damage reasonably attributable to its defective condition.

It was held, therefore, in *Anon* (6) that, where a horse of the plaintiff escaped into the defendant's field through defect of a fence which the defendant was bound to maintain, and was killed by falling into a ditch in defendant's field, the defendant was liable; and in a later case, *Rooth v. Wilson* (7), that it made no difference that the plaintiff was only a gratuitous bailee of the horse which escaped and was killed. The same view of the law was acted on in *Powell v. Salisbury* (8), where the defendant was held liable for the loss of cattle which escaped from an adjoining field through a defective fence which he was bound to repair, and were killed on his premises by the falling of a haystack. In all these cases, however, the prescription to maintain and repair obviously implies the pre-existence of the fence, and the right consequently to have it always existing as a fence; in other words, in a condition sufficient to protect the owner entitled to it from trespasses by his neighbour's cattle, and renders it, we think, incumbent on the party on whom the prescriptive obligation is imposed to repair it in time to prevent its becoming defective, and subjects him also to all risks of injury that may be done to it by strangers or trespassers.

We think, therefore, that as the true nature of the prescription is that the defendant was bound at his own risk to have a sufficient fence always existing, he was liable to the plaintiff, notwithstanding he had no knowledge of the injury done to the fence, and, consequently, that the decision of the county court should be reversed, and judgment given for the plaintiff.

Appeal allowed.

A
COLLARD v. SOUTH EASTERN RAIL. CO.

[COURT OF EXCHEQUER (Pollock, C.B., Bramwell, Martin and Channell, BB.), May 4, 1861]

B [Reported 7 H. & N. 79; 30 L.J.Ex. 393; 4 L.T. 410;
7 Jur.N.S. 950; 9 W.R. 697; 158 E.R. 400]

Carriage of Goods—Damage to goods—Liability of carrier—Measure of damages—Depreciation in market price between date when delivery ought to have been made and date when goods rendered fit for sale.

C The plaintiff sent by the defendants' railway some hops which, during the journey, became wet and damaged with the result that the consignee refused to accept them. The defendants kept them for some days in order to dry them, but when they were fit for sale the market price had dropped.

Held: the plaintiff was entitled to recover in respect of the damage which the hops had sustained the difference between the market price when they ought to have been delivered and that when they had been dried.

D *Smeed v. Foord* (1) (1859), 1 E. & E. 602, distinguished.

Notes. Considered: *The Parana* (1877), 2 P.D. 118.

As to measure of damages for delay in delivery of goods, see 4 HALSBURY'S LAWS (3rd Edn.) 151 et seq.; and for cases see 8 DIGEST (Repl.) 151 et seq.

E Cases referred to:

(1) *Smeed v. Foord* (1859), 1 E. & E. 602; 28 L.J.Q.B. 178; 32 L.T.O.S. 314; 5 Jur.N.S. 291; 7 W.R. 266; 120 E.R. 1035; 17 Digest (Repl.) 128, 360.

(2) *Hadley v. Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

F Also referred to in argument:

Le Peintur v. South Eastern Rail. Co. (1860), 2 L.T. 170; 8 Digest (Repl.) 152, 959.

Rule Nisi obtained by the plaintiff for a new trial in an action against the defendant company for damage to hops carried by them, and for the difference in the market price which had occurred before their re-sale.

G At the trial, before ERLE, C.J., at Kent Assizes, the following facts appeared. The plaintiff, a hop-grower in Kent, had sold to Messrs. Crosier, of the Borough Market, London, eight pockets of hops, to be delivered at the Bricklayer's Arms station, London, at £18 per cwt., according to sample. The hops were sent to Pluckley station on the defendants' railway on Oct. 20, 1860, consigned to Messrs. Crosier, whose carman applied for them at the Bricklayer's Arms station on Oct. 23, but was told that they could not be found. He applied again on the following day, and received the same answer. On Oct. 29 he called again, and found them in an open van. On examination it appeared that the hops in some of the bags were partially stained, apparently from lying in a wet truck. On the same day the hops were removed to Messrs. Crosier's, who refused to receive them on account of their damaged condition, and by the custom of the hop-market they had a right to reject them. The plaintiff caused them to be dried, and when saleable, which was not until Nov. 19, sent them to a factor, who valued them at £8 per cwt. Between Oct. 29 and Nov. 19 the market price fell from £18 to £9 per cwt. The damage to the hops caused a further diminution in value of £3 or £4, but for actual use by a brewer the hops, when dried, were as good as ever. Evidence was adduced on the part of the defendant to prove that the quantity of hops actually damaged by the wet did not exceed eight pounds a pocket in six pockets, and that taking the value of the hops at £18 per cwt., the damage was covered by the amount paid into court.

The learned judge told the jury that the plaintiff was entitled to damages for the deterioration in the value of the hops by reason of the wet, and also in respect of the difference in value which occurred between the time when they ought to have been delivered and when they were rendered saleable by drying. The jury found a verdict for the plaintiff with £18 damages, beyond the amount paid into court, in respect of the depreciation in the quality of the hops, and £65 damages in respect of the depreciation in their value by reason of the fluctuation of the market. A verdict was entered for both those sums, and leave was reserved to the defendants to move to reduce the damages by the sum of £65.

Bovill, Q.C., and *G. Francis* showed cause against the rule.

Lush, Q.C., and *Garth* supported the rule.

MARTIN, B.—I am of opinion this rule should be discharged, and I own that it seems to me to be a clear case. The plaintiff sent these hops to be carried by the defendants to London on a certain day, and to be there delivered in proper condition to the consignee. The price of them then in the market was so much. The hops were not, however, delivered on that day, because, from their having sustained damage, they were not in a fit state to be delivered or sold, but were delivered on a certain other day afterwards, when the market price had fallen, and the plaintiff seeks to recover the difference in the value at the time they ought to have been delivered and the price at the time when they had been dried. If this is not direct and immediate damage, I cannot understand what is. It was contended on the part of the defendants that they had no notice that these hops were sent up for sale. But that will not relieve them from responsibility. *Smeed v. Foord* (1) is quite correct, no doubt, but it is distinguishable from this. There, as **POLLOCK, C.B.**, observed during the argument of this case, the damages were consequential, here it is direct. I have his Lordship's authority for stating that he concurs in our opinion that this rule should be discharged.

CHANNELL, B.—I agree with the law as laid down in *Hadley v. Baxendale* (2), and also with *Smeed v. Foord* (1); but both of those cases are distinguishable from the present. In *Smeed v. Foord* (1) the damage claimed in respect of the fall in the market price was remote and consequential, but in this case the hops were delivered in a sound state to be carried by the defendants to London. The hops, during the journey, and it must be taken from the defendants' negligence, became wet and injured. The plaintiff's consignee refused to take them in that damaged state; and in fact they were, in that damaged condition, unsaleable. The defendants kept them for some time, probably to dry them, before the delivery to the plaintiff's consignee, who would not receive them in such a wet state. The market price had, in that interval, fallen. The question is whether the defendants are liable for that head of damage. When the hops should have been duly delivered to the plaintiff's consignee by the defendants they were worth £65 more in the market than when they were actually delivered after they had been dried. This appears to me to be direct damage for which the defendants are liable. The first time the hops came to the plaintiff's possession in anything like proper condition, the hops had fallen in the market price to that extent, and the delay was admitted to be occasioned by the defendants' want of due care in not properly protecting them during the journey from wet. If this is not direct damage, it is difficult to see what test can be resorted to to ascertain it.

POLLOCK, C.B., and **BRAMWELL, B.**, had previously left the court.

Rule discharged.

A

WALLIS v. LITTELL

[COURT OF COMMON PLEAS (Erle, C.J., Williams, Byles and Keating, JJ.),
November 9, 18, 1861]

B

[Reported 11 C.B.N.S. 369; 31 L.J.C.P. 100; 5 L.T. 489;
8 Jur.N.S. 745; 10 W.R. 192; 142 E.R 840]

Evidence—Admissibility—Oral agreement condition precedent to subsequent written agreement.

C

By an oral agreement the defendant agreed to assign his farm to the plaintiff if the landlord consented (the landlord's consent to any assignment being one of the terms of the lease under which the defendant held his farm), and it was further agreed that, if the landlord did not consent to the assignment, the agreement should be void. Later the parties entered into a written agreement which did not refer to the necessity for the landlord's consent. The defendant did not obtain the consent and refused to assign the farm. In an action by the plaintiff on the written agreement,

D

Held: the oral agreement was in its nature a condition precedent which suspended the obligation under the written agreement, and not a contemporaneous agreement in variation or defeasance of it, and, therefore, it was admissible in evidence.

E

Notes. Referred to: *Wake v. Harrop* (1862), 1 H. & C. 202; *Lindley v. Lacey* (1864), 17 C.B.N.S. 578; *Abrey v. Cruz* (1869), L.R. 5 C.P. 37; *Johnson v. Appleby* (1874), 30 L.T. 261; *Hitchings and Coulthurst Co. v. Northern Leather Co. of America and Doushkess*, [1914] 3 K.B. 907.

As to the admissibility of an oral agreement varying a written agreement, see 11 HALSBURY'S LAWS (3rd Edn.) 379, 402; and for cases see 17 DIGEST (Repl.) 342.

F

Cases referred to:

(1) *Pym v. Campbell* (1856), 6 E. & B. 370; 25 L.J.Q.B. 277; 2 Jur.N.S. 641; 4 W.R. 528; 119 E.R. 903; sub nom. *Pim v. Campbell*, 27 L.T.O.S. 122; 17 Digest (Repl.) 222, 222.

(2) *Davis v. Jones* (1856), 17 C.B. 625; 25 L.J.C.P. 91; 4 W.R. 248; 139 E.R. 1222; 17 Digest (Repl.) 342, 1478.

G

Also referred to in argument:

Turner v. Power (1828), 7 B. & C. 625; 108 E.R. 856; sub nom. *Turner v. Ford*, 6 L.J.O.S.K.B. 122; 30 Digest (Repl.) 468, 1101.

Whitford v. Tutin (1834), 10 Bing. 395; 4 Moo. & S. 166; 3 L.J.C.P. 106; 131 E.R. 957; 22 Digest (Repl.) 231, 2216.

H

Buxton v. Cornish (1844), 12 M. & W. 426; 1 Dow. & L. 585; 13 L.J.Ex. 91; 2 L.T.O.S. 313; 152 E.R. 1264; 22 Digest (Repl.) 270, 2728.

Murray v. Earl of Stair (1823), 2 B. & C. 82; 3 Dow. & Ry.K.B. 278; 107 E.R. 313; 17 Digest (Repl.) 223, 229.

I

Cross-Rules Nisi, one obtained by the defendant to enter a nonsuit in or for a new trial of the action on the first issue, and the other by the plaintiff calling on the defendant to show cause why the verdict for him on the second issue should not be set aside and a verdict entered for the plaintiff, in an action for breach of an agreement to assign a farm.

The defendant before February, 1861, occupied a farm belonging to Lord Sidney, under a lease, containing a power to assign it if Lord Sidney should consent thereto. Being desirous of parting with it, he told the plaintiff of his intention, and intimated that he would let it to him. The plaintiff later met the defendant, and offered him £200 for the live and dead stock, whereupon the

defendant told him that he could not assign the farm without Lord Sidney's consent, as there was a clause in the lease to that effect; but that if he could get the consent he would do so. The matter remained open for a few days, when the plaintiff and defendant again met, and it was then agreed that the plaintiff was to pay the £200, and that the defendant should write to Lord Sidney's steward, stating that he contemplated letting the farm to the plaintiff, and requesting Lord Sidney's consent. The plaintiff said he would also call upon the steward, and satisfy himself that there would be no objection. The following agreement was subsequently entered into:

"Memorandum—Feb. 26, 1861.—Agreed with Mr. Thomas Wallis to transfer Hoyman's farm with the house and cottages thereto belonging, upon the terms and conditions of the agreement under which the same is held under Lord Sidney. Mr. Wallis to have immediate possession and to pay the rent, taxes and tithes from Michaelmas, 1860, and to pay the sum of £200 for the live and dead stock as enumerated."

This agreement was signed by the plaintiff and the defendant and the plaintiff then gave a cheque for £100 to the defendant. Upon Lord Sidney being asked to give his consent he refused, consequently the defendant was unable to assign the farm, and afterwards called upon the plaintiff and returned the £100; this the plaintiff accepted, but subsequently brought the present action for not assigning the farm according to the agreement. The declaration stated that the defendant was possessed of a farm called Hoyman's farm, with a house and cottages thereto belonging, and live and dead stock thereon, which farm he held under an agreement with Lord Sidney, and on Feb. 26, 1861, the plaintiff and the defendant agreed that the defendant should transfer to the plaintiff the farm, with the house and cottages thereto belonging, upon the terms and conditions of the agreement under which the same was then held by the defendant under Lord Sidney; and that the plaintiff should have immediate possession, pay the rent, taxes and tithes from Michaelmas, 1860, and should pay the sum of £200 for the live and dead stock as enumerated. It was averred that all things were done necessary to entitle the plaintiff to have the agreement performed by the defendant and to sue him for the breach thereof hereinafter mentioned, yet the defendant after the making of the agreement, and before the time for the plaintiff to prepare a transfer of the defendant's interest in the farm had arrived, refused to transfer the farmhouse and cottages to the plaintiff, or to give him possession thereof, or to sell or deliver to him the live and dead stock, or any part thereof, and dispensed with the plaintiff preparing an assignment or transfer of the defendant's interest in the farm, whereby the plaintiff was deprived of divers profits which he might and would have made from the purchase of the farm and stock, and the interest on the money prepared by him to complete the purchase, and divers expenses incurred by him in preparing to complete the said purchase on his part became and were wholly lost and useless to him. The plaintiff claimed £100.

The defendant pleaded: 1. No agreement as alleged. 2. That at the time of the making of the agreement in the declaration mentioned it was agreed by and between the plaintiff and the defendant, and the agreement in the declaration mentioned was made subject to the terms and conditions that it should be null and void if Lord Sidney should not, within a reasonable time after making the agreement, consent to agree to the transfer as in the declaration mentioned, and then he said that Lord Sidney would not consent within such reasonable time as aforesaid, or agree to the transfer and refused to do so, although often requested so to do, of all which premises the plaintiff had notice. 3. Inducement to make the alleged agreement by the fraud of the plaintiff. 4. That after the alleged agreement, and before any breach thereof, the plaintiff exonerated and discharged the defendant from his agreement, and from the performance of the

A same. 5. That before action the defendant delivered to the plaintiff and the plaintiff accepted and received from the defendant a certain large sum of money, to wit, the sum of £100 in full satisfaction and discharge of the plaintiff's claim. Issues thereon.

B At the trial before KEATING, J., with a jury in London, in June, 1861, a verdict was found for the plaintiff on the first, third, fourth and fifth issues; and for the defendant on the second. The damages were assessed at £64, with leave for the plaintiff to enter a verdict for £64 on the second issue, and for the defendant to move for a nonsuit.

C Cross-rules were obtained, one calling upon the plaintiff to show cause why the verdict should not be set aside, and instead thereof a nonsuit entered in pursuance of leave, on the ground that the agreement under which the premises, mentioned in the declaration were held by the defendant under Lord Sidney was not produced, or why a new trial should not be granted on the ground that the verdict on the first issue was against the evidence on which the jury found the issue on the second plea for the defendant; and the other calling on the defendant to show cause why the verdict found for him on the second issue should not be set aside, and instead thereof a verdict entered thereon for the plaintiff for £64 pursuant to leave reserved, on ground that the parol agreement mentioned in the second plea was inadmissible to vary the written contract, or why judgment should not be entered for the plaintiff on the plea non obstante veredicto, on the ground that the agreement mentioned in the plea was not stated to be in writing.

E *Huddleston, Q.C. (Holl with him)* for the plaintiff.
Serjeant Shee (Macdonnell with him) for the defendant.

Cur. adv. vult.

Nov. 18, 1861. **ERLE, C.J.**, delivered the following judgment of the court.—
At the time when the parties made the written agreement to assign the farm with immediate possession, there was an arrangement that the written agreement was to be void if Lord Sidney, the landlord, did not consent to the assignment. In an action for not assigning, the pleas were: First, non assumpsit; secondly, the oral agreement, and that Lord Sidney did not consent. The jury found that Lord Sidney did not consent, and that the oral agreement was made. Thereupon the question has been whether the evidence of the oral agreement was admissible; if it was, the verdict on both pleas ought to be found for the defendant, and there would be no judgment non obstante veredicto on the second plea. We are of opinion that it was admissible.

I In *Pym v. Campbell* (1) and *Davis v. Jones* (2), it was decided that an oral agreement to the same effect as that relied on by the defendant might be admitted without infringing on the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation. It was contended for the plaintiff that the present case could be distinguished from the cases cited, on the ground that the intention here was that the written agreement should have the same effect, but should be liable to be defeated if the event mentioned in the oral agreement happened, and the stipulation named for the immediate possession, and the facts that money was paid by the plaintiff, and a cow sold by him in part execution of the written agreement, were relied on to show that the oral agreement was a defeasance merely; and if so, it would be in contradiction of the written agreement, which was in terms absolute.

But this is a question of fact; and we think there is evidence that the fact is not so. The evidence shows that the defendant introduced the oral agreement for his benefit, and has treated the written agreement as suspended, having always retained possession of the farm; also the subject-matter of the two agreements is

strong to show that the oral suspended the written agreement from the beginning, and was not in defeasance of it; for if the written agreement was to assign, the possibility of assigning was supposed to depend on Lord Sidney's consent, and the oral agreement that the written agreement should be void if he did not consent, is in its nature a condition precedent.

The defendant in effect says: "If I have the power to act I will agree; if I have no power to act, I will make no agreement at all." On those grounds we think that the verdict for the defendant on the second plea should stand, and the rule for judgment non obstante veredicto be discharged. We also think that this would have entitled the defendant to a verdict on non assumpsit, and that the rule to enter the verdict for the defendant on non assumpsit, by reason of the non-production of the lease by Lord Sidney, should be discharged.

According to our construction, both parties agree to assign the lease, to be held on the terms of Lord Sidney's lease, not to assign in a particular manner, to be ascertained by the terms of that lease. The agreement is set out in the declaration in its literal terms, and might be performed literally by the assignment in the terms of the agreement without producing Lord Sidney's lease. If upon examination it should appear that the pleadings require amendment, the court will exercise its jurisdiction, and amend them according to the evidence and our consideration of the effect of it.

Orders accordingly.

SINGLETON v. WILLIAMSON (No. 1)

[COURT OF EXCHEQUER (Pollock, C.B., Bramwell, Channell and Wilde, BB.), November 21, 1861]

[Reported 7 H. & N. 410; 31 L.J.Ex. 17; 5 L.T. 644; 26 J.P. 88; 8 Jur.N.S. 60; 10 W.R. 174; 158 E.R. 533]

Animal—Cattle—Distress damage feasant—Cattle trespassing on land through defective fence of landowner—Subsequent breaking through sound fence and doing damage.

The plaintiff's cattle escaped from his land into an adjoining close of the defendant, due to the defendant's neglect to keep in repair the fence between his close and the plaintiff's land. The cattle strayed from the close over a fence which was in good repair into the defendant's corn, damaging the corn. The defendant distrained the cattle as damage feasant and impounded them. On an action of trover by the plaintiff,

Held: the cattle had escaped in the first place as the result of the defendant's omission to fence his land properly; consequently, he had no right to distrain them; and, therefore, the plaintiff was entitled to recover.

Notes. As to distress damage feasant, see 1 HALSBURY'S LAWS (3rd Edn.) 668, 675; and for cases see 18 DIGEST (Repl.) 433 et seq.

Cases referred to in argument:

Powell v. Salisbury (1828), 2 Y. & J. 391; 148 E.R. 970; 2 Digest (Repl.) 302, 101.

Holbach v. Warner (1623), Cro. Jac. 665; Palm. 331; 79 E.R. 576; 7 Digest (Repl.) 298, 191.

Rule Nisi obtained by the defendant for a new trial on the ground of misdirection in an action for trover and detinue for cattle. The defendant

A pleaded: 1. Not Guilty. 2. That the cattle were not the plaintiff's. 3. Non-detinet. 4. Justification by reason of distress damage feasant.

The plaintiff was the occupier of land called Hail Moor, which in 1813 was awarded to him by certain inclosure commissioners. By this award the plaintiff was bound to erect and keep in repair a fence to the south of this land, which was bounded on the north by the river Irt. The defendant occupied land **B** bounded on the south by this river, so that the river divided the plaintiff's land from the defendant's. In 1815 the Inclosure Commissioners for the parish of Gosforth, awarded this land by a sale thereof to defendant's wife's father, a Mr. Butler.

By the Act (4 Geo. 3) for inclosing the lands of the parish of Gosforth, s. 13 required the commissioners

C "to allot and set out by marks and bounds so much of the commons and waste grounds as shall seem necessary, and to sell the same, and the purchasers thereof and their heirs and assigns shall be liable to make and keep in repair such part of the ring or outer fences as shall be directed by the said commissioners."

D The commissioners by their award required "fences to be erected and kept in repair east and south" of the lands so allotted to Butler, which land was called Bridge Green. Butler had since died, and the defendant was now the owner of Bridge Green. On the north of Bridge Green the defendant had a piece of arable land which was bounded on the south by a fence in good repair. In June, **E** 1861, six or seven of the plaintiff's beasts in Hail Moor crossed the river Irt, and got into the defendant's land called Bridge Green, the fence being out of repair, and thence from Bridge Green, over the fence that was in good and perfect repair, into the defendant's arable land, where they did damage. The defendant caused them to be distrained as damage feasant and impounded, for which this action was brought.

F The cause was tried at Carlisle at the Summer Assizes of 1861, before WILDE, B., who told the jury that it was the defendant's duty to maintain a fence in Bridge Green along the margin of the river, and this in many places was shown to be level with the ground. If the jury believed the plaintiff's cattle crossed the river into Bridge Green and thence into the corn field, it was immaterial whether the fence of the corn field or arable land was in repair or **G** not. The jury returned a verdict for the plaintiff for £1 10s. 6d. A rule nisi having been obtained for a new trial on the ground of misdirection, first, in directing the jury that it was immaterial what was the state of the fences of the field, or whether the cattle were taken damage feasant; secondly, in discharging the jury from giving any verdict as to the second count,

H *Mellish, Q.C., and T. Jones* showed cause against the rule.
Edward James, Q.C. (Kemplay with him) supported the rule.

POLLOCK, C.B.—I am of opinion that this rule should be discharged. It was a motion for a new trial on an alleged misdirection of WILDE, B., to the jury. When application was made for the rule it certainly appeared to me to be not only a case of hardship upon the defendant, but one which was worthy of some consideration. After hearing the argument upon it, I have come to the conclusion that WILDE, B., was correct, and that it is in accordance with the whole policy of the law of England upon the subject. When any wrong is done or damage sustained, the law inquires when was the first wrong done, who was the cause of first setting it in motion, or what was the origin of the mischief? **I** In this instance the owner of the close called Bridge Green was bound so to fence it as to prevent his neighbour's cattle from getting into it. This it appears he neglected to do; there was little or no fence at all there in some

places; the consequence was, that the plaintiff's cattle got into the close called Bridge Green, and thence on over a fence into the defendant's corn field, where they were distrained by him as damage feasant. It was argued for the defendant that it was not a necessary consequence of their being on the corn land that their original escape was by the defendant's default in fencing Bridge Green as against the river; but, if a man dig a pit in a highway, it is not a necessary consequence that a passenger should fall into the pit, but if he does, it is sufficient if the accident is the result of something that ought not to be done. I think the learned judge's summing-up was in this case correct.

BRAMWELL, B.—I am entirely of the same opinion. The defendant was bound to fence his own land as between himself and the plaintiff. The defendant is as much obliged to fence his land to keep the plaintiff's cattle in his (the plaintiff's) own land as he is to keep his (the defendant's) own cattle upon his own land. If any injury arises from his neglect, the party injured has a right to complain of the injury which is the necessary consequence of the omission to perform that duty. It is conceded that, according to the authorities, if the plaintiff's cattle being by defendant's default in his land, had escaped therefrom into the close of a third party and had there sustained an injury, the plaintiff could maintain an action against the defendant for damages in consequence of the injury, and on that ground, to avoid circuity of action, the defendant should not be at liberty to impound the plaintiff's cattle damage feasant, and then leave the plaintiff to cross-action against him for the injury sustained by the impounding. The damages to be occasioned is the not unnatural consequence of the defendant's own omission to fence the first close, called Bridge Green. No man should complain of another's act when it is the immediate result of his own negligence. Suppose the plaintiff's bull escaped into the defendant's first field from a neglect of the defendant to fence his land, and while in the first field, where he had escaped from the defendant's neglect to fence, from some excitement or other he broke down a sound fence, and got over into a second close, where he would not otherwise have gone if he had not been induced to do so when in the first field; surely the defendant could not complain of it.

CHANNELL, B.—I am also of opinion that this rule should be discharged. We are asked to grant a new trial on the ground that the jury were misdirected; but I think the ruling of **WILDE, B.**, was correct. Assuming in this case that the second or inner hedge, as it has been called, was a strong and sufficient one, the question is whether the defendant can resist this action, it being clear that the cattle would not have escaped from the plaintiff's land but for the defect of the defendant's fence to his close Bridge Green. It was the defendant's duty to keep good that fence, and but for his default the plaintiff's cattle would not have escaped, and their doing so was the natural, if not the necessary, consequence of his omission, and, therefore, the defendant had no right to distrain them. I do not think it distinguishable from the case I put and compared it to during the argument—that when the defendant complains of the plaintiff's cattle breaking into his land and then over an inner fence into his corn, the plaintiff may very well reply, "My cattle were in a pound, and you opened the gate from whence they escaped and did the damage complained of—you were the cause of it."

WILDE, B.—I am of the same opinion, that the rule should be discharged. I am not sorry that the question has been discussed, as it has proved to be one of some novelty; but I retain the same opinion now, after having heard the arguments, as I entertained at the trial. Ordinarily speaking, if cattle stray and damage is done by them, the owner is liable; but in this case it was the defendant's neglect to repair his fence that was the cause of the cattle escaping in the first

A instance. The defendant was bound to fence the first field in order as much to keep the plaintiff's cattle out of it as his own in; he did not do so, and the plaintiff's cattle having got into the defendant's close called Bridge Green, over a defective fence which it was the defendant's duty to keep good, they escaped into another field of the defendant, where the damage was done which was complained of. I do not think the plaintiff is liable for that damage, either according to
B common sense or the common principles of justice.

Rule discharged.

SINGLETON v. WILLIAMSON (No. 2)

D [COURT OF EXCHEQUER (Pollock, C.B., Martin, Channell and Wilde, BB.), January 22, 1862]

[Reported 7 H. & N. 747; 31 L.J.Ex. 287; 5 L.T. 645; 26 J.P. 231;
 8 Jur.N.S. 157; 10 W.R. 301; 158 E.R. 670]

Animal—Cattle—Distress damage feasant—Impoundage—Tender of amends.

E The defendant distrained the plaintiff's cattle damage feasant, and impounded them in a common pound. The plaintiff tendered as amends an amount sufficient to cover the damage done by the cattle, but the defendant refused it. In an action of detinue to recover the cattle by the plaintiff,

F **Held:** when the cattle had been impounded they were in the custody of the law, and, therefore, the plaintiff's offer of amends was too late, and the action failed.

Notes. As to tender of amends after the impounding of animals distrained damage feasant, see 1 HALSBURY'S LAWS (3rd Edn.) 677; and for cases see 18 DIGEST (Repl.) 443, 444.

Case referred to:

G (1) *Gulliver v. Cosens* (1845), 1 C.B. 788; 14 L.J.C.P. 215; 5 L.T.O.S. 199; 9 Jur. 666; 135 E.R. 753; 18 Digest (Repl.) 444, 1882.

Also referred to in argument:

Pilkington's Case (1601), 5 Co. Rep. 76a; 77 E.R. 169; sub nom. *Pilkington v. Hastings*, Cro. Eliz. 813; 18 Digest (Repl.) 443, 1872.

H *Six Carpenters' Case* (1610), 8 Co. Rep. 146a; 77 E.R. 695; 18 Digest (Repl.) 314, 591.

Thomas v. Harries (1840), 1 Man. & G. 695; 1 Scott, N.R. 524; 9 L.J.C.P. 308; 4 Jur. 723; 133 E.R. 511; 18 Digest (Repl.) 315, 603.

Evans v. Elliott (1836), 5 Ad. & El. 142; 2 Har. & W. 231; 6 Nev. & M.K.B. 606; 6 L.J.K.B. 65, 259; 111 E.R. 1120; 18 Digest (Repl.) 315, 597.

I *Glynn v. Thomas* (1856), 11 Exch. 870; 25 L.J.Ex. 125; 26 L.T.O.S. 281; 20 J.P. 227; 2 Jur.N.S. 378; 4 W.R. 363; 156 E.R. 1085, Ex. Ch.; 18 Digest (Repl.) 314, 588.

Loring v. Warburton (1858), E.B. & E. 507; 28 L.J.Q.B. 31; 4 Jur.N.S. 634; 6 W.R. 602; 120 E.R. 598; 18 Digest (Repl.) 315, 598.

Ellis v. Taylor (1841), 8 M. & W. 415; 10 L.J.Ex. 462; 151 E.R. 1101; 18 Digest (Repl.) 316, 608.

Ladd v. Thomas (1840), 12 Ad. & El. 117; 4 Per. & Dav. 9; 9 L.J.Q.B. 345; 4 Jur. 797; 113 E.R. 755; 18 Digest (Repl.) 315, 604.

Demurrer in an action of detinue to recover cattle which had been distrained damage feasant and impounded. After the impounding the plaintiff had tendered ample compensation for the damage the cattle had done, which defendant refused to accept.

The declaration stated that the defendant detained from the plaintiff the plaintiff's cattle, that is to say, two bullocks, whereby they were injured, and plaintiff incurred costs in endeavouring to procure a return of them, and the plaintiff, under the last count, claimed a return of the cattle therein mentioned, or their value, and £20 for detention, and under the rest of the declaration he claimed £50. The defendant by his fifth plea pleaded that before and at the time of the alleged detention the defendant was lawfully possessed of closes of land situate in the parish of Gosforth, in the county of Cumberland, and because the said cattle were then wrongfully in the said closes doing damage there, and eating, and depasturing, and treading down the corn, grass, and herbage thereof, the defendant then seized the cattle doing damage as aforesaid, as a distress for such damage. The defendant drove the cattle out of the closes to a certain common pound, and there impounded them, and kept them impounded until the plaintiff paid the costs for their release as a reasonable satisfaction for the said damage, as it was lawful for the defendant to do. The defendant used no unnecessary violence and did no unnecessary damage on such occasion, which was the alleged detention and grievance mentioned in the second count.

The plaintiff by a second replication to the fifth plea, said that after the defendant had so impounded the cattle, the plaintiff was willing and ready, and in fact had tendered and offered, to pay to the defendant the sum of £1 2s. 4d. as a reasonable and sufficient satisfaction and amends for the damage done by the said cattle; which constituted a good tender and entitled the plaintiff to sue the defendant for the subsequent detention of the cattle. The defendant had refused to accept the tender of £1 2s. 4d., but had wrongfully detained the said cattle as above stated.

Edward James, Q.C., for the defendant.

Mellish, Q.C. (T. Jones with him) for the plaintiff.

POLLOCK, C.B.—I am of opinion that the defendant is entitled to our judgment upon this demurrer. The books and authorities upon the subject have existed for so long a period that we are not now at liberty to overrule them. The law appears to be, that a tender of amends for damage done by cattle distrained damage feasant after they have been impounded, is too late, because they are then in the custody of law, and not of the defendant, so that a tender after impounding may be as ineffective as it would in any other case be after action brought. The plaintiff, therefore, cannot maintain detinue.

MARTIN, B.—It seems very strange that, when a person's cattle have been distrained as damage feasant and impounded, the owner of the cattle should not be allowed to tender to the distrainer full compensation and amends for such damage, and get back his cattle. Oftentimes, perhaps, no real damage has been sustained, and yet the owner, after impounding, cannot get back his property without proceedings in replevin. The law may be so, and it may be a very absurd law; but it appears to be the law, and we are bound by it.

CHANNELL, B.—I also think our judgment must be for the defendant. The authorities are so strong that we cannot get over them, and the court must abide by them. I was struck at first with the dicta of *TINDAL, C.J.*, in *Gulliver v. Cosens* (1), but the observations to which I refer were not at all necessary for the decision of the case then before the court.

- A WILDE, B.**—I am of the same opinion. The law is, that a tender of amends, after impounding cattle distrained damage feasant, is too late. If so, the owner cannot maintain an action of detinue against the distrainer to recover the cattle, the same being then not in the possession of the defendant, but in the custody of the law. We cannot alter the law as so long existing, and decide in favour of the replication, without overruling that law. Whatever practical inconvenience may
- B** arise from it we cannot disturb it.

Judgment for defendant.

GEIPEL AND OTHERS v. SMITH AND ANOTHER

- D** [COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn, Mellor and Lush, JJ.), January 26, 1872]

[Reported L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361;
20 W.R. 332; 1 Asp.M.L.C. 268]

- E** *Shipping—Charterparty—Exception clause—Restraint of princes—Blockade of port—Obligation to carry out charterparty when blockade lifted.*

Carriage of Goods by Sea—Cargo—Loading—Obligation to load when insuperable obstacle to cargo being carried to destination.

- To a declaration for a breach of a charterparty whereby the defendants agreed that their ship should, with all convenient speed, proceed to a spout as directed by the plaintiffs, and, having there loaded a cargo of coals, should, as soon as wind and weather permitted, proceed to Hamburg and there deliver the same, "restraints of princes and rulers" (inter alia) excepted, the defendants pleaded that, before any breach, war was being carried on between Germany and France, that Hamburg was blockaded by the French fleet, that the charterparty could not have been carried out within a reasonable time except by running the blockade, and that the defendants were ready to perform their contract so far as they were not hindered and prevented by any of the excepted causes.
- F**
- G**

- H** **Held:** (i) the blockade constituted a restraint of princes and rulers within the charterparty, and the defendants were not liable for failing to proceed to Hamburg while it existed; (ii) the defendants were not liable for failing to proceed to the port after the blockade had been lifted, since (per SIR ALEXANDER COCKBURN, C.J.) there was no rational probability that the obstacle would be removed within a reasonable time, or (per BLACKBURN, J.) it turned out that the blockade was not raised within a reasonable time; and (iii) the contract being an entire one, anything which justified a breach of the whole justified equally a breach of part, and the defendants were not liable for failing to load the cargo when there existed an insuperable obstacle to its being carried to the
- I** port of destination.

Notes. Considered: *Rodocanachi v. Elliott* (1873), L.R. 8 C.P. 649; *Jackson v. Union Marine Insurance Co.*, [1874-80] All E.R. Rep. 317; *Dahl v. Nelson, Donkin & Co.*, [1881-5] All E.R. Rep. 572. Applied: *Embricos v. Sydney Reid & Co.*, [1914-15] All E.R. Rep. 185. Considered: *Sanday v. British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; *Miller v. Taylor*, [1916] 1 K.B. 402; *Horlock v. Beal*, [1916-17] All E.R. Rep. 81; *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, [1917] 2 K.B. 1. Referred to: *Duncan v. Koster, The Teutonia* (1872), 8

Moo. P.C.C.N.S. 411; *Nobel's Explosives Co. v. Jenkins & Co.*, [1895-9] All E.R. Rep. 524; *Carlton Steamship Co. v. Castle Mail Packets Co.* (1898), 78 L.T. 661; *Leiston Gas Co., Ltd. v. Leiston-cum-Sizewell U.D.C.*, [1916] 1 K.B. 912; *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916-17] All E.R. Rep. 104; *Scottish Navigation Co. v. Souther, Admiral Shipping Co. v. Weidner, Hopkins & Co.*, [1917] 1 K.B. 222; *Watts, Watt & Co., Ltd. v. Mitsui & Co., Ltd.*, [1916-17] All E.R. Rep. 501; *Countess of Warwick Steamship Co. v. Le Nickel Soc. Anon., Anglo-Northern Trading Co. v. Emlyn Jones and Williams*, [1918] 1 K.B. 372; *Russian Bank for Foreign Trade v. Excess Insurance*, [1918] 2 K.B. 123; *Fried. Krupp Akt. v. Orconera Iron Ore Co.* (1919), 120 L.T. 386; *Bank Line, Ltd. v. Arthur Capel & Co.*, [1918-19] All E.R. Rep. 504; *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency*, [1925] All E.R. Rep. 530; *Hirji Mulji v. Cheong Yue Steamship Co., Ltd.*, [1926] All E.R. Rep. 51; *Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 242; *White and Carter, Ltd. v. Carbis Bay Garage, Ltd.*, [1941] 2 All E.R. 633; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Denny, Mott and Dickson, Ltd. v. James B. Fraser & Co.*, [1944] 1 All E.R. 678; *Re Sergeant* (1948), 29 Ry. & Can. Tr. Cas. 84; *Arab Bank, Ltd. v. Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263. *Atlantic Maritime Co. Inc. v. Gibbon*, [1953] 2 All E.R. 1086; *Universal Cargo Carriers Corpn. v. Citati*, [1957] 2 All E.R. 70.

As to exception of restraints of princes and rulers, see 35 HALSBURY'S LAWS (3rd Edn.) 290; as to delay under charterparty, see *ibid.* 264 et seq., and 362 et seq.; as to duty to reach port of discharge, see *ibid.* 441-444; and for cases see 12 Digest (Repl.) 417-419; 41 Digest 409-414.

Case referred to :

- (1) *Touteng v. Hubbard* (1802), 3 Bos. & P. 291; 127 E.R. 161; 29 Digest (Repl.) 255, 1910.

Also referred to in argument :

The Helen (1865), L.R. 1 A. & E. 1; 35 L.J.Adm. 2; 13 L.T. 305; 11 Jur.N.S. 1025; 14 W.R. 136; 2 Mar. L.C. 293; 41 Digest 226, 636.

Hadley v. Clarke (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, 3426.

Atkinson v. Ritchie (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, 2955.

Spence v. Chodwick (1847), 10 Q.B. 517; 16 L.J.Q.B. 313; 9 L.T.O.S. 101; 11 Jur. 872; 116 E.R. 197; 41 Digest 416, 2596.

Hochster v. De La Tour (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, 2960.

Avery v. Bowden (1856), 6 E. & B. 953, 962; 26 L.J.Q.B. 3; 28 L.T.O.S. 145; 3 Jur.N.S. 238; 5 W.R. 45; 119 E.R. 1119, 1122, Ex. Ch.; 12 Digest (Repl.) 381, 2978.

Scott v. Libby, 2 Johnson's Reports (New York Supreme Court) 336.

Medeiros v. Hill (1832), 8 Bing. 231; 1 Moo. & S. 311; 1 L.J.C.P. 77; 131 E.R. 390; 12 Digest (Repl.) 300, 2310.

Naylor v. Taylor (1829), 8 B. & C. 718; Dan. & Ll. 240; 4 Man. & Ry.K.B. 526; 7 L.J.O.S.K.B. 311; 109 E.R. 267; 12 Digest (Repl.) 300, 2310.

Pole v. Cetcovich (1860), 9 C.B.N.S. 430; 12 Digest (Repl.) 436, 3331.

Hills v. Sughrue (1846), 15 M. & W. 253; 153 E.R. 844; sub nom. *Mills v. Seybourne*, 6 L.T.O.S. 414; 12 Digest (Repl.) 431, 3311.

Paradine v. Jane (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236.

Williams v. Lloyd, Sir Wm. Jones' Rep. 179.

Baily v. De Crespigny (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 12 Digest (Repl.) 420, 3249.

A Demurrers in an action in which the plaintiffs claimed damages against the defendants for breach of a charterparty when the defendants failed to load a cargo of coals and to deliver them to Hamburg, which had been blockaded by the French fleets.

The declaration alleged that by a charterparty, it was agreed between the plaintiffs and defendants that the defendants' vessel the *Martindale* being tight, staunch, and strong, and every way fitted for the voyage, should with all convenient speed sail and proceed to a spout as directed by the plaintiffs or their agent, and there take on board a full and complete cargo of coals, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture, and being so loaded, the captain should immediately call at the office of the plaintiffs or their agents and clear with them at the Custom House, also sign bills of lading without qualification as they present them, but without prejudice to the charterparty, and then as soon as wind and weather should permit, should proceed to Hamburg, and there deliver the same to the freighters or assigns, they paying the freight for the same at a certain agreed rate, the act of God, Queen's enemies, restraints of princes and rulers, fire, and all and every of the dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind during the said voyage, always excepted, the brokerage of 2½ per cent. on account of freight to be due on signing the charterparty, and in case of the breach or non-performance of the charterparty, the defendants or the captain to pay to the plaintiffs £100 as and for liquidated damages.

The plaintiffs further alleged that they did and were ready and willing to do all things, and all conditions precedent were fulfilled, and all times elapsed necessary to entitle, and nothing happened to disentitle them to have the defendants observe and fulfil the terms of the charterparty, and to maintain this action for the breach thereof hereinafter mentioned; yet the defendants before any breach by the plaintiffs of the charterparty, and although not prevented by any of the excepted perils, causes, manners, or things, absolutely refused to observe and fulfil the terms of the said charterparty and to let their ship take or carry any goods of the plaintiffs to the port of Hamburg, and gave notice to the plaintiffs that they absolutely refused to do, and they would not observe or fulfil, and absolutely renounced the charterparty, and wrongfully and in violation of the charterparty, discharged the plaintiffs from directing the ship to sail or proceed to any spout, and from otherwise observing and fulfilling the terms of the charterparty, and renounced the charterparty, and thereby wrongfully broke and violated the said charterparty, and by reason of the premises the plaintiffs became and were unable to have the charterparty observed and fulfilled by the defendants, and uselessly incurred great expense in and about procuring cargo for the said ship, and were prevented from sending the said goods to Hamburg, and lost divers large profits.

H The defendants by their fifth plea averred that after the making of the charterparty, and before any breach thereof, a war was being carried on between the peoples of Germany, wherein the port of Hamburg was situated, and the peoples of France; and the port of Hamburg was then blockaded by the fleets of France; and her Most Gracious Majesty the Queen, by her royal proclamation, enjoined all her subjects to maintain a strict neutrality between the said belligerent peoples, and not to commit any act contrary to or in violation of the law of nations. **I** The defendants say that they were and are British subjects, and that the ship was a British ship, and the cargo was a cargo to be carried to and delivered at the port of Hamburg; wherefore, the further performance of the said charterparty became and was illegal, and the defendants, as they lawfully might, refused further to carry out the same. By their sixth plea the defendants further averred that after the charterparty was entered into, and before any breach thereof by them, a state of war arose and existed as in the last plea mentioned, and the port of Hamburg became and was blockaded by the French, and her Majesty

the Queen published a proclamation as aforesaid, and thereupon the defendants, having notice of the blockade, and of the proclamation of her Majesty, refused to allow the ship to receive a cargo for the purpose of then carrying the same to the blockaded port while the same was so blockaded, and of running the blockade with the cargo for the purpose of delivering the same at the port during the continuance of the blockade, which is the breach complained of, and not otherwise. By their seventh plea the defendants alleged that after the charterparty was made, and before any breach by them of the charterparty, a state of war existed, and the port of Hamburg was blockaded, and her Majesty the Queen published her proclamation as in the fifth plea stated, and they were ready and willing to perform the charterparty on their part, so far as they might lawfully, and so far as they were not hindered and prevented by any of the excepted causes; and the ship could not have received a cargo, nor could the charterparty have been carried out and fulfilled within a reasonable time in that behalf, except by the ship receiving a cargo for the purpose of carrying the same to the blockaded port, and of running the blockade with the cargo, and of delivering the same at the port while so blockaded; wherefore the defendants refused to carry out the said charterparty.

The plaintiffs demurred to these pleas, and the defendants joined in demurrer.

Cohen for the plaintiffs.

Watkin Williams (with him *Blake Steele*) for the defendants.

SIR ALEXANDER COCKBURN, C.J.—I am of opinion that our judgment ought to be for the defendants. I will not say that the pleas are all and every one of them sufficient to raise a defence; but the main question to be decided is whether, upon the admitted facts of the case, the plaintiffs are entitled to recover. The declaration is on a charterparty, by which the defendants agreed to proceed with all convenient speed to Newcastle, the place of loading the coals, and there having loaded a cargo, to proceed as soon as wind and weather would permit to the port of Hamburg, and there deliver the same, "the act of God, Queen's enemies, restraints of princes," etc., excepted. The pleas show that after the making of the charterparty war having broken out between the French and German nations, the French government proceeded to declare the port of Hamburg to be blockaded, and followed up that declaration by an effectual blockade; and the question is whether that brought about a state of things which justified the defendants in throwing up the charterparty.

The charterparty contains stipulations for the performance of several things by the defendants. They were to go first to a spout and load a cargo of coals there; then they were to proceed to Hamburg as soon as wind and weather should permit, and there deliver the cargo. It is quite true that the defendants might have gone to a spout, and there loaded a cargo: there was no obstacle to prevent their doing that. But there was an obstacle in the way of their proceeding thence to the port of Hamburg. I do not consider it necessary on the present occasion to consider the larger proposition contended for by counsel for the defendants, on the authority of continental codes, namely, that in the absence of such an express exception as "restraints of princes," we should by implication import such a term into the contract made by the parties. I base my judgment on the exception expressly contained in the contract, namely, on the exception of "restraint of princes."

Is it a sufficient justification of the defendants' refusal to carry out the contract that a blockade existed of the port of Hamburg? Does that term come within the designation "restraint of princes"? I think it does. It is an act of a sovereign State, one of the belligerent parties. A person may succeed in running a blockade notwithstanding the efforts of the blockading squadron. Nevertheless, we must take it that in the eye of the law an effectual blockade existed of the

A port of Hamburg; that that did amount to a positive obstacle in the way of fulfilling the contract, and, arising from an act of state of one of the belligerent parties, I am of opinion that it constituted a "restraint of princes," which would apply to the exception contained in the charterparty. I think, therefore, that there was in this case a "restraint of princes," and that the defendants were justified in saying that they were not called on to perform the contract.

B But then counsel for the plaintiffs says that the expression "restraint of princes" applies to the whole contract, and that the contract must be read as meaning that whereas the ship was to go to Hamburg when wind and weather permitted, subject to the restraint of princes, when that restraint, once existing, is removed, the vessel is to go when wind and weather permits. If we are to construe the contract in that way, I think the consequence would be monstrous—

C to hold that if a blockade should last for an unusually long time, the defendants would be bound to keep their vessel idle all that time until the blockade should cease. It must be taken, if you are to construe the contract in that way, that the restraint of princes must have an end within a reasonable time. The defendants meet the plaintiffs' claim by saying: "It was impossible in the present case that the contract should be performed within a reasonable time; granted that the restraint of princes must be only for a reasonable time, then I should be bound to start; but having lasted an unreasonable time I am not so bound." It may well be that if he failed to make out such a plea, he would have to answer for it; but as the case now stands, I think the defence a good one. Where there is no rational probability that the obstacle will be removed within a reasonable time, that furnishes, I think, a sufficient answer.

E It is further contended that the contract is divisible into two parts, and perhaps it is; and if the performance of the whole is impossible, looking at the reason and convenience of the thing it is quite obvious that that should excuse the performance of the part. What object could be attained, or what benefit be derived from the shipowners going through part of the undertaking when the whole could not be performed? The view I take of it is that the contract is one entire one, and that anything which justifies a breach of the whole will apply equally to a breach of part. It is admitted that the defendants could not, without violating the blockade, take the cargo to Hamburg, its destination; and the contract being one entire one, whatever justifies a breach of the contract to carry the cargo there justifies a breach of part of that contract.

F
G The case put by counsel for the defendants by way of illustration in the course of his argument is, I think, much to the purpose. If I undertake to convey goods from London to York, which it is impossible to do if a certain bridge on the way is broken down and cannot be repaired within a reasonable time; if the bridge is actually broken down, and I know it, I am not bound to perform part of the contract by carrying the goods as far as the bridge, in order that at some future time I may be able to perform the rest of it. I think, then, the defendants in the present case could not be called on to load the cargo in question when there existed an insuperable obstacle to its being carried to the port of destination; and our judgment must, therefore, be for the defendants.

I **BLACKBURN, J.**—I am of the same opinion. Upon all the substantial matters involved I agree that judgment must be for the defendants, and that they are right. I have some doubt, however, as to whether the fifth plea is good, and, indeed, I am inclined to think that on it judgment should be for the plaintiffs. But that is a mere question of form, and affects only costs.

By the charterparty the ship is to proceed with all convenient speed to a spout and there load a cargo of coals, and then, as soon as wind and weather should permit—which means, I apprehend, nothing more than with reasonable speed and despatch—should proceed to Hamburg; and on this last the exception is engrafted of, among other things, the "restraint of princes." While the contract

was still executory, war broke out between France and Germany, and an effectual blockade of the port of Hamburg was effected by the French, so that the defendants could not bring the cargo to Hamburg without breaking the blockade and evading the restraint of the Emperor of France. I have been unable to see how that blockade can be regarded otherwise than as a restraint of princes. A

Then comes another question. If while the blockade existed there was a "restraint of princes" which excused the performance of the contract, the moment the blockade was raised were not the defendants bound to carry out their contract? If the blockade had existed only for an hour or two, or for a very short time, I do not think it would put an end to the contract; but I cannot agree with counsel for the plaintiffs' contention that, however long the blockade might have existed, even if it had lasted as long as the blockade of Toulon, some eight or nine years, I think, or as long as some of the blockades in the War of Independence between the United Provinces and Spain; that after that enormous time the owners of the ship and cargo should be obliged to have them ready in order that the contract might then be carried out. It seems to me monstrous and inconvenient to hold such a position, the consequence being to frustrate the very object of the contract, which is one for the prompt transport of the shipper's goods, and the remunerative employment of the shipowner's vessels. Such a state of affairs, in my opinion, not only produces a delay in the fulfilment of the contract, but puts an end to it altogether. B C D

Touteng v. Hubbard (1), if I do not misapprehend it, is a decision to that effect. There the vessel, a Swedish one, was chartered in December, 1800, to sail to the island of St. Michael's, and bring home a cargo of fruit, the charter-party containing the usual exception against restraints of princes. An embargo having been laid on Swedish vessels by the British government, the vessel was detained till the 19th of the following June, after which time it went to St. Michael's, and then claimed to recover the freight against the British merchant; but the Court of Common Pleas, in its decision, said : E

"No, you are not entitled to it: the exception of restraints of princes is introduced into the charterparty not for the benefit of the merchant, but of the master." F

The object which the merchant had in view would have been altogether frustrated if the contrary had been held. It would be a monstrous thing if a party could, under such a contract, be obliged to load a cargo at any time whatever in *saecula saeculorum*. While the contract is still executory, the object of both the parties to it depends very greatly upon time. The goods owner—it is hard to say when his period can be said to have come; but he is entitled to get his cargo within a reasonable time, that being a matter to be determined by a jury. It would be monstrous to hold that the time might last, in case a blockade should take place, for ten or twelve years. A cargo would inevitably deteriorate in that time. A cargo of coals would deteriorate; so would a cargo of corn, and still more one of fruit. On the other hand there would be the obvious hardship on the shipowner of making him keep his ship lying up in dock, waiting till the news should come of the blockade having been raised, his ship meantime rotting. The intention of each party was to carry on a commercial undertaking within a reasonable time; and if the restraint of princes lasts beyond a reasonable time, it seems to me that a shipowner is entitled to sail away, and treat the contract as at an end. G H I

Taking this view of the matter, the sixth plea puts the case thus: That the plaintiffs asked the defendants to take their cargo and go and break the blockade, that is, to carry out the undertaking, notwithstanding that a restraint of princes did exist. Then comes the seventh plea, which says, in effect, that the blockade lasted so long that the defendants were not able to receive a cargo, or carry out the contract without running the blockade. This is the meaning of

A the plea, whether the fact, as therein asserted, be true or false. Counsel for the plaintiffs says that this plea does not answer the declaration, though it would affect the question of damages. It seems to me that as the events turned out, the plea would not be a bad one on general demurrer, but constitutes an entire defence to the action. For I take it that where a contract is still executory, the defendant may say, "I am not going to do what I bound myself to do, because
B I know that you, the plaintiff, will never be ready and willing to perform your part of the contract." That, I take it, it would be quite competent for the defendant to say and do, if it turned out in the end that he was right in his opinion. If the defendant says: "I am so confident that the blockade never will be raised within a reasonable time that I will chance the matter; I will take the risk of my opinion turning out correct"; then if the chances turn out
C against him, and the blockade is raised within a reasonable time, the plaintiff will have a good cause of action against him, he, the plaintiff, being then ready and willing to put his cargo on board. But in the present case it has happened that the defendants were right in their opinion, the blockade not having been raised within a reasonable time; and it having turned out that they were right in
D the judgment they formed, there never came a time when the plaintiffs would have the smallest benefit from the contract. Different considerations would influence our judgment in a case where the contract was executed, but whilst a contract is still executory I think time is of the essence of the contract.

LUSH, J.—I am authorised by my brother **MELLOR** [who had just left court] to say that he entirely concurs in the judgment already delivered; and I
E have only to say the same for myself, having nothing to add to what has been said.

Cohen asked for the direction of the court as to how judgment was to be entered on each plea.

LUSH, J.—The sixth and seventh pleas have been already pronounced to be
F good. I think the fifth plea may also be treated as valid. It alleges the breaking out of a war between France and Germany, and a blockade of the port of Hamburg. If the impediment had been in its nature temporary, I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this. The plea, therefore,
G seems to me *prima facie* good.

SIR ALEXANDER COCKBURN, C.J., and BLACKBURN, J., agreed.

Judgment for defendants.

OFFORD v. DAVIES AND ANOTHER

[COURT OF COMMON PLEAS (Erle, C.J., Williams, Willes and Byles, JJ.), June 9, 17, 1862]

[Reported 12 C.B.N.S. 748; 31 L.J.C.P. 319; 6 L.T. 579;
9 Jur.N.S. 22; 10 W.R. 758; 142 E.R. 1336]

Guarantee—Revocation—Guarantee for specified period—Revocation before end of period.

The defendants promised that in consideration of the plaintiff's discounting bills of exchange for a certain firm, they (the defendants) would guarantee "for the space of twelve calendar months the due payment of such bills of exchange. . . ." The defendants countermanded the guarantee before the plaintiffs had discounted any bills. On a claim by the plaintiff under the guarantee,

Held: although the guarantee was fixed for a period of twelve months, the defendants were entitled to revoke it at any time before it was acted on by the plaintiffs, and, therefore, the claim failed.

Notes. Referred to: *Coulthart v. Clementson* (1879), 5 Q.B.D. 42; *Beckett v. Addyman* (1882), 9 Q.B.D. 783; *Re Crace, Balfour v. Crace*, [1902] 1 Ch. 733.

As to the law relating to the revocation of a guarantee before it has been acted on, see 18 HALSBURY'S LAWS (3rd Edn.) 417; and for cases see 26 DIGEST (Repl.) 13.

Cases referred to:

- (1) *Calvert v. Gordon* (1828), 7 B. & C. 809; Dan. & Ll. 173; 3 Man. & Ry.K.B. 124; 7 L.J.O.S.K.B. 77; 108 E.R. 925; 7 Digest (Repl.) 243, 817.
- (2) *Gordon v. Calvert* (1828), 2 Sim. 253; affirmed, 4 Russ. 581; 38 E.R. 924, L.C.; 26 Digest (Repl.) 212, 1633.
- (3) *Hassell v. Long* (1814), 2 M. & S. 363; 105 E.R. 416; 26 Digest (Repl.) 55, 395.
- (4) *Hough v. Warr* (1824), 1 C. & P. 151, N.P.; 26 Digest (Repl.) 212, 1632.
- (5) *Mason v. Pritchard* (1810), 12 East, 227; 2 Camp. 436; 104 E.R. 89; 26 Digest (Repl.) 93, 642.
- (6) *Holland v. Teed* (1848), 7 Hare, 50; 68 E.R. 20; 26 Digest (Repl.) 214, 1644.
- (7) *Bradbury v. Morgan* (1862), 1 H. & C. 249; 31 L.J.Ex. 462; 7 L.T. 104; 8 Jur.N.S. 918; 10 W.R. 776; 158 E.R. 877; 26 Digest (Repl.) 216, 1657.

Demurrer in an action on a guarantee.

The first count of the declaration stated that by an instrument in writing signed by the defendants and addressed and delivered by them to the plaintiff the defendants gave the plaintiff the following undertaking, that is to say:

"We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guarantee for the space of twelve calendar months the due payment of all such bills of exchange to the extent of six hundred pounds. And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys."

It was averred that the plaintiff, relying on the promise of the defendants, discounted certain bills of exchange for the said Messrs. Davies, which were dishonoured. It was alleged that the defendants broke their said promise and did not pay to the plaintiff or the holders of the bills the moneys payable in respect thereof. The fourth plea of the defendants (in relation to which the case is reported) was to the first count of the declaration, so far as the same related to the sums payable by the defendants of the sums of money payable by the

A said bills of exchange and the said sums so advanced that, after the making of the said guarantee and before the plaintiff had discounted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guarantee and requested the plaintiff not to discount such bills of exchange and not to advance such moneys.

The plaintiff demurred to this plea. Joinder in demurrer.

B *Prentice* (*Brandt* with him) for the plaintiff.—This plea is bad. It is contended that, after a person has once given a guarantee, he cannot countermand it without the consent of the party to whom it is given: *THEOBALD'S PRINCIPAL AND SURETY*, 150, citing *Calvert v. Gordon* (1); *Gordon v. Calvert* (2), where an injunction to restrain proceedings at law upon the bond was dissolved; *Hassell v. Long* (3); *Hough v. Warr* (4); *POTHIER ON OBLIGATIONS*, ss. 442, 443. It is not stated

C in the plea that the countermand was in writing; the agreement necessarily was so under the Statute of Frauds. [WILLES, J.: The cases holding that the plea must show a countermand in writing have been overruled in the Exchequer Chamber.] In the next place, the countermand should have been given before any discount of bills or advance of money made; the plea is, therefore, bad on that ground.

D *Edward James* (*T. Jones* with him) for the defendants.—It will be observed that the guarantee is for twelve months. It is simply a guarantee where, if words of limitation had not been introduced, the plaintiff would be entitled to go on discounting for any length of time. The true construction of the instrument is, "I will be liable for any bills you may discount within twelve months." Clearly the guarantor, before any bills were discounted, may say, "I countermand; do not discount any bills."

E The guarantee is a mere promise, which becomes a contract in each case upon the performance of a condition, which condition is the discounting a bill: *POTHIER ON OBLIGATIONS*, part 2, c. 6, s. 8; *STORY ON AGENCY*, c. 18, para. 464, 466; *PASK ON CONTRACTS (AMERICAN)*, 115; *Mason v. Pritchard* (5); *Hollond v. Teed* (6). This being simply a mandate or authority, not acted on before notice given, the notice of countermand was a withdrawal, and the defendants are relieved by it.

F *Brandt* in reply, referred to *Bradbury v. Morgan* (7), where it was decided that a guarantee is not determined by the death of the guarantor, but that his executors are liable upon it. This is cited to show that the guarantee is not a mandatum, but a contract.

Cur. adv. vult.

G

June 17, 1862. **ERLE, C.J.** delivered the following judgment of the court.—The declaration alleged a contract by the defendants in consideration that plaintiff would at the request of the defendants discount bills for Davies & Co. not exceeding £600. The defendants promised to guarantee the repayment of such discounts for twelve months, and alleged the discount, and no repayment.

H The plea was a revocation of the promise before the discount in question, and the demurrer raises the question whether the defendants had a right to revoke the promise. We are of opinion that they had; and that consequently the plea is good. This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants or to the detriment of himself.

I But until the condition has been at least in part fulfilled, the defendant has the power of revoking it. In the case of a simple guarantee for a proposed loan the right of revocation before the proposal has been acted upon did not appear to be disputed. Then are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discount had been made before that now in question and repaid? We think not. The promise to repay for twelve months creates no additional liability on the guarantor; but on the contrary fixes a limit in time, beyond which his liability cannot extend. With respect to other discounts which had been repaid, we

consider each discount as a separate transaction, creating a liability on the defendants till it is repaid, and after repayment leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for defendants.

MOUFLET v. COLE

[COURT OF EXCHEQUER CHAMBER (Byles, Blackburn, Keating, Lush and Brett, JJ.), June 21, 22, November 30, 1872]

[Reported L.R. 8 Exch. 32; 42 L.J.Ex. 8; 27 L.T. 678;
21 W.R. 175]

Business—Goodwill—Assignment—Covenant prescribing distance within which assignor may not trade—Measurement—"As the crow flies" between nearest points of premises.

To ascertain whether or not a covenant not to carry on a trade within a specified distance of a specified place has been broken the proper mode of measuring the distance is to draw a circle upon a map round the spot in question with a radius of the given distance, or, in other words, to measure the distance "as the crow flies" and not as a travelled distance from the one house to the other. The measurement should be taken from the nearest point of the one place to the nearest point of the other without regard, in the case of a building to where the doors are situated.

Lake v. Butler (1) (1855), 5 E. & B. 92, approved.

Per Curiam: there is no distinction in this matter between measurements for the purpose of contracts and those for the purpose of statutes.

Notes. As to measurement of distances specified in radius agreements, see 38 HALSBURY'S LAWS (3rd Edn.) 30; and for cases see 43 DIGEST 45.

Cases referred to:

- (1) *Lake v. Butler* (1855), 5 E. & B. 92; 24 L.J.Q.B. 273; 25 L.T.O.S. 128; 19 J.P. 692; 1 Jur.N.S. 499; 3 W.R. 458; 119 E.R. 416; 44 Digest 147, 143.
- (2) *Leigh v. Hind* (1829), 9 B. & C. 774; 4 Man. & Ry.K.B. 579; 7 L.J.O.S.K.B. 313; 109 E.R. 288; 43 Digest 45, 454.
- (3) *Woods v. Dennett* (1817), 2 Stark. 89; 171 E.R. 582; 43 Digest 45, 453.
- (4) *R. v. Inhabitants of Saffron Walden* (1846), 9 Q.B. 76; 1 New Mag. Cas. 557; 2 New Sess. Cas. 360; 15 L.J.M.C. 115; 7 L.T.O.S. 204; 10 J.P. 499; 10 Jur. 639; 115 E.R. 1204; 44 Digest 146, 141.
- (5) *Stokes v. Grissell* (1854), 14 C.B. 678; 2 C.L.R. 729; 23 L.J.C.P. 141; 23 L.T.O.S. 114; 18 J.P. 378; 18 Jur. 519; 2 W.R. 466; 139 E.R. 279; 44 Digest 146, 142.
- (6) *Jewel v. Stead* (1856), 6 E. & B. 350; 25 L.J.Q.B. 294; 27 L.T.O.S. 101; 20 J.P. 612; 2 Jur.N.S. 783; 4 W.R. 544; 119 E.R. 895; 44 Digest 147, 144.
- (7) *Duignan v. Walker* (1859), John. 446; 28 L.J.Ch. 867; 33 L.T.O.S. 256; 5 Jur.N.S. 976; 7 W.R. 562; 70 E.R. 496; 44 Digest 147, 149.
- (8) *Atkyns v. Kinneir* (1850), 4 Exch. 776; 19 L.J.Ex. 132; 154 E.R. 1429; sub nom. *Atkins v. Kinnear*, 14 L.T.O.S. 353; 44 Digest 147, 148.

Also referred to in argument:

Wing v. Earle (1591), Cro. Eliz. 212; 78 E.R. 468; 44 Digest 146, 138.

A **Appeal** by the defendant against a decision of the Court of Exchequer, reported L.R. 7 Exch. 70, discharging a rule obtained by him to set aside a verdict for the plaintiff for £500 entered in an action brought by the plaintiff against the defendant for breach of a covenant in a deed of assignment of the lease of a public house, and to enter a verdict for the defendant.

B The plaintiff was a licensed victualler, carrying on business at the Lord Holland public-house, at Brixton, S.W. The defendant was also a licensed victualler. He formerly carried on business at the Lord Holland public-house, and on Feb. 15, 1871, by indenture made between him, of the first part, certain persons therein described of the second and third parts respectively, and the plaintiff, of the fourth part, he assigned

C "all the messuage or tenement and premises called the said Lord Holland public-house, and also all that the goodwill, or trade, or business of a licensed victualler, carried on at the said public-house to hold unto the said plaintiff, his executors, administrators, or assigns, for all the residue [of a certain term of years]."

D The defendant covenanted for himself, his executors, and administrators, with the plaintiff that in case he (the defendant)

"should take, keep, or be in any way concerned in the trade or business of a licensed public-house, beershop, or place for the sale of wines or spirits, within the distance of one-half of a mile of the . . . Lord Holland . . . during the occupancy thereof by the plaintiff or his widow, then the defendant would . . . repay, or cause to be repaid, to the plaintiff the sum of £500 as liquidated damages."

E Shortly after the execution of the indenture, and after the payment by the plaintiff to the defendant of the consideration moneys therein mentioned, the defendant became possessed of and set up business in a certain public-house called the Duke of Cambridge, situate in Thorn Road, South Lambeth. The plaintiff then began the present action for breach of the covenant in the deed of assignment, alleging that the Duke of Cambridge was within half a mile of the Lord Holland. The defendant denied that he kept or was concerned in the trade or business of a public-house within the said distance, and on that plea issue was joined. At the trial before MARTIN, B., in Michaelmas Term, 1871, it was contended on behalf of the plaintiff that, on the true construction of the covenant declared on, the distance between the two public-houses ought to be measured "as the crow flies"; while on the part of the defendant it was contended that that was not the true mode of measuring the distance, but that it was to be measured by the nearest mode of access for a foot passenger going from the one public-house to the other. MARTIN, B., who was of the opinion

F that the question depended upon the true construction of the covenant declared on, and that the plaintiff's contention was right, and that, as the crow flies, was the proper mode of measuring the distance, directed, with the consent of both parties, that the verdict should be entered provisionally for the plaintiff for £500 damages, subject to the distance being measured, such measurement to be made upon such principle as should be laid down by the court upon its

G final decision as to what was the true construction of the contract, leave being granted to the defendant to enter the verdict for himself, in the event of its being found by the measurement, made upon the principle so by the court laid down, that the public-houses were more than half a mile from each other.

Subsequently a rule nisi was obtained by the defendant to enter the verdict for him, but that rule was discharged by the Court of Exchequer, MARTIN and CHANNELL, BB., being of opinion that, upon the true construction of the covenant, the distance was to be measured "as the crow flies," and CLEASBY, B., being of opinion that the distance should be measured by the nearest mode of access

(according to the state of the streets at the time of the alleged breach of covenant) for a foot passenger going from one public-house to the other. The defendant appealed to the Court of Exchequer Chamber, the question for the opinion of the court being in which of the aforementioned two modes of measurement the distance was, upon the true construction of the covenant, to be measured.

Garth, Q.C., and *A. L. Smith* for the defendant.

Serjeant Parry and *F. Turner* for the plaintiff.

Cur. adv. vult.

Nov. 30, 1872. **BLACKBURN, J.**, read the following judgment of the court.—The defendant, by deed, sold to the plaintiff the public-house called the Lord Holland, and the goodwill of the business, and the defendant in the deed covenanted that he should not be in any way concerned in a public-house “within the distance of one half of a mile of the said premises called the Lord Holland,” during the plaintiff’s occupancy thereof. Upon the trial, before my brother MARTIN, it appeared that the defendant did occupy a public-house so near the Lord Holland as to make it a matter of controversy whether it was within the half-mile or not. The learned judge was of opinion that the distance was to be measured “as the crow flies,” and the verdict was entered for the plaintiff, subject to the distance being measured, such measurement to be made upon such principle as should be laid down by the court upon its final decision as to what was the true construction of the covenant, leave being granted to the defendant to enter the verdict for himself in the event of its being found by the said measurement, made upon the principle of the court laid down, that the public-houses are more than half a mile apart. The majority of the Court of Exchequer were of opinion that

“the true construction of the language used is that a circle of half a mile radius is to be drawn round the Lord Holland, and that, if the defendant carries on the business of a publican within this space, he has broken his covenant.”

My brother CLEASBY, on the other hand, was of opinion that the distance was to be measured as a travelled distance, and to be measured “by the nearest available mode of access between the two houses.” There is a difference, though not generally of any consequence, between the distance as it would appear if measured on a map, without regard either to the curvature of the earth or the difference of level, if any such exists on the spot, and the distance in an actual straight line drawn from one point to the other. The majority of the court below have not noticed this, but subject to some remarks which we shall afterwards make on this, we agree with their judgment.

We agree with what PARKE, J., says in *Leigh v. Hind* (2), that the parties to such an agreement do not contemplate the actual distance which a customer would have to traverse in going from one house to the other. No doubt their first object is to have protection for the custom of the purchased house by securing that the seller should not set up business so near it as to affect the custom, and that would involve the consideration of how the customers would travel, but, as a contract to that effect would obviously lead to constant litigation, they wish those who prepare their contract to lay down a fixed rule that will admit of no dispute; the words which they have used are to be construed in their ordinary sense, bearing in mind that such is their object; and that object is best effected by measurement on the map.

We think that the matter is now concluded by the balance of authority in favour of that construction. In *Woods v. Dennett* (3), LORD ELLENBOROUGH, C.J., in 1817, at nisi prius, laid down a rule contrary to this. In *Leigh v. Hind*

- A** (2), where there were two practicable modes of going between the houses, which were both less than the stipulated distance, and a third which was greater, the whole Court of Queen's Bench thought that the contract was broken, but LORD TENTERDEN, C.J., and LITTLEDALE, J., assigned as their reason that the distance should be measured by the nearest mode of access, and PARKE, J., that it should be "as the crow flies," which, of course, was shorter than either. At the time
- B** the weight of authority was probably in favour of the defendant's construction. But then arose a series of cases: *R. v. Inhabitants of Saffron Walden* (4), in the Queen's Bench, decided in 1846; *Stokes v. Grissell* (5), in the Common Pleas in 1854; *Lake v. Butler* (1), in the Queen's Bench in 1855; *Jewel v. Stead* (6), in the same court in 1856; and *Duignan v. Walker* (7), in Chancery, before PAGE-WOOD, V.-C., in 1859; which all adopted the other rule.
- C** It is true that most of these cases were on the construction of statutes, and not of contracts. We do not, however, think that there is any sound distinction between statutes and contracts in this respect. In each the object is to substitute a certain distance, capable of easy determination, for a reasonable distance which, being uncertain, would be a trap for litigation. The object of the draftsman, who prepares either an Act of Parliament or a contract, where
- D** it is necessary to specify a distance, ought to be to use words that give a fixed and easily ascertainable guide.

In *Lake v. Butler* (1) CROMPTON, J., says (5 E. & B. at p. 99):

- E** "If this question were quite new, the convenience would be all in favour of construing the distance as that measured in a straight line; and the words would be, to say the least, capable of bearing that construction. In common language, if you ask, 'How far is it from one place to another?' the answer often is, 'Do you mean by the road, or by the fields, or as the crow flies?'" But the recent authorities being all in favour of this construction, and the decision in *R. v. Inhabitants of Saffron Walden* (4) being precisely in point, we
- F** ought to adhere to it, at any rate so that the legislature may know how such general words in an Act of Parliament will be construed, and may use them in that sense."

- Since that case there has been a further decision in the Queen's Bench, in *Jewel v. Stead* (6), and also a decision of PAGE-WOOD, V.-C., in *Duignan v. Walker* (7),
- G** where the vice-chancellor applies the same rule to a contract as we think it should be applied. We, therefore, adopt as our own the judgment of CROMPTON, J., only slightly altering the last sentence. "The recent authorities being all in favour of this construction, and the decision in *Duignan v. Walker* (7) being precisely in point, we ought to adhere to it at any rate, so that the parties framing a contract may know how such words in a contract will be construed, and may
- H** use them accordingly."

- It is to be observed that the phrase used in the judgment of the majority of the court below in the present case is, that "a circle of half a mile radius is to be drawn round the Lord Holland," and CROMPTON, J., in the passage just cited, uses the phrase "in a straight line." This we think would be understood by anyone to mean that the circle is to be drawn and the line measured on a map,
- I** and this is we think, the true meaning of the contract here. It is a very simple matter to take the Ordnance map, and with a pair of compasses to measure the distance between any two points, and then by the scale ascertain what the distance is. We think that that is what, in ordinary language, is meant, when people speak of a circle round a particular point. But inasmuch as in laying down a map, it is treated as if the surface was projected on a plane, while in reality the surface of the earth is part of a very large sphere and the surface varies in its level, this distance, measured in an actual straight line between the points, is not precisely the same as that measured on a map, or, as the legislature

expressed it in the 6 & 7 Vict., c. 18 [dealing with the registration of Parliamentary voters and repealed by the Representation of the People Act, 1949], "the distance measured in a straight line on the horizontal plane." In so short a distance as "half a mile," the difference arising from the curvature of the earth would be not more than a quarter of an inch, and may clearly be neglected as insensible. But that arising from the inequalities of the surface, though not great, may be perceptible. If, for instance, the distance measured on the map between the two places was half a mile, and there was a difference in level of 150ft., the actual distance in a straight line would be half a mile and a yard. But, to ascertain this slight difference, it would be necessary to call in a surveyor, and to incur trouble and expense; and we cannot think that people, in speaking of the distance round a point, do contemplate such minute accuracy. We think, therefore, that the distance should be measured on the map. We may observe that where, in any case, it is desired to adopt another rule, words can easily be used to express it, as was done in *Atkyns v. Kinneir* (8).

There is another point to be disposed of. We think that, in measuring the distance, it should be taken from the nearest point of the one house to the nearest point of the other, without regard to where the doors are situated. The judgment of the majority of the court below, therefore, must be affirmed.

Appeal dismissed.

SHAW AND OTHERS v. GOULD AND OTHERS

[HOUSE OF LORDS (Lord Cranworth, Lord Chelmsford, Lord Westbury and Lord Colonsay), March 27, May 7, 1868]

[Reported L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833]

Conflict of Laws—Marriage—Dissolution under foreign law—Recognition of decree—Parties not bona fide domiciled in foreign country.

A divorce a vinculo obtained in a foreign court cannot be recognised as having any consequences in England so as to dissolve a marriage in England between English persons, unless such persons were at the time that such divorce was decreed bona fide domiciled in the country where the foreign court had jurisdiction, and the suit was prosecuted without collusion.

Where, therefore, a husband went to Scotland, the law of which country provided that a person residing therein for forty days was, for the purposes of litigation, to be treated as domiciled there, and when he had so resided for that period his wife raised against him an action for divorce and obtained a decree from the Court of Session,

Held: the decree, while legal in Scotland, was of no effect in England, and, therefore, the subsequent marriage in Scotland of the divorced wife with a third party would not be regarded as valid, nor the children of that marriage as legitimate for the purpose of benefiting under a will.

Notes. Considered: *Re Goodman's Trusts*, [1881-5] All E.R. Rep. 1138; *Bater v. Bater*, [1906] P. 209; *Re Stirling, Stirling v. Stirling*, [1908] 2 Ch. 344; *Re Luck, Walker v. Luck*, [1940] 3 All E.R. 307. Distinguished: *Re Bischoffsheim, Cassel v. Grant*, [1947] 2 All E.R. 830. Referred to: *Le Sueur v. Le Sueur* (1876), 1 P.D. 139; *Harvey v. Farnie*, [1881-5] All E.R. Rep. 52; *Le Mesurier v. Le Mesurier*, [1895-9] All E.R. Rep. 836; *Lord Advocate v. Jaffrey*, [1920] All E.R. Rep. 242;

- A** *Keyes v. Keyes*, [1921] P. 204; *Salvesen (or Von Lorang) v. Austrian Property Administrator*, [1927] All E.R. Rep. 78; *Mountbatten v. Mountbatten*, [1959] 1 All E.R. 99.

As to the recognition by English courts of foreign decrees of divorce, see 7 HALSBURY'S LAWS (3rd Edn.) 112-119; and for cases see 11 DIGEST (Repl.) 481 et seq.

B Cases referred to:

(1) *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895; 4 Jur. 1076; 7 E.R. 1308; sub nom. *Doe d. Birtwhistle v. Vardill*, 6 Bing. N.C. 385; West, 500; 1 Scott, N.R. 828, H.L.; 3 Digest (Repl.) 424, 203.

(2) *R. v. Lolley* (1812), Russ. & Ry. 237; sub nom. *Sugden v. Lolley*, 2 Cl. & Fin. 567, n., C.C.R.; 11 Digest (Repl.) 486, 1108.

C (3) *Conway v. Beazley* (1831), 3 Hag. Ecc. 639; 162 E.R. 1292; 11 Digest (Repl.) 459, 931.

(4) *Dolphin v. Robins* (1859), 7 H.L.Cas. 390; 29 L.J.P. & M. 11; 34 L.T.O.S. 48; 23 J.P. 725; 5 Jur.N.S. 1271; 7 W.R. 674; 3 Macq. 563; 11 E.R. 156, H.L.; 11 Digest (Repl.) 356, 252.

D (5) *Tovey v. Lindsay* (1813), 1 Dow. 117; 3 E.R. 643, H.L.; 11 Digest (Repl.) 467, 1005.

(6) *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli. N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, 250.

(7) *Pitt v. Pitt* (1864), 10 L.T. 626; 10 Jur.N.S. 735; 12 W.R. 1089; 4 Macq. 627, H.L.; 11 Digest (Repl.) 348, 167.

E **Appeal** from a decision of KINDERSLEY, V.-C., on petitions for the payment out of a fund in court.

On June 18, 1828, a marriage was solemnised at Manchester between Elizabeth Hickson, a girl under seventeen years of age, and a man named Buxton. The marriage had been brought about by Buxton by means of a fraudulent conspiracy, for which he was afterwards prosecuted and convicted, and sentenced to three

F years' imprisonment. The parents or friends of the girl succeeded in getting possession of her before the marriage had been consummated, and she and her husband never lived together even for a day. Attempts were made to get rid of the marriage by Act of Parliament, but without success, and in December, 1838, Buxton and his wife joined in executing a deed of separation under which pecuniary benefits were secured to Buxton in consideration of which he covenanted

G that his wife, described by her maiden name of Elizabeth Hickson, should be at liberty to live separate and apart from him as if she were sole and unmarried. The parties continued to live separate from each other, and Buxton from the time of the separation, if not before, lived in adultery with a woman named Sarah Lant. In or about the year 1845, a man living at Derby, named John Shaw, then studying for the English Bar, became attached to Mrs. Buxton, who was

H always designated by her maiden name of Elizabeth Hickson, and he proposed to marry her. To this she agreed, if she could get rid of her marriage with Buxton. To accomplish this object, Shaw altered his intention as to the English Bar and resolved to take the necessary steps for being called to the Scottish Bar. In March, 1845, he and Elizabeth Hickson went to Edinburgh, and both afterwards were resident in Scotland. In September, 1845, Thomas Buxton also

I went to Scotland. It was arranged that he should receive a sum of money if the wife obtained a divorce, and after he had been there above forty days an action of divorce was raised against him by his wife before the Court of Session by a summons served on him founded on the undisputed fact that he was living in adultery with Sarah Lant. A decree of divorce was pronounced by the Court of Session on Mar. 20, 1846. In June, 1846, a marriage, valid by the law of Scotland, was celebrated between John Shaw, and Elizabeth Hickson, and there was issue of that marriage three children. Buxton died in January, 1852; Shaw in the September following, and Elizabeth Shaw, or Hickson, in 1863. The

question then arose whether the three children were entitled to money bequeathed by John Wilson, the great uncle of Elizabeth Hickson, whose will was dated in 1832, and who died in 1835. By that will he gave a sum of £2,000 to trustees upon trust for the benefit of his great niece, Elizabeth Hickson, for her life, and after her death, subject to a power of appointment, which was never exercised, in trust for all and every the child or children of his great niece, who being a son or sons, should attain the age of twenty-one, or being a daughter or daughters, should attain that age or marry, to be equally divided among them as tenants in common. After the death of Elizabeth Hickson, the trustees paid the money into the Court of Chancery, under the Trustee Relief Act. *KINDERSLEY*, V.-C., decided that the children were to be treated as illegitimate and that the fund should go over to the persons entitled in the event of Elizabeth having no children. The children appealed.

Sir Roundell Palmer, Q.C., Anderson, Q.C., and Archibald Smith for the appellants.

Coleridge, Q.C., Jessel, Q.C., and G. N. Colt for the persons held to be entitled.

Their Lordships took time for consideration.

May 7, 1868. The following opinions were read.

LORD CRANWORTH.—The question to be decided in this case is one of a class which not unfrequently gives rise to great difficulties, viz., how far the status of legitimacy or illegitimacy, undoubtedly existing according to the laws of this country, may, or ought to be modified by the laws of another country. If the law of Scotland on the subject of marriage and divorce were the same as that of England, the present case would not have admitted of doubt. As Elizabeth Hickson was married to Thomas Buxton in 1828, and as she gave birth to three children during his lifetime, these children must, by the law of England, supposing that law alone to be in question, be either his children or be bastards. The former conclusion is that which in bygone days would possibly have been adopted, so reluctant were the court to receive any evidence of non-access by the husband while he was *intra quatuor maria*. Adopting, however, the more reasonable views on this subject, by which the courts of this country are now guided, we may safely act on the hypothesis, adopted by all parties in the argument of the case, that the children of Elizabeth are either her lawful children by John Shaw or are illegitimate. That they are illegitimate, if we are to look only to the laws of England, is certain, for *ex hypothesi* they are not the children of Buxton, who was the husband of Elizabeth when they were born.

This, therefore, brings us to consider whether, to help us in deciding this question, we are warranted in looking at any other law than that of England, whether we may be guided by the law of Scotland. (If the parties in this case had been Scottish and not English, and if all which occurred had occurred not in England, but in Scotland, there would, I presume, have been no question on the subject.) If Thomas Buxton, being a domiciled Scotsman, had married in Edinburgh Elizabeth Hickson, being a domiciled Scotswoman, and afterwards while their Scottish domicile continued, she had obtained a decree of divorce in the Court of Session, and then had married John Shaw, the issue of that marriage would certainly have been legitimate. The argument of the appellants is that the consequence must be the same, though the parties were at the time of the first marriage domiciled in England, and were married there. The question, it is contended, is whether, when the second marriage was contracted, the parties to it had the capacity to contract marriage—in other words, whether the effect of the divorce was to enable them to enter into a valid contract of marriage, which but for the divorce they certainly could not have entered into.

The whole, therefore, turns on the validity of the divorce. The law of Scotland seems clear, that a residence in Scotland for forty days makes that country the

A domicilium fori of any person so residing, and for the purposes of litigation he is to be treated as being domiciled there. It is assumed that this is true, whatever be the nature of the litigation, that it holds equally in cases the decision in which may involve the personal status of those who may claim through the litigant parties, as also where it is a mere dispute between the litigant parties themselves. Taking this, however, to be the undoubted law of Scotland, the question B is whether that principle is one which this country is bound to recognise. I think not. The facts of this case do not raise the question what would have been the status of these children of Buxton and Elizabeth Hickson, if, though married at Manchester, they had always been Scottish persons, and had always lived in Scotland, or even what it would have been if, before the proceedings for the divorce, Buxton had actually bona fide quitted England permanently and established himself in Scotland, so as to have acquired a Scottish domicile for all intents and purposes. It may be that in these circumstances the courts of this country C would recognise the status of these children, so as to entitle them, after the death of their mother, to the fund given to her children, which no doubt must be construed as meaning her legitimate children. But on that point I express no opinion.

D The decision in *Birtwhistle v. Vardill* (1), though the case did not turn on any question depending in the validity of a divorce, yet rests on principles hardly, to my mind, distinguishable from it, and it may certainly be assumed, looking at that case, that these children could not, in any circumstances, claim real estate in England by descent. But the opinions of the judges in that case, and E of the noble lords who spoke in the House, left untouched the question of legitimacy except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the Statute of Merton, the law of the domicile would decide the question of status. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinion F seems to me to show a strong bias towards the opinion that the question of status must for all purposes unaffected by the feudal law as adopted and acted on in this country, be decided by the law of the domicile. Even, however, if that had been expressly so decided it would not affect this case. The domicile for such a purpose must be a bona fide domicile for all purposes, not such as alone existed in this case, a mere residence of forty days so as to give jurisdiction to the G Scottish courts.

The important differences on the subject of marriage and divorce which exist in the different parts of the United Kingdom often give rise to perplexing difficulties, and exhibit a state of our law little creditable to us. But these difficulties make it more than usually incumbent on those who have to administer the law to take care that whenever a clear line has been drawn by judicial decision the H course which it has marked out should be rigidly followed. Whatever be the difficulties in such cases as the present, I think the doctrine that no divorce in Scotland resting merely on a forum domicilii had, at all events before the passing of the Matrimonial Causes Act, 1857, any effect in England on the validity of an English marriage, is established on the highest authority. It is impossible to have a stronger authority for this than *R. v. Lolley* (2), for it was decided I there by the twelve judges that by the second marriage he was guilty of bigamy, though on general principles every leaning in a criminal case would be in favour of the party accused. That case was followed by DR. LUSHINGTON in *Conway v. Beazley* (3). There, as in the present case, the second marriage was had in Scotland, not as in *Lolley's Case* (2) in England, and it was attempted on that ground to distinguish the two cases. But DR. LUSHINGTON held that the principle was the same wherever the second marriage was solemnised, for that, as neither of the parties to the first marriage were at any time bona fide domiciled in Scotland, the principle of *Lolley's Case* (2) must prevail. The same question

arose in this House in 1859, in *Dolphin v. Robins* (4). The case was very fully considered, and the conclusion at which your lordships unanimously arrived was that the Scottish courts have no power to dissolve an English marriage where the parties were not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrines of the Scottish courts, gives them jurisdiction in the matter.

These cases clearly decide the one now before the House, for if the first marriage here was not dissolved, there could not have been a second marriage. Till the first was dissolved, there was no capacity to contract a second. If, after the second marriage, Buxton and Elizabeth had again cohabited, and there had been issue, that issue would certainly have been legitimate by the law of England, and it cannot be argued that the issue of both marriages could share together.

There is only one further observation which I desire to make. It is this. In saying that the Scottish courts have no power to dissolve an English marriage, where the parties have only gone to Scotland for the purpose of obtaining there a domicile *fori*, I do not mean to express any opinion as to what might be the effect of a divorce so obtained, considered merely as a Scottish question. In the anomalous state of our laws relating to marriage and divorce it may be that such a proceeding may be valid to the north of the Tweed, but invalid to the south. I am painfully sensible of the inconvenience which may result from such a state of the law. But it must be for the legislature to set it right. The authorities seem to me to show clearly that, whatever may be the just decision of the Scottish courts on the subject of divorce, according to Scottish law it is one in which the English courts cannot admit any right in them to interfere with the inviolability of an English marriage, or with any of its incidents. To do so would be to allow a prejudice to English law to be created by the decision of what, for this purpose, we must call a foreign law, thus going beyond what any country is called on to do. On these short grounds, I am of opinion that there was no ground for this appeal, and I move, your Lordships, that it may be dismissed with costs.*

LORD CHELMSFORD.—The question by this appeal is whether the appellants are entitled under a devise and bequest in the will of John Wilson, made in England on Feb. 27, 1832, of the produce of real estate, "to the first and other sons lawfully begotten" of their mother, described as the testator's great niece, and of his personal estate to her children. Whether the appellants answer the descriptions respectively of "sons lawfully begotten" and of "children," depends upon whether their parents were lawfully married, and this, again, depends upon the effect of a divorce in Scotland upon the marriage of their mother with Thomas Buxton in England. This marriage of the appellants' mother with Buxton, though procured by his fraud, for which he afterwards suffered punishment, and though never consummated, was still a valid marriage, and at the period when it took place was indissoluble, except by Act of Parliament.

[His LORDSHIP stated the facts, and continued:] KINDERSLEY, V.-C., in giving his judgment against the validity of the Scottish marriage said that to assert the validity of the Scottish divorce, upon which alone the validity of the marriage with Shaw depended was to assert that the Court of Session was not bound by the principle of international law that all questions as to the validity, or incidents, or consequences of a marriage are to be decided according to the *lex loci contractus*, i.e., the law of the country where it was solemnised. But in a suit for a divorce, the validity of the marriage is not in question, and the violation of the marriage contract can hardly be called one of the "incidents" or "consequences" of it. If a divorce is to be regarded as a remedy for the breach of the matrimonial contract, it is a general principle of international law

* See addition to this opinion, post p. 891.

A that all remedies depend upon the *lex fori*, and not on the *lex loci contractus*. The vice-chancellor also thought it to have been solemnly decided in *Lolley's Case* (2) that

B “the law of this country did not recognise the right or authority of any court, whether domestic or foreign, to dissolve an English marriage for any cause or upon any pretext whatever, and any decree, judgment, or sentence of any foreign court purporting to dissolve such marriage is treated as a mere nullity.”

C In this view of the decision in *Lolley's Case* (2), the vice-chancellor is supported by the opinion of LORD ELDON in *Tovey v. Lindsay* (5), where he said (1 Dow at p. 136):

“The twelve judges of England have lately unanimously decided that an English marriage could not be anywhere [which seems to be a misprint for ‘otherwise’] dissolved except by an Act of the legislature.”

D It does not appear to me that *Lolley's Case* (2) can be regarded as an authority for so extensive a proposition. I cannot help joining in the doubt expressed by DR. LUSHINGTON in *Conway v. Beazley* (3) whether it was the intention of the judges to decide a principle of universal operation absolutely, and without reference to circumstances, or whether they must not, almost of necessity, be presumed to have confined themselves to the particular circumstances that were then under consideration. *Lolley's Case* (2) is very briefly reported, but there is little doubt E that Lolley went to Scotland for no other purpose than to enable his wife to be divorced from him, for it is stated as a fact in the case, that “the second wife agreed to marry him if he could obtain a divorce.” In the appellants’ Case in the present appeal it is said:

F “It would be enough to distinguish *Lolley's Case* (2) from the present, to say that the second marriage was entered into by Lolley, the divorced husband, in England, and that it was with a view to the English marriage that he went to Scotland, from whence he appears to have returned and married again immediately after he got the divorce.”

G But it must have been quite immaterial to the question of the validity of the Scottish divorce where Lolley was afterwards married, or whether he was married at all. The only consequence of the second marriage being in England was that it brought Lolley within the jurisdiction of the English criminal court. If he had married in Scotland, and thereby committed bigamy in the eye of the English law, he could not have been tried here, as the offence would have been committed out of the jurisdiction, and if he had been prosecuted in Scotland, the courts H there would have held that he had been guilty of no crime as the first marriage, in their opinion, would have been legally dissolved. I think that *Lolley's Case* (2) cannot be pressed as an authority beyond this extent, that the Scottish court has no power to dissolve an English marriage where the parties are not domiciled in Scotland, but have only gone there for such a time as would render them amenable to the jurisdiction of the Scottish courts. It certainly did not decide I (as the vice-chancellor supposed), nor has any other case decided, that

“the law of this country did not recognise the right or authority of any court, whether domestic or foreign, to dissolve an English marriage for any cause or upon any pretext whatever.”

On the contrary, the decision in *Warrender v. Warrender* (6) appears to me to be a direct authority in support of the exercise of such a jurisdiction by the Scottish courts. It was not because in that case the husband’s domicil was Scottish at the time of the English marriage that the courts assumed the juris-

diction, which was upheld by the House of Lords, but on account of the Scottish domicile which he had at the time he raised the action of divorce against his wife, which attracted her domicile and brought her constructively within the jurisdiction. There can be no distinction in principle as to the power of the Scottish court to dissolve an English marriage between the case of a domicile existing at the time of marriage, and a permanent domicile afterwards acquired. A

A question of greater difficulty which has been argued in this case is: What is the effect of a Scottish divorce upon an English marriage where the married parties do not afterwards become domiciled in Scotland, nor have resorted thither with the design of invoking the jurisdiction of the court, but where, happening to be in the country, one of them applies for and obtains a decree of divorce? Since the decision in *Lolley's Case* (2), the courts of Scotland have from time to time asserted and exercised a jurisdiction to dissolve marriages which have taken place in England and elsewhere than in Scotland, where the parties to them had acquired no permanent domicile in that country, but had merely continued there a sufficient time to give the courts jurisdiction. These cases have never been appealed to this House so as to raise the question of the validity of such divorces in a form to require your Lordships to decide upon the existence of the jurisdiction according to the principles of Scottish law. I cannot, therefore, subscribe to the opinion expressed by my noble and learned friend LORD CRANWORTH in *Dolphin v. Robins* (4) (7 H.L. Cas. at p. 414): B C D

"that it must be taken now as clearly established that the Scottish courts have no power to dissolve an English marriage where . . . the parties are not really domiciled in Scotland." E

But, whatever opinion may be ultimately entertained as to the extent of the power of the Scottish courts to dissolve English marriages, the validity of the divorce of the appellants' mother from Buxton cannot be admitted if it was obtained by concert or collusion. It was argued for the appellants that the only collusion which can affect the validity of a divorce is where there is concert and connivance in the acts upon which the decree proceeds, and that if a just cause of divorce exists without collusion any arrangement to bring the facts before a court of competent jurisdiction, however purchased or obtained is unobjectionable. I quite agree that if the agreement in this case had been that Buxton should bring himself within the reach of the Scottish court so as to enable his wife to institute a suit for a divorce to be determined upon the merits, although it was stipulated that he was to receive a sum of money when the divorce was obtained, this would not amount to collusion. But the arrangement between the parties was of a different character. To make it possible for the contemplated marriage between the father and mother of the appellants to take place, the previous dissolution of the marriage with Buxton was absolutely necessary. Shaw, therefore, who was intent upon obtaining his object, stipulated that Buxton should be paid a sum of money in case he was divorced, and restrained him from attempting to defeat the proceedings by imposing upon him the forfeiture of the money, in case he should "by himself," or by anyone through him, give information which should be prejudicial to the divorce. Such an agreement as this appears to me to come within the very words of the oath de calumnia, which was required to be taken by Mrs. Buxton, by which she swore that there had been no concert or collusion between her and the defender, or her friends or agents, in raising the action in order to obtain a divorce against him, nor did she know, believe, or suspect, that there had been any concert or agreement between any other person on her behalf, and the said defender, or any other person on his behalf, with the view or for the purpose of obtaining such divorce. It is impossible to doubt that the disclosure to the court of the agreement between the parties upon which the action was raised might have been prejudicial to the divorce, and Buxton would have run the risk of forfeiting the money he was to F G H I

A receive if he had given information about it. I do not think much of the proof of bona fides, which the appellants' counsel founded upon Buxton's plea to the jurisdiction of the court. It was necessary that the parties should be sure of their ground, and that they should be satisfied of the competency of the Scottish court to pronounce a divorce upon the legality of which the validity of their intended marriage entirely depended. It was in furtherance, therefore, and not in opposition to the proceedings, that the defence of want of jurisdiction was offered, because, if it had been well founded, it would have proved that the impediment to the marriage of the parents of the appellants could not be removed, and that all hope of it must be abandoned.

It is possible that the Scottish court might not have entertained the same view of the question of collusion which I have formed. But even if they had, it appears from the evidence of the Scottish advocates produced in this case, that, according to the law of Scotland, reduction of a decree of divorce upon the ground of collusion cannot be pronounced after a year and a day from the date. I suppose, therefore, that the Scottish courts would sustain the decree of divorce and would hold the subsequent marriage to be valid, if these matters were brought into question before them. The counsel for the appellants, therefore, contend that the decree of divorce being irreversible, the marriage of the parents of the appellants was valid, and the status of legitimacy of the appellants, being established in Scotland, must be recognised everywhere. They further argue that, even assuming the marriage to be invalid, the appellants might still be legitimate. They ground this argument upon the law of Scotland which (according to the evidence of the Scottish advocates)

“from considerations of expediency and humanity, adopted the rule of the canon law, which recognised the legitimacy of children born of a putative marriage, that is, a marriage regular and solemn in point of form, but null in law, because of the existence of an impediment, such as the prior existing marriage of one of the parties, both or either of the parties being ignorant of the existence of the prior marriage.”

The authority of text writers was referred to upon this point, all of whom confine the ignorance which renders children of a void marriage legitimate to ignorance of some fact by the parents. In the present case there was no fact bearing on the validity of the second marriage unknown to either of the parties to it. They drew their conclusions from known facts, and acted upon their own judgment as to the correctness of the advice given them upon the subject of the decree of divorce. Although they may have proceeded bona fide upon this advice, still their case is not brought within the principle of the law as laid down both by the evidence and in the text writers, as the ignorance imputed is not of fact but of law. But if a constructive legitimacy of this kind would, under the circumstances, have arisen in Scotland, I cannot think that we could be bound to recognise it so far as to qualify offspring of a void marriage to take under the description of “children” in an English will.

My opinion is that this case is founded entirely upon the peculiar circumstances attending it, the first marriage having taken place in England between parties having an English domicil, which they never changed, and the divorce in Scotland having been obtained by preconcerted arrangement, the parties resorting to the Scottish courts for the sole purpose of making it instrumental to the attainment of their objects. If this does not amount to collusion in the sense in which that term appears to have been employed in some cases of this description, I do not think that the tribunals of this country can regard a divorce thus obtained as binding on their judgment. It seems to me that this case cannot be distinguished from *Dolphin v. Robins* (4) decided by your lordships, where the validity of a will made in France depended upon the effect of a Scottish divorce upon an English marriage. In that case there was an agreement between the married

parties to procure a divorce in Scotland, and the husband was to receive £12,000, to be forfeited in case he should, by false or insufficient evidence, prevent the divorce being obtained (for so I interpret the ambiguous and inaccurate language of the memorandum upon the subject). It was held that a divorce prevented by the execution of this preconceived arrangement was, as LORD KINGSDOWN expressed it, "mere mockery and collusion from beginning to end." In that case the husband was to forfeit the money he was to receive for assisting to procure the divorce "if he should prevent its being obtained by any false or insufficient evidence." In the present case Buxton was to forfeit what he was to receive "in case he should give information prejudicial to the divorce." I think the cases exactly resemble one another, whatever may be the view of the Scottish courts as to the legitimacy of the appellants.

Your lordships are called upon to determine whether the appellants answer a particular description, upon principles of English law, and by the rules of construction of an English will. It is clear that the words "son lawfully begotten" and "children" in the will in question can apply only to a legitimate son, or to legitimate children, and that the appellants, not having the character of legitimacy according to the English law, cannot take under these descriptions. The decree appealed from must be affirmed.

LORD WESTBURY.—This case depends on the answer to the question whether a marriage, solemnised in England between two English subjects, domiciled in England at the time, can be dissolved by the decree of a foreign tribunal. According to the institutions of England, as existing at the time of the alleged divorce, no such decree could have been obtained in any court, for no forensic tribunal existed in England with jurisdiction to grant a divorce a vinculo matrimonii. The foreign decree of divorce is adduced for the purpose of determining a question touching a right of property that has arisen in an English court of justice and must be decided by English law. It is, therefore, a question of English law, and the true inquiry is: Does the English law recognise and admit the finality of a foreign judgment divorcing a vinculo matrimonii English subjects who were married in England? The foreign decree may be perfectly valid and unimpeachable within the territorial jurisdiction of the judge who pronounced it. It may there fix the legal status of persons and conclude the right and title to property, but it may still not be such a sentence as by the comity of nations (that is, by the general principles of jurisprudence, which are recognised by the Christian States of Europe) has an extra-territorial effect and authority.

The first essential for the validity of a foreign decree is that it should be pronounced by a court of competent jurisdiction between parties who are bona fide, subject to that jurisprudence. In the present case two English subjects who had married in England, being desirous of obtaining a divorce, crossed the border into Scotland for the purpose of getting it. The wife sued the husband for a divorce in a court which was competent to exercise jurisdiction for such a purpose over those who were subject to it. But could this court, consistently with true principles, assert such jurisdiction over those who were not permanently residing within the limits of its authority? I am not looking at the simulated residence in Scotland with a view to holding the judgment collusive, but with reference to the question whether the Scottish court can justly assert that by such temporary residence it acquired a jurisdiction which the courts of another country ought to recognise and admit. It is perfectly competent to the court in Scotland to fix a certain amount of residence as the condition for the exercise of its jurisdiction, and, if that condition be fulfilled, it may proceed to pronounce a judgment that will be binding within its own borders, but that judgment cannot claim extra-territorial authority unless it be pronounced in accordance with rules of international public law. The extent and limits of the comity of nations, or of the obligation which one nation is under to receive and

- A admit the judgments of the court of another country are well defined in one of the axioms of Huber, who says :

“*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*”

- B If the court of a foreign country permits the subjects of a bordering nation to resort to it for the purpose only of getting rid of the personal status and obligations of husband and wife, which release they cannot obtain in the court of their own country, it is plain that that foreign court is in reality usurping the rights and functions of sovereignty over the subjects of another country who still retain, and as soon as the purpose is answered intend to return to their native country and resume, their original position. Can this be done without injury to the authority of the bordering power, and to the rights of its subjects? Social rights depend in very many cases upon the personal status and relations of individuals, that is to say, upon the relation of husband and wife, father and child, and all the relations which are consequent upon marriage; and if these relations as they exist cannot be altered by the tribunals and domestic law of the country where they were formed, are not the institutions of the country prejudiced and its subjects injured by permitting a foreign court to be invoked for the purpose of altering social rights and duties which cannot be changed under their own laws in their own courts of justice? It is true that persons commorant in a foreign country, but without any intention of remaining there, are, while they are so commorant, subject to the laws of that country, and must yield obedience to them, but that is a very different thing from a country permitting foreigners to resort to it for the sole purpose of getting released from the most solemn of all contracts and the most important of social obligations. Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and, if necessary, dissolving the marriage contract. No nation can be required to admit that its domiciled subjects may lawfully resort to another country for the purpose of evading the laws under which they live. When they return to the country of their domicile, bringing back with them a foreign judgment so obtained, the tribunals of the domicile are entitled, or even bound, to reject such judgment as having no extra-territorial force or validity. They are entitled to reject it if pronounced by a tribunal not having competent jurisdiction, and they are bound to reject it if it be an invasion of their own laws and policy.

- But this right to reject a foreign sentence of divorce cannot rest on the principle stated by the vice-chancellor in his judgment, namely, that where by the *lex loci contractus* the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence, that is to say, with those rules which, for the sake of general convenience, and by tacit consent, are received by Christian nations and observed in their tribunals. One of these rules certainly is that questions of personal status depend on the law of the actual domicile. It is said by a foreign jurist of authority, RODENBURG—and his works are cited with approbation by many recent writers :

“*Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum queritur, uni solum, modo judicii et quidem domicilii, universum in illa jus sit attributum.*”

(*DE STAT. DIVERS.*, tit. 1, c. 3, s. 4). This position, that “*universum jus*”—that is, jurisdiction which is complete, and ought to be everywhere recognised—does in all matters touching the personal status or condition of persons, belong to the judge of that country where the persons are domiciled, has been generally

recognised. The language of BOULLENOIS, a French jurist of authority, is to the same effect. His position is that the laws of a sovereign extend over persons domiciled within his territory, and over property which is there situate: DE STAT. PRINC. GEN. 6, p. 4. A

That this rule is one which is introduced by "*ipsa rei natura, ac necessitas*," is well illustrated and enforced by LORD BROUGHAM in his judgment in *Warrender v. Warrender* (6). If, as is certain, the domicile of origin may be effectually put off and a new domicile acquired by persons who are *sui juris*, it must follow that such persons thereby become, to all intents and purposes, subject to, and entitled to, the benefit of the laws and institutions of the adopted country in like manner as they were entitled and subject to the laws of the domicile of origin, and that without becoming aliens in their own native country. STORY, J., in his book on the CONFLICT OF LAWS, p. 266, cites a judgment delivered by the Supreme Court of Pennsylvania, in which, after observing that a bona fide domicile, in the strictest sense of the word, was essential to jurisdiction to pronounce a divorce a vinculo matrimonii, the Chief Justice treats the British tenet of perpetual allegiance as the root of the English doctrine of the indissolubility of the marriage contract. I hardly need observe that this is an unfounded notion, and that the political maxim of *nemo potest exuere patriam*, which preserves the duty of allegiance notwithstanding the change of domicile, has nothing to do with the personal relations and rights of British subjects under civil contracts. B C D

If it were permitted by this House to be supposed that the law of this country was to the effect stated by the vice-chancellor, viz., that the *lex loci contractus* enters into and forms part of the marriage contract, so that if, by the law of the country where the marriage is solemnised and of which the parties are natural-born subjects, no divorce a vinculo can be granted, such marriage is everywhere indissoluble, it would be a conclusion that would lead to the most startling results. Suppose two Roman Catholics who, having married in Spain, afterwards became Protestants, and are bona fide domiciled in this country, where they reside for years, could it be held that the husband was bound by the *lex loci contractus* from seeking a divorce from his wife by reason of adultery committed during such residence? On the other hand, suppose two Prussian subjects married at Berlin where a divorce may be obtained for incompatibility of temper, could they, on becoming domiciled in England, claim a divorce on such a ground before the tribunal of this country where such a ground of divorce is not judicially recognised? E F G

Many other cases might be put, but it is unnecessary to do so, for I apprehend there is no substantial authority for the position. In England, since the Reformation, marriage, being no longer a sacrament, has always in theory of law been dissoluble for adultery in the wife and for incestuous adultery and other crimes by the husband, but until the Matrimonial Causes Act, 1857, this law was administered by Parliament alone, and, although the decision of Parliament was in the form of an Act or privilege, and not of a judicial decree, yet the Act was granted upon evidence proving that the case came within the scope of certain established rules. This proceeding was in spirit a judicial, though in form a legislative, Act. The justice of divorce was recognised, but no forensic tribunal was entrusted with the power of applying the remedy. But the law and practice of Parliament was well known, and, in fact, this House acted as a court of justice. It cannot, therefore, be correctly said that divorce a vinculo matrimonii was contrary to the principle and institutions of this country. It follows that the validity of a foreign decree of divorce must be ascertained in the same manner, and on the same rules by which the conclusive effect of other foreign judgments has to be determined. The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects is competent to pronounce a similar decree between English subjects, who were married in England, but who before and at the time of the suit are permanently H I

A domiciled within the jurisdiction of such foreign tribunal, such decree being made in a bona fide suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case* (2).

The facts of *Lolley's Case* (2) are not fully stated in every report or note of it; but from the report of it in RUSSELL AND RYAN, and the observations of LORD BROUGHAM (who was of the counsel in the cause) made in *Warrender v. Warrender* (6), correcting some erroneous observations in a previous case of the Court of Chancery, it would seem that the material facts were similar to the present case. Lolley and his wife were married in England, where they were domiciled at the time of their marriage, and also at the time of their alleged divorce in Scotland. Although it does not appear that there was any actual collusion in the suit, yet it is stated that Lolley took his wife to Scotland, in order that she might institute a suit of divorce there, and that adultery was, with a view to such a suit, committed by Lolley in Scotland. The resolution of the judges in *Lolley's Case* (2) is commonly cited as involving a very different conclusion from that which the resolution, strictly construed, really expresses, for the resolution was that no sentence or act of any foreign country or State could dissolve an English marriage a vinculo matrimonii for ground on which it was not liable to be dissolved a vinculo in England, a resolution which is consistent with the conclusion that English law would admit the validity of a decree of divorce a vinculo by a foreign tribunal for ground recognised as sufficient by the laws of England (whether administered by Parliament or by a court is immaterial) to justify a divorce a vinculo matrimonii. *Lolley's Case* (2) was without question rightly decided, but it does not involve a conclusion that the judges held the Scottish decree of divorce of no effect because an English marriage was indissoluble by English law. There are other and legitimate grounds of decision to which the judgment in *Lolley's Case* (2) may, and, in my opinion, ought to, be referred. Throughout the Scottish proceedings the domicile of both parties was in England, and the residence in Scotland was temporary only, and intended only for the purpose of having a suit of divorce instituted. The judge, therefore, was not the judge of the domicile, the suit was not bona fide, and the whole proceeding was in fraud of English law and injurious to English interests.

It has been supposed that *Lolley's Case* (2) was recognised by LORD ELTON in *Tovey v. Lindsay* (5), which came before the House in 1813. But, on an examination of the report of that case in 1 Dow. at p. 117, it will be seen that one main difficulty felt by LORD ELTON as to the validity of the Scottish divorce arose from the circumstance of the parties not being domiciled in Scotland at the time of the decree. So DR. LUSHINGTON, in *Conway v. Beazley* (3), appears to have thought that the true ground of the invalidity of the decree of divorce in *Lolley's Case* (2) was the fact of the parties not being domiciled in Scotland at the time. In *Warrender v. Warrender* (6), a marriage solemnised in England was dissolved by the decree of the Scottish Commissary Court. Some suggestion was made in the speech of LORD BROUGHAM, apparently for the purpose of escaping from the resolution in *Lolley's Case* (2), that as the husband was a domiciled Scotsman at the time of the marriage, the wife being an English woman and the parties at the time of the marriage intending to reside in Scotland, the marriage must be regarded as a Scottish and not an English contract. But with great deference I cannot consider this suggestion as well founded, or entitled to weight, and the decision of this House ought to be rested on the grounds assigned both by LORD LYNTHURST and LORD BROUGHAM, namely, that the husband who obtained the divorce was throughout a domiciled Scotsman and that, as no other domicile could be legally ascribed to the wife, both parties were domiciled in Scotland at the time of the suit, and of the decree. This was followed by *Dolphin v. Robins* (4) in which it was decided that where the parties to an

English marriage went to Scotland for the purpose of founding jurisdiction, the Scottish courts had no jurisdiction to entertain a suit for divorce, inasmuch as the parties were not bona fide domiciled in Scotland. So in *Pitt v. Pitt* (7), which was decided by this House in 1864, the counsel for Colonel Pitt admitted that the sentence of divorce which he had obtained in Scotland could not be upheld unless it could be shown that before and during the suit Colonel Pitt was permanently domiciled in Scotland, and this House, being of opinion that he had no such domicile, held that the Scottish court had no jurisdiction to pronounce the decree of divorce.

The point, therefore, must be regarded as finally settled by decision, on grounds wholly independent of the resolution in *Lolley's Case* (2). It follows that the marriage of Mr. and Mrs. Buxton was legally subsisting at the time of the second marriage between Mrs. Buxton and Mr. Shaw, and that the second marriage was, therefore, void, and the issue of it cannot claim to be entitled by English law to the benefit of the trust previously declared for the children of Elizabeth Hickson. Even if the first husband had been permanently domiciled in Scotland before and at the date of the decree of divorce, in which case the Scottish courts might have had jurisdiction, I should still have been of opinion that the decree was not binding, as having been collusively obtained. But I abstain from resting my judgment upon this ground, because I entertain a doubt whether collusion could be now used as a sufficient reason for setting aside the decree after the deaths of all the parties to the proceedings. It must be admitted that there has been a series of decisions in the Scottish courts to the effect that a permanent domicile of parties is not necessary to found a jurisdiction in the Scottish tribunals to pronounce a decree of divorce a vinculo between parties who have been married in England or any other foreign country, and that, if the defendant in any such suit has been resident for forty days in Scotland, it is sufficient to subject him to the jurisdiction of a Scottish tribunal in a suit for divorce. It would, however, seem to be the law of Scotland that, if the divorce be sought on the ground of adultery, the adultery must have been committed in Scotland. The whole reasoning of the judges in the Scottish cases is founded upon the right of the Scottish courts to redress any wrong committed by either of the spouses if the act be done within the territory of Scotland, and that, if divorce be sought on the ground of a personal wrong committed within the jurisdiction of a Scottish court, it is the right of the party who suffers the wrong to have that remedy which the law of the country affords. Such reasoning, however, although it may be good for maintaining the validity of the Scottish divorce in Scotland, cannot be required to be accepted by the tribunals of another country.

The result is that a sentence of divorce under such circumstances may be binding in Scotland, although of no validity in the territory of England. The inconvenient consequences of this state of the law are obvious, and have been frequently exposed with great force, particularly by LORD BROUGHAM in his speech in giving judgment in *Warrender v. Warrender* (6). But this disgraceful anomaly can only be removed by the legislature. For these reasons I am of opinion that the decree of the vice-chancellor was correct, and ought to be affirmed.

LORD COLONSAY.—This case brings us into contact with principles of vast importance. In handling and applying those principles we must be careful neither to impair them nor to extend them beyond their proper limits. The facts out of which the case has arisen have been repeatedly stated, and I shall not recapitulate them. The practical question is whether the appellants are entitled to certain interests under the will of their mother's great uncle, John Wilson, of Stenson, in the county of Derby. The will is dated Feb. 27, 1832, Mr. Wilson died on Oct. 2, 1835, and the appellants' mother died on July 28, 1863. By the will the interest now in question (I speak at present of the personal estate) is held in trust

A for "all and every the child or children of my said great niece," meaning thereby the lawful or legitimate children of his great niece. The appellants are undoubtedly her children born of a marriage contracted by her with John Shaw, and celebrated in regular form in facie ecclesie at Edinburgh, on June 17, 1846. At the time of the marriage Mr. Shaw, though a native of England, was living in Edinburgh studying law, with the view of becoming an advocate at the Scottish Bar, to which he was soon thereafter called, and at which he practised till his death in 1852. The fixed residence of Mr. and Mrs. Shaw was at Edinburgh, and their children, the appellants, were all born there. Prima facie, then, they are the lawful or legitimate children of their mother, and it does not appear that their status as legitimate children has ever been questioned in the country in which they were born, and in which their father had his permanent domicile at the time of their birth. Nevertheless, there may be a fatal flaw in their pretensions to legitimacy, and the respondents say that there is such a flaw, that the marriage of their parents was invalid in respect that at the date of it their mother was the lawful wife of Thomas Buxton, a domiciled Englishman, to whom she had been married at Manchester in June, 1828, and who was still alive at the date of her marriage with Shaw, and was known to the parties to be then alive. The answer made to that plea is that the marriage with Buxton had been dissolved by a decree of divorce a vinculo, on the ground of the husband's adultery pronounced by the Court of Session in Scotland in March, 1846, being some months before the marriage with Shaw, and that the marriage with Buxton being so dissolved, it was no longer an obstacle to her contracting a valid marriage with Shaw, and no bar to the legitimacy of the children born of that marriage.

E The respondents deny the validity or efficacy of the decree of divorce, or that it could, either in Scotland or in England, have the effect ascribed to it, and they contend that it must be treated as a nullity, that, consequently, the marriage with Shaw must also be treated as a nullity, and that the children born of that connection must be regarded as illegitimate, both in Scotland and in England, or at all events in England. I did not understand that any of these propositions was departed from in the argument. Some of them I am not disposed to affirm. They may not be necessary to the decision of this case, but having been advanced in the course of it, and having, as appears to me, received countenance from the terms in which the very learned judge in the court below is reported in the print before us to have expressed himself in giving the rationes of his judgment, I think it necessary to notice them.

G Whatever may be my judgment on the case, I am desirous to exclude possible misapprehension as to the elements that enter into it. When it is said in unqualified terms that a marriage duly celebrated in England according to the rites of the English Church, ought to be regarded and treated by the courts of other countries as a contract involving the element of absolute indissolubility as of its essence, and ought not to be, under any circumstances, dissolved by decree of a foreign court—in short, that a foreign court has no power to dissolve an English marriage—that is a proposition in general or international law, and would require to be maintained by reference to recognised rules of international law on general principles of jurisprudence. But although the proposition has been introduced into this case, it has not been supported by any such reference, and I cannot assent to it as resting on any recognised rule of international law. It appears to me to involve more than one fallacy. It assumes as a basis that absolute indissolubility is an inherent quality of an English marriage necessarily attaching to it under all circumstances. Then, building on that basis, it assumes that as regards international law the relation of husband and wife stands on the same footing as ordinary business contracts; and further it assumes that the *lex loci contractus* must be the sovereign rule for determining all questions as to the rights, duties, and obligations arising out of that relation, and the remedy or redress to be given in the event of either party acting in violation of the contract.

I hold each and all these assumptions to be more or less erroneous. Is it sound that absolute indissolubility is an inherent quality of marriage when celebrated in England according to the rights of the English Church? Is it so regarded even in England? I have heard no authority for that. The terms of the opinion of the twelve judges in *R. v. Lolley* (2) appears to me to imply the reverse. The words are that they are

“unanimously of opinion that no sentence or act of any foreign country or State could dissolve an English marriage a vinculo for ground on which it was not liable to be dissolved a vinculo in England.”

These words appear to me to be qualified, and to imply that for some ground an English marriage is liable to be dissolved a vinculo in England. That the procedure for obtaining dissolution of marriage should be by Bill in Parliament and not by a suit in court, proves only that in England the power of decreeing dissolution had not yet been conferred on any court, not that absolute indissolubility was regarded as an inherent quality of marriage. The procedure, though Parliamentary, was substantially judicial; the allegations were investigated and, if substantiated, the relief sought was granted as a matter of right and justice. In short, Parliament was the tribunal for such cases, and was resorted to as matter of recognised procedure by those who sought relief on good grounds, and could afford to pay for it. The indissolubility of an English marriage in England was true only in this sense, that no court in England had power to dissolve an English marriage, or, indeed, any other marriage, and in this other sense, that to the great bulk of the community the want of any such court had the effect of making their marriage practically indissoluble, because they could not afford to avail themselves of the cumbrous and expensive machinery by which alone the desired result could be obtained.

The establishment of a Divorce Court in 1857 took away both of these causes for popularly describing English marriages as indissoluble, and they are no longer so described; the dissolubility is now patent. But did the establishment of a court to administer the law of divorce alter the inherent qualities of marriage, that is, of the institution called marriage as it existed in England and in all other Protestant countries? I think it is impossible to ascribe to the Matrimonial Causes Act, 1857, the effect of altering the inherent qualities of that domestic relation as already construed, and up to that date subsisting between all the living married pairs throughout the kingdom. If it did not do so as to marriages then existing, it did not do so at all, for it makes no difference between marriages then existing and future marriages. By devolving on a new tribunal some of the duties in regard to the administration of justice previously discharged by Parliament, increased facilities were given for obtaining the remedy of divorce a vinculo, but the element of dissolubility was not thereby introduced into a domestic relation from which that element had hitherto been absolutely excluded as inconsistent with the essence of the relation. Indissolubility was not in principle an inherent quality of an English marriage before 1857, any more than it is now, although the means of obtaining the remedy are more accessible than they were. That it is given by one tribunal, or by one form of proceeding rather than another is immaterial, and does not affect any principle of jurisprudence or international law. Therefore, to say that in 1846 an English marriage was indissoluble, save by an Act of the legislature, is of no more pertinency to the question of international law than to say that now it is indissoluble, save by a decree of the Divorce Court.

Further, in reference to the bearing of general law, is it a sound view that marriage stands on the same footing as ordinary business contracts, and that the *lex loci* must furnish the sovereign rule for determining all questions in regard to the rights, duties, and obligations arising out of the contract, and the redress competent to be given? There appear, however, to be some very obvious

- A** differences. In ordinary contracts each contract depends entirely on, or rather consists of, such conditions as it may be the pleasure of the contracting parties to stipulate, whereas marriage, though classed among contracts, is an institution—a domestic relation of parties recognised in all Christian countries, the essentials of which are not to be looked for in conditions prescribed in each case according to the pleasure of the contracting parties, or in the formalities or words of the
- B** ceremonial used in constituting the relation, but in duties, rights, and obligations which spring from the relation itself, when constituted. Certain formalities may be necessary to constitute the relation. These may vary in different countries, and in any inquiry whether the relation has been duly constituted, the *lex loci contractus* governs. That is a recognised principle of jurisprudence in most countries.
- C** What authority is there in general for holding as a universal rule that the *lex loci contractus* must govern in regard to all the results and incidents, especially as to the remedy or redress to be given in the event of violation of the primary duties and obligations? I know of no authority for that unless we read in that sense the opinion of the judges in *R. v. Lolley* (2), and some passages in the judgment we are now reviewing. I believe that at first the opinion in *R. v. Lolley* (2) was rested on the absolute indissolubility of English marriages, and the supremacy of the *lex loci contractus* under all circumstances. But it does not appear to have been accepted and acted upon in that sense in other cases in later times. In *Conway v. Beazley* (3) DR. LUSHINGTON anxiously guarded himself from being supposed to accept it as an authority for any such broad doctrine, and limited his recognition of it to the case of parties domiciled in England, resorting temporarily to a foreign country for the purpose of obtaining divorce. That may or may not be a good ground for denying effect to the foreign decree, but it is a ground altogether different from the theory of absolute indissolubility, or the supposed supremacy of the *lex loci contractus*. I read the observations of LORD CRANWORTH in *Dolphin v. Robins* (4) as implying a similar limitation.
- F** Whatever may have been the impression originally produced on the minds of lawyers in this country or in other countries by the opinions of the judges in *R. v. Lolley* (2) or whatever may have been the impression in the minds of the very eminent judges who gave that opinion, I think that more recent cases indicate at the very least a hesitation, and I may, perhaps, be permitted to say a very reasonable hesitation, on the part of eminent English judges to accept
- G** *R. v. Lolley* (2) as an authority for the theory of absolute indissolubility, or for the doctrine of the absolute supremacy of the *lex loci contractus*, under every state of circumstances, in the matter of divorce. I venture to think that that doctrine has no solid foundation in authority; that there is no such universal rule of international law. The hesitation (to use no stronger word) of eminent English judges to commit themselves to the doctrine of the supremacy of the *lex loci contractus* in the matter of divorce, under all possible circumstances, entitles me to say that England cannot be cited as a country which recognises that doctrine. We know that it is not acknowledged in the neighbouring country of Scotland, although in no country has the law of divorce in all its bearings been discussed more thoroughly, or with greater ability and learning. We see that from a very remote period—certainly from the date of the Reformation—the law of that
- I** country, and the constant practice of its courts, has been to decree divorce a vinculo for proved adultery in all cases in which the parties were, at the date of the proceedings, properly subject to their jurisdiction, applying the *lex fori*, no matter in what country the marriage may have been contracted.

That such is the settled law of Scotland was recognised in this House in *Warrender v. Warrender* (6). In that case there was the element of domicil, inasmuch as Sir George Warrender was a domiciled Scot, but the marriage was an English marriage—a marriage celebrated in England, according to the rites of the English Church—and the *lex loci contractus* was not allowed to be any

obstacle to sustaining the validity of the decree of divorce a vinculo. Then we have been referred to the work of an American jurist of great celebrity who writes on the conflict of laws and expresses his sympathy with the law of Scotland on this point, and his unwillingness to recognise *R. v. Lolley* (2) as a sound exposition of the general law, if that case is to be read in the sense in which it appears to have been at the time understood. We have not been referred to any authority the other way.

The fallacies that have lurked in undefined notions of the indissolubility of English marriages, and the omnipotence of the *lex loci contractus* being dislodged, what are the rules by which we should be governed in this case? Assuming, in the mean time, that the case depends entirely on the reception (so to speak) to be given to the foreign decree of divorce, it is to be observed that the respondents deny that the decree is valid according to the law of the country in which it is pronounced. If we are to go into that inquiry, we must deal with it upon the evidence, and the evidence, so far as it goes, is in favour of the validity of the decree. I, therefore, presume that we must deal with the case on the footing that the decree is or may be a valid decree of divorce in Scotland. Why is that decree to have no effect given to it in England? Not because the English marriage was absolutely indissoluble; not because the *jus gentium* restrains the court of one country from dissolving a marriage celebrated in another country, or holds that the *lex loci contractus* is necessarily imported, in its totality, into whatever country the parties may go. It must be because the circumstances of this case bring it within some exception recognised in general law, or because the law of England, irrespective of any rules of general law, refuses to give effect to such a decree.

The main feature of the case, in this view, is that the parties, at least Buxton, the husband, being a domiciled Englishman, having no connection with Scotland, went there for the purpose of giving to the Scottish court jurisdiction in the suit for divorce at the instance of the wife. I think that the English cases referred to—viz., *R. v. Lolley* (2) and *Conway v. Beazley* (8), and *Dolphin v. Robins* (4), are precedents to the effect that the courts of England will not recognise a decree of divorce obtained under such circumstances, and, that, sitting in an English court, I am bound to respect these precedents so far as they go. And they may be sufficient for the decision of the present case. At the same time, I may be permitted to say that I am not so clear in my apprehension of the principle of general law on which these decisions proceeded. It was said that a foreign court has no jurisdiction in the matter of divorce, unless the parties are domiciled in that country, but what is meant by “domicil”? I observe that it is designated sometimes as a *bona fide* domicil, sometimes as a real domicil, sometimes as a complete domicil, sometimes as a domicil for all purposes. But I must, with deference, hesitate to hold that on general principles of jurisprudence, or by rules of international law, the jurisdiction to redress matrimonial wrongs (including the granting of a decree of divorce a vinculo) depends on there being a “domicil,” such as seems to be implied in some of these expressions.

Jurisdiction to redress wrongs in regard to domestic relations does not necessarily depend on “domicil for all purposes.” If the decisions to which I have referred proceeded on the ground that the resort to the foreign country was merely for the temporary purpose of giving to the courts of that country the opportunity of dealing with the case according to their own law and thereby obtaining a dissolution of the marriage, and that such was the object of both parties, I think that the cases might derive support from principles of general law on the ground of being in *fraudem legis*. But if you put the case of parties resorting to Scotland with no such view, and being resident there for a considerable time, though not so as to change the domicil for all purposes, and then suppose that the wife commits adultery in Scotland, and that the husband discovers it and immediately raises an action of divorce in the court of Scotland where the witnesses reside, and where his own duties detain him, and that he

A proves his case and obtains a decree, which is unquestionably good in Scotland, and would, I believe, be recognised in most other countries, I am slow to think that it would be ignored in England, because it had not been pronounced by the Divorce Court here. How would the Divorce Court here deal with the converse case? I can figure many phases in which the question of the efficacy of a decree of divorce may present itself, and I am unwilling in the present case to go further than to say that the cases referred to satisfy me that the law of England does not acknowledge the validity of a decree of divorce obtained in the circumstances disclosed in this case.

There is still another point in the case which has raised some doubt in my mind. It is this. Assuming, as we must do on the evidence, that according to the law of Scotland the marriage of the father and mother of the appellants was a valid marriage, and that they are children lawfully procreated of that marriage, and so, in their own country, legitimate from their birth, is that status to be denied to them in this country, on the ground that is here pleaded? I do not question the logic of the reasoning by which the conclusion has been reached that, if there was no valid divorce, there was an incapacity to marry, and consequently no valid marriage. But there was a valid divorce and a capacity to marry, in the territory, and when that marriage has resulted in the birth of children who have the status of legitimate children according to the law of their own country, are we, in reference to them and their rights, to revert to an inquiry, at whatever distance of time, into whether Buxton's resort to Scotland was or was not for the purpose of facilitating the divorce? That has not been directly decided in any of the cases, not even in *Birtukistle v. Vardill* (1); but I think the cases tend in that direction so strongly that I cannot, especially after the opinions now delivered, take upon myself to suggest a doubt as to their being the law of England, although I do not see my way to reconciling it with general principles of jurisprudence, or the generally recognised rules of international law.

As to the plea founded on the doctrine of putative marriage, I am not disposed to give effect to it in this case. In the first place, I am not satisfied that the doctrine is at all recognised in the law of England. In the second place, assuming that it is recognised in certain cases, I do not see how the law of England, which treats the divorce as a nullity, can admit the application of the doctrine in this case. The doctrine is founded on ignorance of fact not on error in law. There was no ignorance of the fact of the marriage to Buxton, or of the fact that he was still alive. Courts of law treat the law of a foreign country as matter of fact in the sense that it requires to be established by evidence, but only in that sense. They do not regard the law of their own country as matter of fact, and consequently in an English court the inefficacy of the divorce must be regarded as matter of law, not of fact. Again, if it be said that in Scotland, and to parties in that country, the law of England was matter of fact, I do not think that would advance the argument, because the condition of the argument is that in Scotland the appellants are legitimate without the aid of the doctrine in question. On the whole, I feel bound by the authority of the cases to the effect I have stated, and I think that is sufficient for the present case. The learned judge in the court below refers to the monstrous consequences that would result from recognising the possibility of a man having two lawful wives, one in England, and another in some other country; but I think he has failed to perceive that such a state of matters would be promoted rather than restricted by the doctrine of absolute indissolubility, and of the supremacy of the *lex loci contractus*, and would not exist where effect is given to the foreign decree of divorce.

LORD CRANWORTH.—Before the question is put to my noble and learned friend on the woolsack, I wish to advert to an observation that was made by my noble and learned friend on my left (LORD CHELMSFORD) as to what fell from me

in the case of *Dolphin v. Robins* (4). My noble and learned friend remarked that he could not subscribe to the opinion I then expressed (7 H.L. Cas. at p. 414),

"that it must be taken now as clearly established that the Scottish court had no power to dissolve an English marriage where the parties were not really domiciled in Scotland."

My noble and learned friend says that that proposition is too extensively stated, because it may be that such a decree of dissolution of marriage, although the parties are not bona fide (whatever that may mean) domiciled in Scotland, may be perfectly valid in Scotland. In the observation which I recently addressed to your Lordships, I adverted to that distinction here. All that I meant to say was that such a decree of divorce is not valid quoad its operation in this country. That was what I meant in what I said in *Dolphin v. Robins* (4). If the words which I used in *Dolphin v. Robins* (4) are fairly to be construed in a more enlarged sense, I beg to say that I entirely concur with my noble and learned friend in thinking that they were too largely stated, and I am very glad that my noble and learned friend has called my attention to them, so that, whenever that case may be referred to hereafter, it may be clearly understood that I qualify them as I have now stated—that is to say, that the Scottish court has no power to decree a valid divorce quoad its operation in this country. I move that this appeal be dismissed.

Appeal dismissed.

LIFE ASSOCIATION OF SCOTLAND v. SIDDAL AND OTHERS

[COURT OF APPEAL IN CHANCERY (Lord Campbell, L.C., Turner and Knight-Bruce, L.JJ.), January 14, 15, February 9, 1861]

[Reported 3 De G.F. & J. 58; 4 L.T. 311; 7 Jur.N.S. 785;
9 W.R. 541; 45 E.R. 800]

Acquiescence—Evidence—Proof of full knowledge of rights and facts of case—Onus—Presumption of acquiescence from great delay.

Delay by a person in interfering to prevent the violation of some legal right which he possesses, where it does not operate as a statutory or positive bar to subsequent proceedings, operates as evidence of consent or acquiescence. Acquiescence imports full knowledge, for a man cannot be said to have acquiesced in what he did not know. A person, therefore, cannot be bound by acquiescence unless he has been fully informed of his rights and all the facts and circumstances of the case.

Per LORD CAMPBELL, L.C.: Although the rule be that the onus lies on the party relying on acquiescence to prove the facts on which consent is to be inferred, it is easy to conceive cases in which from great lapse of time such facts ought to be presumed.

Trust—Cestui que trust—Acquiescence in breach—Interest in reversion—Information by trustee of commission of, or intention to commit, breach—Discretionary trust—Request by trustee for advice or help—Notice by trustee of intention to do act where trust doubtful.

In cases of express trusts a cestui que trust whose interest is reversionary is not bound to assert his title until it comes into possession, but the mere

A circumstance that he is not bound to assert his title does not bear upon the question of his assent to a breach of trust. A cestui que trust is not less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not is a question to be determined on the facts of each case. It is the duty of a trustee to observe the trust and to preserve the property for the benefit of those entitled in remainder, and he cannot be permitted to escape from the liability incident to that duty simply by informing the cestui que trust that he has committed, or intends to commit, a breach of it. He cannot, where the trust is clear, throw upon the cestui que trust the obligation of telling him what his duty is and of cautioning him to observe it, thus involving the cestui que trust in the burden and expense of those duties which he has undertaken himself to perform. If there is a discretion to be exercised under the trust, the trustee may apply to the cestui que trust for his advice or assistance in the exercise of it, and if the cestui que trust refuses his aid, he may not be entitled afterwards to complain of what the trustee has done in the exercise of his discretion. Where it is doubtful what ought to be done under a trust, the trustee may give notice to the cestui que trust of his intention to do a particular act unless the cestui que trust interferes to prevent it, and, if the cestui que trust does not interfere, the court may well hold that the trustee was not liable for doing that act. But in cases where the trust is definite and clear a breach of trust cannot be held to have been sanctioned or concurred in by mere knowledge and non-interference on the part of the cestui que trust before his interest has come into possession.

E **Quaere**, how far, if at all, the above statements of the law apply to constructive trusts.

Notes. Considered: *Lyell v. Kennedy* (1889), 14 App. Cas. 437; *Soar v. Ashwell*, [1891-4] All E.R. Rep. 991. Referred to: *Evans v. Davis* (1878), 10 Ch.D. 747; *Buckmaster v. Buckmaster* (1886), 55 L.T. 279; *Evans v. Benyon* (1887), 37 Ch.D. 329; *Price v. Phillips* (1894), 11 T.L.R. 86.

F As to the equitable doctrine of acquiescence and the effect of laches, see 14 HALSBURY'S LAWS (3rd Edn.) 638-647; and for cases see 20 DIGEST (Repl.) 552 et seq. As to acquiescence of beneficiaries in breaches of trust, see 38 HALSBURY'S LAWS (3rd Edn.) 1040-1051; and for cases see 43 DIGEST 998-1006.

Cases referred to:

- G** (1) *Browne v. Cross* (1851), 14 Beav. 105; 51 E.R. 226; 24 Digest (Repl.) 720, 7067.
 (2) *March v. Russell* (1837), 3 My. & Cr. 31; 6 L.J.Ch. 303; 1 Jur. 588; 40 E.R. 836; 20 Digest (Repl.) 565, 2665.
 (3) *Rackham v. Siddall* (1848), 16 Sim. 297; affirmed (1850), 1 Mac. & G. 607; 2 H. & Tw. 44; 16 L.T.O.S. 21; 41 E.R. 1400, L.C.; 43 Digest 989, 4309.

H Also referred to in argument:

Cooper v. Green (1861), 3 De G.F. & J. 58; 4 L.T. 311; 7 Jur.N.S. 785; 9 W.R. 541; 45 E.R. 800, L.C. & L.J.J.; 20 Digest (Repl.) 566, 2668.

Hope v. Liddell (1855), 21 Beav. 183; 25 L.J.Ch. 90; 26 L.T.O.S. 305; 2 Jur.N.S. 105; 4 W.R. 145; 52 E.R. 829; 43 Digest 1003, 4434.

I *Bennett v. Colley* (1833), 2 My. & K. 225; Coop. Temp. Brough. 248; 39 E.R. 930; 20 Digest (Repl.) 565, 2666.

Munch v. Cockerell (1840), 5 My. & Cr. 178; 9 L.J.Ch. 153; 4 Jur. 140; 41 E.R. 338, L.C.; 43 Digest 1001, 4426.

Duke of Leeds v. Lord Amhurst (1846), 2 Ph. 117; 16 L.J.Ch. 5; 10 Jur. 956; 41 E.R. 886, L.C.; 21 Digest (Repl.) 451, 1539.

Adams v. Clifton (1826), 1 Russ. 297; 38 E.R. 115; 43 Digest 977, 4176.

Cockerell v. Cholmeley (1830), 1 Russ. & M. 418; Taml. 435; 48 E.R. 173; on appeal (1832), 6 Bli. N.S. 120, H.L.; 43 Digest 1001, 4422.

MacLeod v. Annesley (1853), 16 Beav. 660; 22 L.J.Ch. 633; 21 L.T.O.S. 40; 17 A Jur. 608; 1 W.R. 250; 51 E.R. 912; 43 Digest 1000, 4412.

Roberts v. Tunstall (1845), 4 Hare, 257; 14 L.J.Ch. 184; 9 Jur. 292; 67 E.R. 645; 43 Digest 783, 2231.

Knatchbull v. Fearnhead (1837), 3 My. & Cr. 122; 1 Jur. 687; 40 E.R. 871, L.C.; 43 Digest 991, 4325.

Harrison v. Hollins (1812), 1 Sim. & St. 471; 57 E.R. 187; 32 Digest (Repl.) 552, 1460.

Raffety v. King (1836), 1 Keen, 601; 6 L.J.Ch. 87; 48 E.R. 439; 32 Digest (Repl.) 552, 1459.

Smith v. French (1741), 2 Atk. 243; 26 E.R. 550; 22 Digest (Repl.) 381, 4108.

Appeal from an order of STUART, V.-C.

Toller and Archibald Smith for the appellants.

Walker, Elmsley, Rogers and Hobhouse for the respondents.

TURNER, L.J.—This case has come before us on appeal from an order of STUART, V.-C., refusing an application on the part of John Seaman and Georgiana his wife, and Charles Lee, the assignee under a fiat in bankruptcy against John Seaman, to vary the chief clerk's certificate in the cause.

William Spencer, by his will dated Mar. 25, 1798, devised his real estates unto and to the use of William Thompson, his heirs and assigns, upon trust, during the life of his wife Mary Spencer, to pay her an annuity of £150 out of the rents, and to pay the surplus of the rents to his daughter Catherine Norton, the wife of Benjamin Norton, and after the decease of his wife he directed that the estates should remain to Thompson, his heirs and assigns, to the use of his daughter Catherine Norton for life, with remainder to Benjamin Norton for life, with remainder to the children of Catherine Norton as tenants in common in tail, with cross-remainders between them in tail, and it was provided by the will that, in case Benjamin Norton and Catherine Norton, or the survivor, should be desirous that the whole or any part of the devised estates should be sold, it should be lawful for Thompson, his heirs or assigns, to sell and dispose of the same, and give receipts for the purchase-money, which, the testator directed, should be laid out either in the purchase of other hereditaments or upon good and sufficient security at interest in the name of his said trustee, and that the hereditaments to be purchased should be conveyed to Thompson, his heirs and assigns, to the uses above declared, and that the interest of the money to be placed out at interest should be paid to the persons for the time being entitled to receive the rents of his estates, and that the principal moneys to be placed out should after the death of Benjamin and Catherine Norton be equally divided between all such children as Catherine Norton might leave at her decease, the shares of the children to be vested at twenty-one.

The testator William Spencer died in January, 1799. William Thompson accepted the trusts of the will. He sold part of the devised estates, and permitted the proceeds of the sale to be received by Benjamin Norton, who laid out the greater part of these proceeds in the purchase of an estate at Bawburgh in Norfolk, but applied the residue to his own use. No question, however, arose as to the application of this residue. William Thompson died in 1806, having by his will devised his real estates to his sister Grace Thompson, but in such terms that the estates remaining vested in him as trustee under the will of William Spencer did not pass by the devise, and Grace Thompson was not his heiress-at-law. Grace Thompson, nevertheless, assumed to have become trustee under the will of William Spencer, and in 1807 she sold the rest of the estates devised by his will for £6,300, and purported to convey the same to the purchaser. She did not, however, actually receive any part of the purchase-money of £6,300, but permitted the whole to be received by Benjamin Norton,

A he and his brother Francis Norton joining in a bond to her conditioned for indemnifying her against any damage she might sustain in consequence of its being received by him. Benjamin Norton applied the whole of this sum of £6,300 to his own use, and the contest upon the present appeal was as to the right to recover from the estate of Grace Thompson a share of this sum.

B Catherine Norton, the daughter of the testator William Spencer, and the tenant for life under his will, had issue eleven children. Five of those children attained twenty-one, and the remaining six died infants and unmarried. Georgiana Spencer Seaman was one of the five children who attained twenty-one. She was born on June 3, 1806 or 1807 (in which of those years is disputed), and consequently she attained twenty-one on June 3, 1827 or 1828. On Dec. 13, 1828, she married John Seaman who became a bankrupt in 1830, and never obtained his certificate. Up to the time of her marriage Georgiana lived with her father and mother. A great variety of deeds at different times were executed by the children of Benjamin and Catherine Norton creating incumbrances on their interests under the will of William Spencer, and some of these deeds, which were executed by Mrs. Seaman, were relied on to fix her with a knowledge of the trust-fund being in Benjamin Norton's hands.

D Ever since the death of Benjamin Norton suits had been pending with reference to the claims of the children of Catherine Norton, in respect of the proceeds of the sales of the estates devised by the will of William Spencer. The first of them, which was instituted immediately on Benjamin Norton's death, affected his estate only, but in 1845 the personal representative of Catherine Norton instituted a suit against the personal representative of Grace Thompson, to recover the sum of £6,300 from her estate, and by the decree in that suit her estate was declared to be liable for that sum. This decree, however, was afterwards reversed upon appeal, so far as it extended to the capital, though left in force as to the life-interest of Catherine Norton. It has been followed by other suits, and ultimately the bill in the cause in which this appeal is presented was filed by the Life Association of Scotland, claiming under another of the children of Catherine Norton, against the personal representative of Grace Thompson, to receive the £6,300 and interest. By the decree in this cause it was ordered that an inquiry should be made whether anything and what was due from the estate of Grace Thompson in respect of the £6,300 and the interest thereon, and to whom. The appellants went in under this decree, and claimed one-fourth of the E £6,300 and interest. But the chief clerk, by his certificate dated April 27, 1859, after certifying in favour of the Life Association of Scotland as to the one-fourth claimed by them, certified that the persons who were entitled under the limitations contained in the will of William Spencer upon the death of the survivor of Benjamin Norton and Catherine his wife to the remaining three fourths of the trust-fund, among whom the appellants were included, were debarred H their right or claim against the estate of Grace Thompson, by acquiescence in the breach of trust committed by her, and that nothing remained due from her estate in respect of their several shares or the interest thereon, respectively, and that their claims had been disallowed accordingly. It was this certificate which the appellants sought by their motion before the vice-chancellor to vary, so far as the share of Georgiana Spencer Seaman was concerned, and the motion having I been refused by the vice-chancellor they brought the present appeal.

There was a breach of trust on the part of Grace Thompson in permitting the £6,300 to be received and retained by Benjamin Norton, and the appellants' case, therefore, is *prima facie* clear and free from difficulty. The onus is upon the respondents to displace it. Three points were urged on their behalf: first, that the claim was barred by the Real Property Limitation Act, 1833 [repealed by Limitation Act, 1939]; that, independently of the statute, it was barred by length of time and acquiescence; and thirdly, that it was displaced by set-off. The argument on the first point was that this was not a case of express trust,

but on the hearing we stated our opinion that it was, and further consideration has more fully convinced me that that opinion was right. Grace Thompson, although not a trustee or legally representing the trustee named in Spencer's will, assumed to act and acted as a trustee under the will. If she had by writing declared herself to be a trustee, the trust in her could not have been otherwise than expressed, and her conduct is equivalent to her written declaration. I am not satisfied, however, that it was necessary even to consider this question, for I am much disposed to think that the pendency of Currie's suit was itself sufficient to take the case out of the Real Property Limitation Act, 1833.

The respondents' argument was mainly rested, however, upon the length of time independently of any statutory limitation and upon acquiescence. So much discussion has of late arisen upon this subject, that it may be as well to state the general views which I entertain upon it before entering upon the facts of this particular case. Length of time, where it does not operate as a statutory or positive bar, operates, as I apprehend, simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not, as I conceive, distinct propositions. They constitute but one proposition, and that proposition, when applied to a question of this description, is that the cestui que trust assented to the breach of trust. A cestui que trust, whose interest is reversionary, is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title does not seem to me to bear upon the question of his assent to a breach of trust. He is not, so far as I can see, less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not is a question to be determined on the facts of each particular case.

The respondents relied much upon some observations which fell from SIR JOHN ROMILLY, M.R., in *Broune v. Cross* (1), seeming to import that if a cestui que trust knows of a breach of trust, he is bound, although his interest may be reversionary, to take proceedings to have the matter set right, and will be held barred by acquiescence if he does not promptly do so. But this broad proposition was not necessary to the decision of that case, and with all deference to the Master of the Rolls, if he intended to lay down the proposition thus broadly, which I doubt, I am not, as at present advised, prepared to assent to it. It is the duty of the trustee to observe the trust and to preserve the property for the benefit of those entitled in remainder, and I am not prepared to hold that he can be permitted to escape from the liability incident to that duty simply by informing the cestui que trust that he has committed, or intends to commit, a breach of it. He cannot, as I apprehend, where the trust is clear, throw upon the cestui que trust the obligation of telling him what his duty is, and of cautioning him to observe it, thus involving the cestui que trust in the burden and expense of those duties which he has undertaken himself to perform. If, indeed, there is a discretion to be exercised under the trust, the trustee may apply to the cestui que trust for his advice and assistance in the exercise of it; and if the cestui que trust refuses his aid, he may not be entitled afterwards to complain of what the trustee has done in the exercise of his discretion. So, again, where it is doubtful what ought to be done under a trust, the trustee may give notice to the cestui que trust of his intention to do a particular act unless the cestui que trust interferes to prevent it; and, if the cestui que trust does not interfere, the court might well hold that the trustee was not liable for doing that act. But these are cases in which the trust is not definite or precise, and I am not prepared to say that where the trust is definite and clear, a breach of trust can be held to have been sanctioned or concurred in by mere knowledge and non-interference on the part of the cestui que trust before his interest has come into possession. *March v. Russell* (2) seems to me to be a strong authority against such a proposition. I need hardly add that in cases in which the cestui que trust has encouraged the trustee to commit the breach of trust, he must

A of course be bound by it; nor need I add that the observations which I have made are meant to apply to cases of express trust, and not to affect the question how far, if at all, they may apply to constructive trusts.

Another question which arises in cases of this description is: What amounts to acquiescence? Acquiescence, as I conceive, imports knowledge, for I do not see how a man can be said to have acquiesced in what he did not know; and in cases of this sort I think that acquiescence imports full knowledge, for I take the rule to be quite settled that a cestui que trust cannot be bound by acquiescence, unless he has been fully informed of his rights, and of all the material facts and circumstances of the case. In this particular case the respondents rely first upon the deed of April, 1828. There is a question whether Mrs. Seaman was of age at the time when this deed was executed by her, but I think this may be laid out of the case. It is sufficient to say that the deed contains a recital that the trust-moneys had been lent to Benjamin Norton on mortgage of the Bawburgh estate, and, this recital being untrue, Mrs. Seaman could not possibly be bound by the deed. The respondents' case was then attempted to be based on the deed of April 28, 1830, but this deed recites no more than that part of the trust property was in money. It does not state that the money was in the hands of Benjamin Norton, or that it was unsecured. It discloses no breach of trust, and certainly does not contain any such full information of the true circumstances of the case as was necessary to render the breach of trust which had been committed binding upon Mrs. Seaman. It was said, however, that Mrs. Seaman was fixed with full knowledge of the breach of trust by the affidavits of Mrs. Hope and Mrs. Norton, but, after looking into the other evidence before us, I am satisfied that no reliance can safely be placed on the affidavit of Mrs. Hope, and, assuming that more reliance may be placed on the affidavit of Mrs. Norton, of which I am not satisfied, I think that her affidavit is far too loose and general to fix upon Mrs. Seaman the knowledge attempted to be imputed by it. Upon the whole, I think this second ground of defence fails as completely as the first.

F Upon the third point—the question of set-off—on examining the papers I find that in a suit to which Grace Thompson was a party, or in which her estate was represented, it has been declared that Benjamin Norton was merely a surety for the £1,700, and that, consequently, that sum must be paid out of Mrs. Seaman's share in relief of his estate, and there cannot, therefore, be any possible case of set-off. Upon these grounds my opinion is that the order of the vice-chancellor must be discharged, and an order substituted declaring the estate of Grace Thompson to be liable for Mrs. Seaman's share of the £6,300 and interest.

LORD CAMPBELL, L.C.—I entirely concur in the view taken by TURNER, L.J. As to the liability of the estate of Grace Thompson to the claim of Mrs. Seaman's share of the sum of £6,300, the only substantial question is whether H in bar to this claim a sufficient answer is given by proof of the acquiescence of the cestui que trust in the breach of trust which is the foundation of the claim. According to the decision of SHADWELL, V.-C., in *Rackham v. Siddall* (3), confirmed so far by LORD COTTENHAM upon appeal, there was a clear breach of trust, Grace Thompson having acted as a trustee, and as such having sold I trust property and received the purchase-money, and having lent it to Benjamin Norton instead of investing it according to the direction contained in the will of William Spencer. On the general doctrine of acquiescence by cestuis que trust, I agree in the explanation of the subject which has been so lucidly given by TURNER, L.J. I must add that, although the rule be that the onus lies on the party relying upon acquiescence to prove the facts from which the consent of the cestui que trust is to be inferred, it is easy to conceive cases in which from great lapse of time such facts might and ought to be presumed. In the present case the respondents admit the obligation upon them to lay a foundation

for their defence, by attempting to prove that Mrs. Seaman had notice of the breach of trust. But in this I think they have failed. The evidence by affidavit as to conversations in which Georgiana Norton (now Mrs. Seaton) is supposed to have taken a part when she was under age and unmarried is very loose, is positively contradicted, and is deserving of no weight. The two deeds which she executed, even if she had been of age and sui juris when she executed both, seem to me quite insufficient to show that she had information of her rights and of the violation of them by Grace Thompson's application of the purchase-money. It must also be borne in mind that, although there was no suit instituted directly on the part of Mrs. Seaman against Grace Thompson or her representative for one-fifth part of the £6,300, that claim, instead of being abandoned, was involved in several of the suits which were pending respecting the administration of the property devised by William Spencer, and it may almost be said to afford an instance of continual claim. I am, therefore, of opinion that in the present suit this claim ought to have been allowed.

KNIGHT-BRUCE, L.J.—My conclusion is the same.

Appeal allowed.

IONIDES v. PENDER AND OTHERS

[COURT OF QUEEN'S BENCH (Hannen, J.), July 4, 1872]

[Reported 27 L.T. 244; 1 Asp.M.L.C. 432]

Insurance—Marine insurance—Barratry—Ship sunk with knowledge of owner—Right of innocent cargo owner to recover.

Insurance—Marine insurance—Inclusion of possible profits.

Insurance—Marine insurance—Fraud—Evidence—Over-valuation of cargo and profits.

V., the owner of the ship, and D. shipped goods on a voyage from Hamburg to a port in Asiatic Russia. The cargo shipped was valued at £8,000, but the total insurances effected amounted to £20,000, the profits being variously estimated at from 80 to 125 per cent. To secure these profits, it was admitted that the goods had been over-valued to the extent of 25 to 30 per cent. and there were heavy insurances of commissions. The slips mentioned that profits were to be insured "however high they might be", but no further notice of over-insurance was given to the underwriters. Among the cargo was a shipment of spirits costing £1,000, but valued at £2,800. The ship sank in fine weather in mid-ocean without any known cause. D. brought an action against the insurers to recover commission, profits on charter, and £1,800 of the £2,800 insured on the spirits. The insurers pleaded that the loss was not the consequence of perils of the sea, that the concealment of the over-insurance was concealment of a material fact, and that the goods were shipped with the fraudulent design of sinking the ship.

Held: (i) an insurance on profits must be taken to mean possible profits; (ii) scuttling a ship with the knowledge of V., the shipowner, but without the knowledge of D., the freighter, was barratry, in respect of which D. might recover against the underwriters; (iii) excessive valuation was almost conclusive evidence of a fraudulent intent.

- A Notes.** Considered: *Forestal Land Timber and Railways Co. v. Rickards, Middows, Ltd. v. Robertson, Howard Bros. & Co. v. Kahn*, [1940] 4 All E.R. 96. Referred to: *Piper v. Royal Exchange Assurance* (1932), 44 H.L. Rep. 103; *Trading Co. L. & J. Hoff v. De Rougemont* (1928), 34 Com. Cas. 291.

As to "barratry" and the effect of consent by the owner, see 22 HALSBURY'S LAWS (3rd Edn.) 82, 83; and for cases see 29 DIGEST (Repl.) 259 et seq.

B

Action on policies of insurance to recover commission, profits and the value of goods insured on a voyage from Hamburg to a port on the coast of Asiatic Russia. The defendants, the underwriters, pleaded that the goods insured were not lost by perils of the sea, that they were excessively over-valued, that there was concealment of the over-insurance, and that the goods were shipped with a fraudulent design that the ship should be sunk and lost.

C

The plaintiffs were brokers representing some German merchants at Hamburg, who professed to have discovered a new and extensive market for European commodities in the ports of Eastern Siberia, and had for some years carried on commerce there. This commerce until lately had been carried on at a port called Nikolayevsk, at the mouth of the Amur, and it was represented that enormous profits had been realised there, especially upon spirits and tobacco, but also to a great extent upon European manufactures, woollen goods, and other articles. It was represented that upon tobacco a profit of 1,000 per cent. and on spirits 500 per cent. had been realised, and on general goods 25 or 30 per cent. Particular instances were adduced in evidence. On the other hand, there was evidence that these instances were exceptional, and that the average

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rate of profit was 25 per cent.; and while one of the merchants in this case estimated the profits on spirits at 150 per cent. another of them was content with less than 80 per cent. It appeared, however, that the Russian government had discovered this commerce, and desired to share in the profits of it, and with this view imposed excise and customs duties at Nikolayevsk. Partly in order to avoid these duties, and partly to obtain a better harbour, the trade had of late years drifted to another port some 700 miles to the south, in a bay called Victoria Bay, opposite the centre of Japan. At this place there was a splendid harbour, and a town called Vladivostok, and the trade there has been gradually increasing. As early as 1871 the German merchants, who had already been engaged in trade at Nikolayevsk, Messrs. Diekmann being the principal, proposed an adventure

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to the new port of Vladivostok, and a ship belonging to one of them, M. Vernicke, was chartered for the purpose, and loaded with a mixed cargo, composed largely of spirits and tobacco, but comprising also a variety of woollen and other manufactured goods. Both Diekmann and Vernicke shipped goods in the adventure, the former chiefly spirits, the other spirits and other goods. In their correspondence they spoke of 25 per cent. profit, but in their insurance

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they valued it at 80 per cent. and 150 per cent. Insurances were effected upon ship, cargo, freight, profits, commission, and everything else that was insurable, to the total amount of £20,000. Some of these insurances were effected at Hamburg, and some through brokers in London, including those now sued upon. The ship was insured for £4,000 at Hamburg; the goods were insured for nearly £13,000 in several policies, some in Hamburg and some in London. Freight was insured to the amount of £1,100; commission was insured for £1,500, in more than one policy, one of which was now sued upon; and, in addition, there was a policy for £1,000 on safe arrival of the vessel. The English policies were not all effected in the same office. Instructions were given to insure £2,000 in the London and Provincial, £1,000 in the Globe, £4,000 in the North China, and £1,000 at Lloyd's. This latter was one of those now sued upon. Out of the £4,000 directed to be insured in the North China, £3,000 upon spirits had been transferred to Lloyd's, and was one of those now sued upon, leaving £1,000 still insured in the North China.

I

The insurances which were questioned were those upon the goods and commission. It was alleged that the goods were enormously over-insured; and that as most of them belonged to the merchants, the commission was for the most part either fictitious, or included in the profits, which were added to and included in the value of the goods insured. It was admitted on the part of the plaintiffs that there had been a considerable addition to the cost price of the goods on account of the profits, the object being, they said, to secure the large profits they expected to realise. This addition, however, on the whole did not exceed 25 or 30 per cent., and though it was admitted that there was a larger addition to the value of the spirits and tobacco, this, it was said, was partly on account of the higher profits and partly on account of duties which it was expected would be imposed, but which would not apply to goods previously shipped. This duty, it was said, would amount upon the quantity of spirits shipped to £2,000, the whole of which would be bonus to the merchants. In this way it was that they valued spirits which cost £1,000 at £2,800; but on the other goods generally the addition was said to be only 25 per cent. The parties did not differ greatly as to the cost value of the goods shipped, which one side made a little under, and the other a little over £8,000. Adding 25 per cent. for profit, this would come to £10,000. The freight would bring it to £11,000, and the addition for anticipated duties, reckoned as bonus, would bring up the amount to £12,000 above the amount of the insurances on goods. The captain himself had a small venture of cigars not over-insured.

To negative the alleged over-insurance, evidence was given that the merchants sent through their brokers their valuations (in German), and the "slip" or proposal, stated that the insurance was to be on profits, however high they might be. All the policies on goods were valued. According to the defendants, the alleged additions to value on account of anticipated profits were grossly excessive, the profits being really imaginary, and the case as to the supposed bonus arising from remission of anticipated duties was visionary and illusory. It was insisted that there was an addition, not of 25 per cent., but of nearly 80 per cent. to the real value of the goods; and as to the profits and commission and freight, it was insisted that the same thing was insured over and over again, the profits being added to the price, as well as the freight and charges, and the commission being really only a mode of charging the profit over again; and, finally, it was said that the insurance of £1,000 for "safe arrival" of the vessel—already abundantly insured—was in reality a repetition of the insurance. In these various ways, it was urged, the over-insurance amounted to several thousands of pounds, and the merchants had an interest to that amount in the vessel going down.

The vessel sailed, thus insured, in April, 1871, and on May 18, 1871, went down in mid-ocean, in fine weather, without any apparent cause. Suddenly the ship began to leak, and in an hour or two had eight or nine feet of water in the hold. The captain said he thought he had felt a shock, but no one else had felt it, and he himself said he thought no more of it, especially as he saw nothing to cause it, and he thought it was a mere stroke of the sea. The sea, however, was quiet, with only a "swell," and there was no apparent cause for the catastrophe. However, the ship rapidly filled, and the captain came on deck, and said the ship was sinking, and ordered out the boats, and he and the crew escaped. They were picked up; he and some of the crew went to Hamburg and others to Liverpool. Those who came to London made no secret of their belief that the ship had been scuttled. An inquiry was held at Hamburg, but the captain was absolved and the Hamburg insurers paid. The English underwriters, however, were not satisfied. The Globe paid; but the North China, the London and Provincial, and the underwriters at Lloyd's resisted, and evidence was taken at Hamburg under a commission, where the captain and the mate were witnesses for the plaintiffs. Neither of them, nor any of the crew, was called as a witness at the trial, and two of the crew were called as witnesses

A for the underwriters. They disproved any "shock," and nautical evidence was given to show that any blow which could have caused a serious leak must have given such a shock to the vessel as must have made all its timbers quiver and knocked every one down.

Sir John Karslake, Q.C., Butt, Q.C., and F. M. White for the plaintiffs.

B *H. James, Q.C., Watkin Williams and Lanyon for the defendants.*

C **HANNEN, J.**, summing-up the case to the jury, said: The questions for their decision were: First, whether the valuations were excessive, especially as to profits? secondly, whether, if so, they were fraudulent? thirdly, was it material for the underwriters to know if the valuations were excessive? fourthly, were they concealed from the underwriters? fifthly, was the vessel lost through the "perils of the seas" insured against? sixthly, was it intended by the assured that the vessel should be lost?

D As to the question whether the goods were excessively over-valued, no doubt in "valued policies," in which the value of the goods was stated, it was to be taken generally that disputes as to the value were precluded. But this was a question mainly as to expected profits, as on both sides the cost value was agreed at about £8,000. As to the profits, the question was whether the estimate was above what could be reasonably contemplated under the circumstances. It was not because the estimate was high that, therefore, it was excessive, provided it was not beyond what might not unreasonably be expected; E but there was a limit. Here it was spirits which were insured, and instances had been given in evidence of enormous profits realised on spirits—as much as 170 per cent. But, on the other hand, it was said that these instances were exceptional, and other parties had insured spirits to the very same place, at a profit of 25 per cent. As to this the jury must judge and decide in their own minds whether the assured could reasonably have expected such a profit as would F justify an insurance of spirits which cost less than £1,000 for £2,800.

As to commission, a man could hardly earn commission on his own goods, and to a great extent these goods were Diekmann's own, though he was to receive commission on the goods of others. As to the ship it must be admitted by the underwriters that there was no excess of valuation, and the insurance was for the real value. The ship belonged to another merchant, Vernicke, who G had valued his profits at 79 per cent., including spirits. It was a remarkable fact that while one of the supposed partners in the fraud rated his profits on spirits at 150 or 160 per cent., another of them was satisfied with less than 80—that is, with about half the amount claimed by the other. This was accounted for by the plaintiff Diekmann in this way—that he had been to East Siberia, and H knew the market better than his partners. If so, then it went to negative the concert which was presupposed in a case of conspiracy. On the other hand, it must not be lost sight of that these parties had, in their correspondence, spoke of valuing their profits only at 25 per cent. On the whole, Was the valuation so excessive that it could not be deemed to have been reasonable? If so, Was it fraudulent? If there was a clear case of excessive valuation, it was difficult to conceive how it could be otherwise than fraudulent. Even if not fraudulent, was I it material that the underwriters should know of it? As to this, assuming the valuation to be excessive, the assured was for some reason so certain that there would be a loss as to be content to pay an excessive premium; and was it not material that the underwriter should know of it? If so, had it been concealed? As to this the merchants, through their brokers, had certainly laid before the underwriters their valuations, and the slip or proposal for the policy stated that the insurance was to be on profits, "however high they may be." Still this meant possible profits, not such as were impossible, or could not reasonably be expected.

Next, was the vessel lost through "the perils of the seas" insured against? As to this the facts were that the vessel, a good stout ship, went down suddenly in fine weather, in mid-ocean, without any known cause. On the other hand, there was the opportunity and there were the means of scuttling the ship. The captain had access to the hold from his cabin, and he had, with other tools, an auger, by which he could have made holes in the sides of the vessel, and he was in his cabin at the time when the ship began to fill. Then there was the conduct of the captain. He had, he said, felt the shock so slight that he took no notice of it, and no one else on board felt it, and it was suggested that this was the cause of the disaster. Nautical men had given evidence to show that it could not have been so, and though a floating wreck might perhaps have caused such damage as might sink a ship, it was difficult to understand how this could be, and yet the shock be so slight as scarcely to be felt. If so, then there was nothing to account for the vessel going down as it did. Indeed, the men all denied that there had been any shock at all, and though the crew had been separated they concurred in this denial. There was certainly an absence of evidence of motive in the captain to scuttle the vessel, and yet he had been relieved from the imputation after an investigation at Hamburg. That, however, was a criminal charge against him, and a criminal charge required full proof; whereas here the onus was on the plaintiffs to satisfy the jury that the vessel was lost by the "perils of the seas." If that was not made out to their satisfaction then they must consider whether the captain scuttled the ship. If he did, then they must consider whether it was done with the knowledge and privity of the real plaintiffs—that is, they knowing beforehand that he was to do it. For if he had done it of his own head, or at the instigation of Vernicke, the shipowner, but without the knowledge of the real plaintiff, Diekmann, then it would be barratry—that is, a loss caused by the misconduct of the crew or the captain, and that would be a loss covered by the policy, for a policy of insurance included a loss by barratry.

The jury retired to consider the questions left to them.

Counsel for the defendants objected that the latter part of the direction as to barratry was erroneous, as it was laid down that if the captain sunk the ship at the instigation of Vernicke, the shipowner, without the knowledge of Diekmann, it would be barratry. He submitted that barratry must be a crime against the employer, the owner of the ship.

HANNEN, J.—I adhere to my ruling, in tending to lay down that a loss may be barratry as regards one party which is not so as to another.

The jury found that the valuations for the insurances were excessive, and that, though they could not say whether the valuations were fraudulent, they were of opinion that they were material, and were concealed. They further found that the vessel was not lost by the perils of the seas, but they could not say whether or not it was intended by the assured that it should be lost.

Judgment for defendants.

A

Re GRESHAM LIFE ASSURANCE SOCIETY. Ex parte PENNEY

[COURT OF APPEAL IN CHANCERY (James and Mellish, L.J.J.), December 20, 1872]

[Reported 8 Ch. App. 446; 42 L.J.Ch. 188; 28 L.T. 150;
21 W.R. 186]

B

Company—Shares—Transfer—Registration—Refusal to register—Requirement of approval by directors of transferee—Discretion of directors.

C

It was provided by the deed of settlement of an assurance company that every shareholder should be at liberty to sell and transfer his shares to any other person who should already be a shareholder or who should have been approved of as such by the board of directors, and that no person not already a shareholder, or the executor or administrator, legatee, or next-of-kin of a shareholder, should be entitled to become the transferee of any share, unless approved by the board.

D

Held: the directors were not bound to state their reasons for refusing to approve of a proposed transferee, and the court had no jurisdiction to interfere with them in the exercise of their discretion in the absence of evidence of corrupt or capricious conduct on their part.

Per Curiam: If there had been such evidence the court had jurisdiction to determine a question of this kind upon a motion under s. 35 of the Companies Act, 1862, to rectify the register of shareholders, and it had a discretion whether it would exercise its jurisdiction without a bill being filed.

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Notes. The Companies Act, 1862, s. 35, has been repealed. The mode of rectifying the register by application to the court is now contained in Companies Act, 1948, s. 116: 3 HALSBURY'S STATUTES (2nd Edn.) 549.

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Distinguished: *Moffatt v. Farquhar* (1878), 7 Ch.D. 591. Considered: *Re Coalport China Co.*, [1895] 2 Ch. 404. Applied: *Cassel v. Inglis*, [1916] 2 Ch. 211; *Re Bede Steam Shipping*, [1917] 1 Ch. 123; *Weinberger v. Inglis*, [1916-17] All E.R. Rep. 843. Referred to: *Re Bell, Ex parte Hodgson* (1891), 65 L.T. 245; *Re Hannan's King (Browning) Gold Mining Co.* (1898), 14 T.L.R. 314; *McEllistram v. Ballymacelligott Co-operative and Dairy Society*, [1919] A.C. 548; *Berry v. Tottenham Hotspur Football and Athletic Co.*, [1936] 3 All E.R. 554.

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As to the exercise of the power to refuse registration, see 6 HALSBURY'S LAWS (3rd Edn.) 253-254; and for cases see 9 DIGEST (Repl.) 382-394.

Case referred to:

(1) *Robinson v. Chartered Bank* (1865), L.R. 1 Eq. 32; 35 Beav. 79; 13 L.T. 454; 14 W.R. 71; 55 E.R. 824; 9 Digest (Repl.) 385, 2483.

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Also referred to in argument:

Bargate v. Shortridge (1855), 5 H.L. Cas. 297; 3 Eq. Rep. 605; 24 L.J.Ch. 457; 25 L.T.O.S. 204; 3 W.R. 423; 10 E.R. 914, H.L.; 9 Digest (Repl.) 387, 2496.

Re Overend, Gurney & Co., Walker's Case (1866), L.R. 2 Eq. 554; 35 L.J.Ch. 826; 15 L.T. 32; 31 J.P. 4; 14 W.R. 1008; 9 Digest (Repl.) 384, 2479.

I

Re London, Hamburg and Continental Exchange Bank, Ward and Henry's Case (1867), 2 Ch. App. 431; 36 L.J.Ch. 462; 16 L.T. 254; 15 W.R. 569, L.J.J.; 9 Digest (Repl.) 217, 1377.

Re Smith, Knight & Co., Weston's Case (1868), 4 Ch. App. 20; 38 L.J.Ch. 49; 19 L.T. 337; 17 W.R. 62, L.J.J.; 9 Digest (Repl.) 382, 2464.

Poole v. Middleton (1861), 29 Beav. 646; 4 L.T. 631; 7 Jur.N.S. 1262; 9 W.R. 758; 54 E.R. 778; 9 Digest (Repl.) 369, 2364.

Pinkett v. Wright (1842), 2 Hare, 120; 12 L.J.Ch. 119; 6 Jur. 1102; 67 E.R. 50; on appeal, sub nom. *Murray v. Pinkett* (1846), 12 Cl. & Fin. 764; 8 E.R. 1612, H.L.; 9 Digest (Repl.) 211, 1337.

Re Heaton Steel and Iron Co., Simpson's Case (1869), L.R. 9 Eq. 91; 39 L.J.Ch. 41; 21 L.T. 629; 9 Digest (Repl.) 220, 1400. A

Bermingham v. Sheridan, Re Waterloo Co. (No. 4) (1864), 33 Beav. 660; 3 New Rep. 699; 33 L.J.Ch. 571; 10 L.T. 256; 10 Jur.N.S. 415; 12 W.R. 658; 55 E.R. 525; 9 Digest (Repl.) 365, 2336.

Slee v. International Bank (1868), 17 L.T. 425; 9 Digest (Repl.) 385, 2484.

Taft v. Harrison (1853), 10 Hare, 489; 68 E.R. 1020; 9 Digest (Repl.) 393, 2525. B

Appeal from a decision of LORD ROMILLY, M.R., ordering the register of the Gresham Life Assurance Society to be rectified by the substitution of the name of Penney for De Paiva as the holder of the ten shares.

The Gresham Life Assurance Society was a company registered under the Joint Stock Companies Act, 1847. The society's deed of settlement, which was dated July 3, 1848, provided by cl. 17 that, subject to the provisions therein contained, and subject also to the provisions of the Joint Stock Companies Act, 1847, so long as the company should be subject to the provisions of that Act, every shareholder should be at liberty to sell and transfer his shares to any other person who should be already a shareholder, or who should have been approved of as such by the board of directors, and that no person not already a shareholder, or the executor or administrator, legatee, or next of kin of any shareholder, should be entitled to become the transferee of any share unless approved by the board. A Mr. De Paiva sold ten shares in the company, of which he was the registered owner, through his broker on the Stock Exchange, in the regular course of business to Penney, whose name was given by his broker on the settling day in the usual way, and a transfer of the shares was executed by both parties on May 4, 1872, and was left at the office of the society for registration on June 19. The transfer was soon afterwards returned to Penney's broker by the secretary of the society, who stated that the board of directors declined to register it, but did not assign any ground of objection to Penney as a transferee. De Paiva then applied to the board of directors, who refused to give any reason for not approving of Penney as a transferee. Thereupon a summons was taken out on behalf of De Paiva and Penney under s. 35 of the Companies Act, 1862, to compel the society to rectify their register of shareholders by entering Penney thereon as the owner of the ten shares transferred to him by De Paiva. The Master of the Rolls held that the directors had no right to refuse to register a transfer without giving a reason for doing so, and he made an order in accordance with the application. From this order the society appealed. C D E F G

Fooks, Q.C., and *Locock Webb* for the society.

Romer (with him *Southgate, Q.C.*) for the respondents.

JAMES, L.J.—In this case I am obliged to arrive at a conclusion different from that at which the Master of the Rolls has arrived. H

Clause 17 of the deed of settlement is very clear. It provides that no transfer shall be made to any person outside the company unless the person shall be approved of by the board of directors. No doubt the directors are in a fiduciary position, both towards the company and towards every shareholder in it. It is very easy to conceive cases such as those cases to which we have been referred, in which the court would interfere if there were any violation of the fiduciary duty so reposed in the directors. But in order to interfere upon that ground it must be made out that the directors have been acting from some improper motive, or arbitrarily and capriciously. That must be alleged and proved, and the person who is to allege and prove it is the shareholder who seeks to be removed from the list of shareholders, and to substitute another person for himself. Therefore, if a case had been made out (such as was made out in one or two of the cases cited) where a man attempted to transfer his shares, and a demand had been I

A made upon him for the payment of a debt which the company had no right to make a condition precedent to such transfer—or one can conceive even a stronger case, as if the directors had said to a shareholder: “We will not allow you to transfer your shares unless you give us each a present of £10”—this court would have jurisdiction to say, “a corrupt breach of trust such as that we will deal with.”

B But if there is no such corrupt or arbitrary conduct as between the directors and the person who is seeking to transfer his shares, it does not appear to me that this court has any jurisdiction whatever to sit as a court of appeal from the deliberate decision of the board of directors, to whom, by the constitution of the company, the question of determining the eligibility or non-eligibility of new members is committed.

C If the directors had been minded, and the court was satisfied that they were minded, whether they expressed it or not, positively to forbid a gentleman from parting with his shares unless upon his complying with some arbitrary condition which they chose to impose, the court would probably, in exercise of its duty, as between the cestui que trust and the trustees, interfere to redress the mischief, either by compelling the transfer or by giving damages; or in some mode or other to redress the mischief which the shareholder would have had a just right to complain of. But if it were to be said that, whenever any shareholder has proposed to transfer his shares to some person not a member of the company, the court has a right to say to the directors: We will presume that your motives are arbitrary and capricious, or that your conduct is corrupt, unless you choose to tell us what your reasons were, and submit those reasons to our decision—if the court were to say that, it appears to me that it would be entirely altering the whole constitution of the company, as provided by the deed of settlement. I cannot conceive that anyone would choose to accept office as director, or to exercise this power, if he were liable to be called upon to say what the particular reasons were or what the particular motive was which influenced him in coming to the conclusion that the particular person proposed was not eligible as a shareholder.

F holder.

I think, therefore, that these directors were well advised in not subjecting themselves to be interrogated and cross-examined as to what particular reasons they might have for personally objecting to this gentleman, and that they were well founded in saying, by their secretary, that the question was discussed at a board meeting of the directors, that the propriety of the transfer to the particular transferee was the subject-matter of discussion, and that having taken that into their consideration they had arrived at the conclusion (which of course in the absence of any suggestion to the contrary, or of any evidence to the contrary, we must assume was a bona fide conclusion on their part) that, for some reason or other connected with the interests of the company, they did not think it fit to approve of this gentleman as a transferee. This gentleman was

G not then, and is not up to the present moment, in any relation of cestui que trust towards them, and, therefore, he as no right to complain, and the gentleman who transferred to him would have no right to complain unless he could make out, unless he could induce us to believe, that he could not find some other purchaser for these shares, either among the shareholders, or some other person more agreeable to the directors, and who would give the same price.

H

I I am of opinion that we cannot sit as a court of appeal from the conclusion at which the directors have arrived, if we are satisfied that the directors have done that which alone they could be compelled by mandamus to do, viz., to take the matter into their consideration; and if they have taken the matter into their consideration, there is nothing to show that they have acted otherwise than honestly and fairly. I am of opinion that this court has no jurisdiction to review the decision of the directors or to compel them to tell the reason why they objected to a particular individual. I am of opinion, therefore, that the order of the Master of the Rolls ought to be discharged.

MELLISH, L.J.—I am of the same opinion. It is quite clear that if this question were raised in a court of law, the court could not compel the registration of the applicant, because that which is made by the deed of settlement a condition precedent to his becoming a shareholder never has been performed, for he has never been approved of by the directors. But if the directors had refused to take the matter into their consideration, a court of law would by mandamus have compelled them to take it into their consideration, though unquestionably it could not have compelled them to have approved. The question, to a certain extent, I quite agree, is different in a court of equity. I think it has been held under s. 35 of the Companies Act, 1862, that the court may enter into equitable considerations, and I am disposed to think, although it is not necessary distinctly to decide it in this case, that, if it were made out that the directors were committing a breach of trust towards a shareholder in refusing to allow him to transfer his shares for a purely arbitrary reason, that might be a ground why the court should interfere. But, on the other hand, this being an insurance company, it is quite obvious that it may be a matter of very great importance to the company that they should have a substantial body of shareholders. The very existence and credit of the company may depend upon that, and in order to procure that, by the deed of settlement the directors are given an absolute power to reject any proposed transferee of shares. Then it is said that they ought not to have objected merely arbitrarily, and that I agree to.

But it is further contended that, in order to secure the existing shareholders against being deprived of the right to sell their shares, they should be bound to give their reason why they reject the proposed transferee, and that if they reject him, giving no reason, that is a ground from which the court ought to infer that they were acting arbitrarily. I cannot agree with that. It appears to me that it is very important that the directors should be able to exercise the power in a perfectly uncontrolled manner for the benefit of the shareholders; but it is impossible that they could fairly and properly exercise it if they were compelled to give the reason why they rejected a particular individual. Take the very common and most ordinary reason why they would be entitled to reject him, namely, that they believe him to be in a state of insolvency, or that they cannot discover what his pecuniary position is, and that upon that ground they reject him. Are they to state that as their reason for doing so? Is it to be said that they are bound to admit everybody as a shareholder whatever doubts they may have whether he is solvent or not, or whether he is pecuniarily able or not to pay the calls? Are they to be prevented from rejecting a person on that ground unless they openly say so, and inform the proposed transferee that that is the ground upon which they reject him?

It is perfectly obvious that directors would never like to exercise their power if they were liable to be called upon to exercise it under such conditions; because of course the shareholder would immediately challenge their opinion; he would make an application to a court of equity to have the matter tried, and they would at once be involved in a considerable litigation. Or suppose a cautious director even to say, "We have no reason to suspect it; it may be untrue, but I do not like to run the risk of publishing that we hold this person to be insolvent; it may cause his bankruptcy the next day, although after all he may be able to get through his difficulties in a perfectly solvent condition if he were allowed to go on." The directors would be most cautious about it. Men of business practically would not exercise the power if they were bound to give their reasons. So, also, if the reason involved something against the proposed transferee's character, that they might have known or heard something against him which was a perfectly good ground of objection; if they were obliged to tell it, of course the matter would be instantly challenged. Actions might be brought, or suits might be instituted, and the directors might be examined and cross-examined as to what their reasons were. A cautious director, of course, never would exercise

A the power if he was obliged to exercise it upon those conditions. I am, therefore, of opinion that, in order to preserve to the company the right which is given by the deed of settlement, a shareholder is not to be put upon them if the board of directors do not approve of him, and it is absolutely necessary that they should not be bound to give their reasons. Although I perfectly agree that if it can be shown affirmatively that they are exercising their power capriciously and wantonly, then that may be ground for the court interfering.

B In my opinion we are not overruling any current of authority, or any case whatever that has been decided heretofore. The only case that really touches the question at all is *Robinson v. Chartered Bank* (1). That was merely a case decided on demurrer, and moreover there was there direct and positive evidence that the directors were refusing to allow Mr. Robinson to assign his shares at all to anybody. I quite agree that that would be a breach of trust towards the shareholder. They have no right to say, "We will have a particular person continue a shareholder, and we will not allow him to transfer his shares at all." That would be an abuse of their power. In the same way it would be an abuse of this power to object on any ground not applying personally to the transferee, to say, for instance, that a particular shareholder should not transfer his shares till he had given security for the calls. Those would be plain cases of abuse, and I do not find anywhere a case in which it has been held that the directors, under a power like this, are bound to communicate the reasons for which they rejected the proposed shareholder. In my opinion it ought not to be held that they are necessarily bound to communicate their reasons for objecting to him.

Appeal allowed.

F

FISHER *v.* PROWSE
COOPER *v.* WALKER

G [COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Crompton, Blackburn and Mellor, JJ.), June 13, November 4, 1861, May 13, June 13, 1862]

[Reported 2 B. & S. 770; 31 L.J.Q.B. 212; 6 L.T. 711; 26 J.P. 613;
8 Jur.N.S. 1208; 121 E.R. 1258]

H *Highway—Nuisance—Existence at time of dedication to public—Nuisance on premises adjoining highway—Liability of occupier.*

When a highway is dedicated to the public, the public take it in the condition in which it is at that time, and any obstructions which, if placed on the highway after dedication might have constituted a nuisance, do not, if already there, constitute a nuisance.

I Where, therefore, the plaintiff in the first case was injured when he fell over a cellar flap which protruded above the pavement, and the plaintiff in the second case was injured by some stone steps of a house adjoining the street, and the evidence was that both the cellar flap and the stone steps had existed before the dedication of the highway,

Held: no liability attached to the occupier of the house to which the cellar flap belonged or to the occupier of the house having the stone steps adjoining the street.

Notes. Followed: *Robbins v. Jones* (1863), 15 C.B.N.S. 221. Applied: *Mercer v. Woodgate* (1869), L.R. 5 Q.B. 26; *Arnold v. Holbrook* (1873), 28 L.T. 23. Con-

sidered : *Hamilton v. St. George, Hanover Square* (1873), L.R. 9 Q.B. 42. Applied : *Brackley v. Midland Rail. Co.*, [1916-17] All E.R. Rep. 220. Distinguished : *Reigate Corpn. v. Surrey County Council*, [1928] All E.R. Rep. 592. Considered : *Nicholson v. Southern Rail. Co. and Cheam U.D.C.*, [1935] All E.R. Rep. 168. Referred to : *Cubitt v. Maxse* (1873), L.R. 8 C.P. 704; *Spice v. Peacock* (1875), 39 J.P. 581; *Moore v. Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462; *Great Central Rail. Co. v. Hewlett*, [1916-17] All E.R. Rep. 1027; *Myers v. Harrow Corpn.*, [1962] 1 All E.R. 876.

As to nuisance on highways arising from obstructions which are there before dedication, see 28 HALSBURY'S LAWS (3rd Edn.) 63; and for cases see 26 DIGEST (Repl.) 472. As to the limitation of public rights on the dedication of a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 59; and for cases see 26 DIGEST (Repl.) 276 et seq, 510 et seq.

Cases referred to :

- (1) *Barnes v. Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, 1100.
- (2) *R. v. Watts* (1703), 1 Salk. 357; 91 E.R. 311; sub nom. *R. v. Watson*, 2 Ld. Raym. 856; 26 Digest (Repl.) 495, 1791.
- (3) *Cornwell v. Metropolitan Comrs. of Sewers* (1855), 10 Exch. 771; 24 L.T.O.S. 244; 19 J.P. 313; 3 C.L.R. 417; 156 E.R. 652; 7 Digest (Repl.) 289, 145.
- (4) *Coupland v. Hardingham* (1813), 3 Camp. 398; 7 Digest (Repl.) 289, 147.
- (5) *Jarvis v. Dean* (1826), 3 Bing. 447; 11 Moore, C.P. 354; 4 L.J.O.S.C.P. 144; 130 E.R. 585; 7 Digest (Repl.) 291, 156.
- (6) *Morant v. Chamberlin* (1861), 6 H. & N. 541; 30 L.J.Ex. 299; 26 Digest (Repl.) 511, 1883.

Rules Nisi obtained by the plaintiffs to enter verdicts for them in two actions for damages for injuries arising out of alleged nuisances on the highway. Both cases, the facts of which are fully stated in the judgment of the court delivered by BLACKBURN, J., raised the same question of law.

In the first case *Fisher v. Prowse* :

J. Browne showed cause against the rule.

The plaintiff in person, supported the rule.

In the second case *Cooper v. Walker* :

Mellish, Q.C. (*Henry James* with him) showed cause against the rule.

Woollett supported the rule.

Cur. adv. vult.

June 16, 1862. **BLACKBURN, J.**, read the following judgment of the court.—The decision in both these cases depends upon the same question of law. In *Fisher v. Prowse*, the defendant, the occupier of a house adjoining to a public street, with a cellar belonging to it, which had existed before the defendant had anything in the house. The mouth of this cellar opened into the footway of the street by a trap-door. During the day this trap-door was open, but at night it was closed by a flap, which slightly projected above the footway. The plaintiff, who was coming along the footway at night, stumbled over this flap, fell, and sustained injury, for which he brought this action. At the close of the plaintiff's case, ERLE, C.J., before whom the case was tried, directed a nonsuit, but gave leave to the plaintiff to move to enter a verdict for £75, it being "to be taken as proved that, as long as living memory went back, the flap had been as described in the evidence." A rule nisi to enter the verdict for the plaintiff was obtained, against which cause was shown by counsel for the defendant in the sittings after last Trinity Term; the plaintiff appearing in person, in support of the rule, in Michaelmas Term, before my Lord and myself.

A We think we must, on this reservation, coupled with the evidence, take it to have been proved that there was no negligence on the part of the plaintiff contributing to the accident, and that the flap did cause obstruction to the footway to such an extent that, if the flap had been put down for the first time after the highway was dedicated to the public, it would have been a nuisance, for the consequences of which those who maintained the nuisance would have been responsible. On the other hand, we must take it to have appeared that the flap continued in its original condition, and that the defendant had not altered it or suffered it to get out of repair so as to increase the danger and obstruction beyond what always must have existed since it was there. We think that on its being shown that the cellar-flap had existed in its present condition so far back as living memory went, the jury ought to draw the conclusion that it had existed as long as the street, and that the dedication of the way to the public was with this cellar-flap in it, and subject to the reservation of its being continued there, so far as by law the highway could be subject to it.

D It seems to us, therefore, that the question reserved was whether after the dedication of the highway the maintenance of such an ancient cellar-flap was unlawful. During the pendency of the rule in this case of *Fisher v. Prowse*, a rule nisi had been obtained in the other case of *Cooper v. Walker*, and as the same question arose in that case, we delayed judgment in *Fisher v. Prowse* till after the case of *Cooper v. Walker* should have been argued.

E In *Cooper v. Walker* the plaintiff declared that the defendant had negligently and improperly placed in a public street certain stone steps, so that the same became and were an obstruction and hindrance to persons using the street, and dangerous to persons passing along it at night, and averred that passing along the street he fell over them and was injured. The defendant, in addition to the plea of not guilty, pleaded a second plea on which the present question arises. This plea was, that the street was subject to the right of the occupiers of a house adjoining it to have steps standing in the highway on a part thereof, and leading to the outer door of the said house, all persons passing along the highway being entitled to pass on foot over the said steps as a part of the highway, but not to remove the said steps, the highway being, at the part thereof which was occupied by such steps, a way for foot-passengers over the said steps, which were part of the said house. The plea then stated that the street was lowered under the Metropolis Management Act, 1855; that in so doing the old steps were necessarily removed, and the present steps placed in their room, and it was averred that the new steps were placed on the same part of the highway on which the old steps had stood and nowhere else; and that they were proper steps, and caused no greater obstruction, hindrance, inconvenience, or danger to persons passing along the lowered highway than did the old steps to persons passing along the highway before it was lowered. Issue was joined on these pleas.

H On trial before my brother HILL the jury found for the plaintiff on the plea of Not Guilty, but for the defendant on the second plea. Counsel for the plaintiff having obtained a rule nisi for judgment non obstante veredicto; against this rule, cause was shown last term before SIR ALEXANDER COCKBURN, C.J., CROMPTON and MELLOR, JJ., and myself. No damages had been assessed at the trial, so that, if we had thought the plea bad after verdict, the rule could not have been made absolute in this form, though probably it might have been moulded so as to afford an opportunity for a new trial; but this we need not consider, as we are of opinion that the plea is good.

I It was hardly disputed on the argument before us, that, if the former highway was subject to a right on the part of the occupiers of the defendant's house to keep steps in it without their being, although to some extent obstructing the highway, a nuisance or illegal, the lowered highway must be subject to a similar right. The main contention was that no such right could exist in law. The plea of Not Guilty having been found for the plaintiff, we must take it to have

been proved that the steps in question were so far an obstruction and hindrance and dangerous to passengers that if they had been placed in the highway after its dedication they would have been improper and a nuisance, so that the party placing them there would have been responsible for any damage thence arising. We must construe the plea as confessing this, but avoiding it by showing that the highway was subject to the right to keep such steps there; and we think that, after verdict, this is sufficient, if in point of law there can be such a private right in a highway. This depends on the same principle as *Fisher v. Prowse*. A

The law is clear that, if after a highway exists anything be newly made so near to it as to be dangerous to those using the highway, such, for instance, as an excavation (*Barnes v. Ward* (1)), this will be unlawful and a nuisance, as it also is if an ancient erection, as a house, is suffered to become ruinous so as to be dangerous (*R. v. Watts* (2)); and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as if the nuisance arose from an obstruction in the highway itself. But the question still remains whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be, or whether the dedication must be taken to be made to the public and accepted by them subject to the inconvenience arising from the existing state of things. B

We think that the latter is the correct view of the law. It is, of course, not obligatory on the owner of the land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to be bound to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere use. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired; it would be doubly so if the consequence was that he was bound to fill up or fence off his canal. C

The question whether the owner of the soil is under such an obligation arose in *Cornwell v. Metropolitan Comrs. of Sewers* (3). ALDERSON, B., there says (10 Exch. at p. 774): D

"Suppose there is an inclosed yard with several dangerous holes in it, and the owner allows the public to go through the yard, does that cast on him any obligation to fill up the holes? Under such circumstances caveat viator." E

PARKE, B., says: F

"This is not the case of a new sewer, and therefore we may dispense with the consideration of what the commissioners are bound to do when they make a sewer. This is an ancient sewer which has existed with the highway time out of mind, and therefore the public have only a right to the highway subject to the sewer." G

Coupland v. Hardingham (4), on which the plaintiffs in the present cases principally relied, was cited in the argument in *Cornwell v. Metropolitan Comrs. of Sewers* (3). There, MARTIN, B., observes on it (*ibid.* at p. 775), that H

I

- A "in all probability the road in that case had been used long before the house was built."

The statement of facts in the report in 3 CAMP. 398, is perhaps scarcely consistent with this explanation, as it is there stated that "the premises had been exactly in the same situation as far back as could be remembered, and many years before the defendant was in possession of them." But LORD ELLENBOROUGH seems to have directed his attention principally to the part of the proposed defence grounded on the fact that the defendant did not himself erect what was alleged to be a nuisance. His ruling on that was, that he who maintains a nuisance is as much responsible as if he had erected it. If his attention was called to the other part of the defence, which, from the report, seems to have been raised on the facts, and he held that though the area had existed with the highway time out of mind, the public had a right to the way not subject to the area, his holding is inconsistent with the judgment of the Court of Exchequer which must yield in point of authority to a judgment in banco.

- D In *Jarvis v. Dean* (5) the report, 3 BING. 447, leaves it uncertain whether the area in that case existed before the dedication of the way or not. As it is stated to have belonged to an unfinished house, it probably had not been long in existence; and as BEST, C.J., states in his judgment, that the way had been a public thoroughfare for many years, it seems that the way must have been more ancient than the area, and that the present point could not, therefore, have been raised. It certainly does not appear to have been raised, and no opinion is given on it.

- E There is no other authority that has been brought to our notice that conflicts with the decision of the Court of Exchequer. In *Barnes v. Ward* (1) the judgment is carefully worded; and the court there said (9 C.B. at p. 420):

"The result is, considering that the present case refers to a newly made excavation adjoining an immemorial public way."

- F This is not a decision that the case would have been different if the way had been more recent than the excavation, but it rather implies that such was the leaning of the court. In *Morant v. Chamberlin* (6), though it was unnecessary to decide the point, the Court of Exchequer stated that it was the inclination of their opinion that the dedication of a highway might, in point of law, be made subject to the reservation of a private right to some extent interfering with the public way. As was pointed out in the course of the argument, there are in many towns ancient streets in which steps descending from the ancient houses are a permanent obstruction to the passengers, while in the foot pavements there are often flap-doors, opening into vaults and cellars, and plates opening into coal-cellar, which, when opened, offer a temporary obstruction to the use of the way, and which therefore, unless justified as having been reserved as of right on the dedication of the way, would obviously be illegal. So in the country there are innumerable footways which would be much more convenient if the ancient stiles were removed or even lowered. Yet it has never been held, or even suggested, that such things were illegal and might be removed as nuisances, and it seems difficult to say how they can be legal on any other principle than that the way has been dedicated subject to them. For these reasons we think that
- I in both cases the rules must be discharged.

Rules discharged.

LEESE AND ANOTHER v. MARTIN & CO.

[VICE-CHANCELLOR'S COURT (Hall, V.-C.), December 5, 6, 8, 1873]

[Reported L.R. 17 Eq. 224; 43 L.J.Ch. 193; 29 L.T. 742;
22 W.R. 230]*Bank—Banker's lien—Deposit of boxes containing securities—Boxes not held as security for advances—Depositor in debt to bank.*

L., a stockbroker, deposited with his bankers boxes containing securities belonging to himself and his customers. L. kept the keys, and the bankers were ignorant of the contents of the boxes. L. became lunatic, and, on his committees applying to the bankers for the boxes, the bankers claimed a lien on the securities for a balance due to them on their account with L. On a bill filed by the committees against the bankers to enforce their claim,

Held: the bankers, being gratuitous bailees, ignorant of what the boxes contained and not entitled to receive either the principal or the income to which the securities in the boxes related, and there being proved no general or special custom in the business of banking which would give them a right to retain the boxes, were not entitled to any lien on the boxes or their contents which must be delivered up to the committees.

Bailee—Duty to restore or account for bailed property to bailor—Effect of adverse claim.

A person who has received property from another as his bailee, agent, or servant, must restore or account for that property to him from whom he received it. It is not enough that the bailee has become aware of the title of a third person, or that an adverse claim is made on him so that he may be entitled to an interpleader. The estoppel, however, ceases where there is an eviction by title paramount.

Notes. As to a banker's lien, see 2 HALSBURY'S LAWS (3rd Edn.) 210-213; and for cases see 3 DIGEST (Repl.) 321 et seq.

Cases referred to :

- (1) *Biddle v. Bond* (1865), 6 B. & S. 225; 5 New Rep. 485; 34 L.J.Q.B. 137; 12 L.T. 178; 29 J.P. 565; 11 Jur.N.S. 425; 13 W.R. 561; 122 E.R. 1179; 3 Digest (Repl.) 32, 235.
- (2) *Giblin v. McMullen* (1868), L.R. 2 P.C. 317; 5 Moo. P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 17 W.R. 445; 16 E.R. 578, P.C.; 3 Digest (Repl.) 65, 60.
- (3) *Re United Service Co., Johnston's Claim* (1870), 6 Ch. App. 212; 40 L.J.Ch. 286; 24 L.T. 115; 19 W.R. 457, L.J.J.; 3 Digest (Repl.) 288, 867.
- (4) *Bellamy v. Marjoribanks* (1852), 7 Exch. 389; 21 L.J.Ex. 70; 18 L.T.O.S. 277; 16 Jur. 106; 155 E.R. 999; 3 Digest (Repl.) 266, 762.
- (5) *Brandao v. Barnett* (1846), 3 C.B. 519; 12 Cl. & Fin. 787; 7 L.T.O.S. 525; 136 E.R. 207, H.L.; 3 Digest (Repl.) 321, 992.

Also referred to in argument :

- Davis v. Bowsher* (1794), 5 Term Rep. 488; 101 E.R. 275; 3 Digest (Repl.) 325, 1014.
- Jones v. Peppercorne* (1858), John. 430; 28 L.J.Ch. 158; 32 L.T.O.S. 240; 5 Jur.N.S. 140; 7 W.R. 103; 70 E.R. 490; 1 Digest (Repl.) 639, 2168.
- Inman v. Clare* (1858), John. 769; 32 L.T.O.S. 353; 5 Jur.N.S. 89; 70 E.R. 629; 3 Digest (Repl.) 279, 834.
- Jeffryes v. Agra and Masterman's Bank* (1866), L.R. 2 Eq. 674; 35 L.J.Ch. 686; 14 W.R. 889; 3 Digest (Repl.) 330, 1040,

- A *Bock v. Gorrisen* (1860), 2 De G.F. & J. 434; 30 L.J.Ch. 39; 3 L.T. 424; 7 Jur.N.S. 81; 9 W.R. 209; 45 E.R. 689, C.A.; 1 Digest (Repl.) 639, 2159.
Cooper v. Willomatt (1845), 1 C.B. 672; 14 L.J.C.P. 219; 5 L.T.O.S. 173; 9 Jur. 598; 135 E.R. 706; 3 Digest (Repl.) 112, 334.
Buxton v. Baughan (1834), 6 C. & P. 674; 3 Digest (Repl.) 79, 165.

B Bill praying for a declaration that the defendants, bankers, were not entitled to any charge or lien upon boxes deposited with them for safe keeping by one
C Leese, or any of the deeds, securities, or documents of title therein contained; or upon any other documents or property held by the defendants for safe custody, as was thereinbefore mentioned, and that the same might be ordered to be delivered up to the plaintiffs; an injunction to restrain the defendants from dealing with the securities and documents until the hearing of the cause; the appointment of a receiver; damages; and that the defendants might be ordered to pay the costs of the suit.

The bill was filed by Mary Leese and Richard Leese, against Martin & Co., bankers. William Leese was a stockbroker, who in October, 1870, was found by
D inquisition to be of unsound mind, the other plaintiffs being appointed his committees. William Leese, when he carried on his business of a stockbroker, employed the defendants as his bankers; and they were in the habit of making advances to him upon the security of share certificates, and similar property deposited with them for that purpose. Those loans were from account day to account day, and it was understood that, if they were not repaid, the defendants
E were to be at liberty to dispose of the securities so specifically lodged with them, and to repay themselves out of the proceeds. At the time of the inquisition there were at the defendants' bank a large box and two cash boxes, the keys of which had been kept by William Leese, and also two other boxes, one containing various securities belonging to a Mr. Vickers, and the other containing property of a Dr. Coles, who were customers of William Leese. The key of
F the box containing the property of Dr. Coles had been retained by him. The course of dealing between the defendants and William Leese while he had an account with them was that they allowed him to keep at their banking house several boxes in which he from time to time, for more safe and convenient keeping, deposited deeds and other documents which were entrusted to him by his customers for purposes connected with his business and others which were
G his own property. The defendants did not keep the keys of those boxes, or any of them, nor were they informed what the same contained, but the contents of the boxes were from time to time, without let or hindrance on the part of the defendants, and in fact without any reference to them, removed and dealt with by William Leese, who kept the keys and had constant access to the boxes as he pleased. In fact, those boxes were kept at the defendants' banking house merely
H for the convenience of William Leese, and were in the possession of the defendants for safe custody only, not as security for the repayment of, or with any reference whatever to, any advances made by the defendants. No advances were made by the defendants upon the securities or property contained in those boxes, and the defendants never in any manner claimed any control over them, and they were opened almost every day and the contents inspected, added to, or taken away,
I without any reference to the defendants.

On Mar. 31, 1871, in consequence of several customers of William Leese having applied for their securities, his solicitors wrote to the defendants' solicitor, requesting an appointment for the delivering up of the boxes. To this letter the defendants' solicitor replied, on April 4, 1871, stating that his clients had several boxes deposited with them by William Leese, of the contents of which they were ignorant, but suggesting that, if the securities contained in the boxes belonged not to William Leese but to his customers, his committees had no right to have them handed over to them. The defendants, it was added, had no objection

to the boxes being opened by the plaintiffs' solicitor, in their presence, and to the making a record of their contents. As to some of the boxes, the defendants had received notices from parties claiming to be interested in their contents not to part with them. To that letter the plaintiffs' solicitor wrote in answer, that, as the securities in the defendants' possession were lodged with them by William Leese, his committees were the only persons to receive and give a valid discharge for the same, that they had given ample security to the commissioners for the due disposal of the documents, and had the directions of the Master in Lunacy to receive them from the defendants. The plaintiffs, in further correspondence, requested the defendants to deliver up the boxes and securities in their hands to them, but not meeting with the compliance to which they considered their demand entitled, filed the bill in this cause on Oct. 18, 1871, since which the securities and documents in question had been deposited for safe custody in the Law Institution.

The defendants, by their answers, stated that they had brought an action and obtained judgment against William Leese for £1,359 11s. 7d., the amount of the balance due to them from him on his account with them as his bankers, and, further, had procured certain charging and garnishee orders with respect to the securities in their possession. They admitted that their solicitor had, in procuring for them those charging orders, availed himself of information afforded by an affidavit filed by one of the committees in this suit on Nov. 14, 1871, in those cases where it was corroborated or confirmed by the list made under the direction of one of the defendants after the opening of the boxes, on May 15, 1871. They also stated that, independently of the right, which they assumed by those orders to have gained as against the plaintiffs, they had a lien upon all such of the securities or other contents of the large box and two cash-boxes at the time of the inquisition which were in the Law Institution, as belonged to William Leese or in which he was beneficially interested, for the full amount of what remained due to them from him as his bankers. They claimed that lien not as acquired by any written document, but as one to which they were by law and custom entitled independently of any special or express contract. They did not know, they said, when in particular or by whom the securities and other contents of the boxes were deposited or left at their banking-house; none of their books contained any entries respecting them, and no money was advanced by them on the specific security of such securities, or property, or any part of it. They had always understood that, by law and custom, and independent of express contract, they had a general lien on all securities or other property of William Leese for the time being in their possession for any balance which might be due from him to them. They alleged that the large box and two cash-boxes, with their contents, and the securities in question at the time of the inquisition and when the boxes were opened by them, came into their possession in the ordinary course of their business, and that it was the custom of themselves and other bankers in London, and a part of their ordinary business, to accept and receive from their customers, but not from other persons, securities and other property for safe custody, and that that had been their course of business with William Leese for several years before and down to the time of the inquisition. They did not dispute the fact that the boxes and their contents had been left at their bank for safe custody, and at some considerable time before the inquisition, when William Leese was—or his clerks or agents were—(there being then no balance due from him to the defendants, or such balance, if any, being supposed to be sufficiently covered by adequate specific security) in the habit of adding to or taking from the contents of the boxes, without any interference on their part.

Dickinson, Q.C., and Ingle Joyce for the plaintiffs.

Greene, Q.C., and Stevens for the defendants.

A **HALL, V.-C.**, stated the facts, and continued: The law applicable to such a case as the present is laid down in *Biddle v. Bond* (1), according to which the general rule is that one who has received property from another as his bailee, agent, or servant, must restore or account for that property to him from whom he received it. It is not enough that the bailee has become aware of the title of a third person, or that an adverse claim is made upon him, so that he

B may be entitled to an interpleader. The estoppel, however, ceases when there is an eviction by title paramount. I do not think that there is any ground for contending that, as regards the documents belonging to the customers of Mr. Leese, the delivery of the boxes to the committees would not have been as effectual a discharge to the defendants as a delivery to Mr. Leese himself, had he not become of unsound mind.

C It has, however, been contended that the defendants, if they could safely have delivered the boxes to Mr. Leese, the lunatic, could not safely deliver them to his committees. I consider that the committees' duty was to obtain possession of the boxes which the lunatic had deposited, and the customers of the lunatic must, I think, be taken to have authorised the placing of their securities in

D the boxes of the lunatic, which boxes, when deposited with the bankers, would be considered to be, and would be dealt with as, the lunatic's own boxes and property, and as a consequence would have to be handed over to the committees should Mr. Leese become lunatic. Counsel for the defendants referred to several cases to show that, if a bailee parts with the possession of the property in his possession, the principal may bring trover or detinue against the person to whom

E such property has been so delivered. These authorities are not at all opposed to the rule of law as laid down in the case to which I have referred. The first defence of the defendants, therefore, altogether fails.

I proceed to consider the defence that the defendants had a general lien on such boxes as belonged beneficially to Mr. Leese. The defendants state in their answer that which will also form part of my judgment.

F

"In reference to the boxes mentioned in the amended bill we say it is not the fact that we ever expressly, or by implication, agreed to deliver up the said boxes, or the contents thereof, to the said William Leese, upon demand, without regard to the state of his banking account with us, or that the contents of the said boxes were not deposited with us, or did not come to our hands in the course of our business as bankers. It is true that the said William Leese was allowed from time to time without any hindrance on our part to have access to, and open the said boxes, and to add to, or take from, the contents thereof as he pleased, but at all such times the said William Leese was either not indebted to us in an amount supposed by us to be more than covered by the securities deposited by him with us as aforesaid

G expressly and specifically by way of security. As regards the large box and two cash boxes mentioned in the amended bill, we say that these things were kept by the said William Leese, and after he became lunatic by the committees of his estate, and such boxes were not opened by us, and we did not know of the contents thereof, except that they were presumed to be securities, or other property of value, until May 15, 1871, when the said boxes were opened.

H It had been stated, however, by our late solicitor, and his son and clerk, that the contents of the said last-mentioned boxes (not excepting any portion thereof) were securities belonging, not to the said William Leese, but to various customers of his, which statement was afterwards found to be incorrect. And we, at various times after the said William Leese had been found lunatic, and prior to December, 1870, allowed some person or persons, then having the keys of the said boxes in their possession, and, as we understood, employed for that purpose by the said Mr. Frost [the solicitor],

I or the committees of the said lunatic's estate, to open the said boxes at our

bank and examine the contents thereof, and the person or persons so employed then, as we are informed, and believe, made a list of the contents of the said boxes without interference on our part."

In para. 27 of their answer the defendants say :

"We admit, and it is the fact, that independently of our rights under the judgment and charging and garnishee orders hereinafter mentioned, we do claim a lien upon all such of the securities or other contents of the said large box and two cash boxes, at the date of the aforesaid inquisition, and now deposited at the Law Institution, as belonging to the said William Leese, or in which he was beneficially interested. We claim such lien for the full amount of what remains due to us as such bankers as aforesaid from the said William Leese, not as acquired by, or evidenced by any written document, but as a lien to which we are by law entitled independently of any special or express contract. The securities and other contents of the said boxes were deposited or left at our banking house either by the said William Leese himself, or some or one of his clerks, but when in particular we cannot say, and save as in this our answer is mentioned and appears we do not know or cannot set forth as to belief or otherwise, the dates or date when the persons or person by whom, or the circumstances under which the said deeds, securities, documents, or property, or any of them were deposited or left at our banking house, or when or how we or our clerks or agents first learned the particulars thereof. None of the books at our bank contains, so far as we are aware, any entry respecting such deeds, securities, documents, or other property, and no money was advanced by us on the specific security of such deeds, securities, documents or property, or any part thereof; but we always understood that by law and custom, and independent of express contract, we had a general lien on all securities or other property of the said William Leese for the time being in our possession for any balance that might be due from him to us."

In para. 35 the defendants say :

"We allege that (as the fact is) the said large box and two cash boxes, and the securities or other the contents thereof, which at the date of the aforesaid inquisition were opened by us, came into our possession in the ordinary course of our business. It was and is the custom of ourselves and other bankers in London, and part of our and their ordinary business to accept and receive from their customers, but not from other persons, securities and other property for safe custody, and this had been our custom and course of business with the said William Leese for several years before and down to the date of the aforesaid inquisition. We do not dispute that the said boxes and the contents thereof, from time to time down to and at the date of the said inquisition came into our possession and were deposited or left at our bank for safe custody. The said boxes first came into our possession some considerable time before the date of the said inquisition, but when in particular, or what was then said or passed we are unable to say. The said William Leese his clerks or agents was or were (there being then no balance due from him to us, or such balance, if any, being supposed to be sufficiently covered by adequate specific security) in the habit of adding to or taking from the contents of the said boxes without any interference on our part, as heretofore is stated."

That the boxes in question were only deposited for safe custody is clear, and that the bankers, there being no special duty undertaken by them, or contract entered into with them, were merely gratuitous bailees, seems also to be clear: *Giblin v. McMullen* (2). There not being, as in *Re United Service Co., Johnston's Claim* (3), any arrangement for the bank receiving the dividends, interest,

A or income payable on any securities contained in the boxes (the bankers being merely gratuitous bailees, and Leese allowed to open the boxes from time to time, and even to take them away) how can the defendants maintain their alleged lien? They had nothing to do with the contents of the boxes in the way of receiving either the principal or the income to which the documents related; they were wholly ignorant of what the boxes contained. The lien, if any, could
B not extend to such documents as belonged to Mr. Leese's customers, the defendants never asserted such a lien in any other case, and they are not able to mention any other case in which a lien has been asserted by any other person.

The defendants relying as they do, on the general law that a banker has a lien on the securities of every one of his customers coming into his possession as bankers, say that the boxes did come into their possession in the ordinary
C course of their business as bankers, because they and other bankers (they do not say all other bankers) in London allow their customers to deposit boxes in their strong rooms. But this statement falls short of alleging a general custom applicable to all bankers, or even to all the bankers in London. I, therefore, apprehend that the defendants ought to have and must have clearly alleged and proved a special custom, if they intended to rely upon that as a defence in this case.
D They have, however, not done so: *Bellamy v. Majoribanks* (4). The answer does not even state facts from which the existence of a lien can be implied.

Many authorities were referred to in the course of the argument, but I think it unnecessary to examine them in detail. The general rule as to a banker's lien is clear, and forms part of the law merchant of which the court takes judicial
E notice. The previous authorities were all examined in *Brandao v. Barnett* (5). That case was a much stronger case in favour of the bankers than the present, because in that case Exchequer bills were taken out of the boxes in the banker's hands, and they received the interest on them and exchanged them. It was admitted in the argument in that case, and such admission was approved in the judgment, that the original bills in the boxes were not subject to a lien, and the
F case of the banker was rested on the distinction that the Exchequer bills had been taken out of the boxes and placed in the banker's hands. LORD CAMPBELL'S opinion was read to me in the course of the argument. I will only add what LORD LYNTHURST said. He first of all stated the general rule in this way (3 C.B. at pp. 535, 536):

G "With respect to some of the points of this case, no doubt whatever can be, I think, for a moment entertained. There is no question that by the law merchant a banker has a lien for his general balance on securities deposited with him. I consider this as part of the established law of the country, and that the courts will take notice of it. It is not necessary that
H it should be given in evidence in this particular instance. Therefore, as to that part of the case, I think it is entirely free from doubt. The only question, therefore, which remains to be considered is whether the facts of this case bring this deposit within the general rule. I think the reasoning of my noble and learned friend is decisive upon the subject, and that the circumstances of the case are not within the general rule. The deposit, in
I this instance, was not such under all the circumstances as to give the banker a lien upon the Exchequer bills. They were deposited in a box; they were kept under lock and key; this key was not kept by the banker, but was kept by the party, Mr. Burn. From time to time he called, for the purpose of taking the Exchequer bills out of the box, in order that he might receive the interest upon them, or if the bills were called in by the government, in order that they might be exchanged for others. He himself attended upon those occasions, took the bills out, and delivered them for that special purpose to the bankers. They were always returned almost immediately. The first time that he applied at the bank after a transaction of this kind they

were delivered to him, and were replaced in the same place of deposit. It is impossible, considering how the business was carried on, that we can come to any other conclusion than this, that it was an understanding between the parties that the new bills were to be returned after the interest was received, or after the old bills had been exchanged. If so, if that was the understanding, or if that was the fair inference from the transaction, it is quite clear that there could be no lien, and that it does not come within the general rule, and what my noble and learned friend has stated I think is perfectly correct."

It appears to me that that case, which, being a decision of the House of Lords, I, of course, must follow, is indistinguishable from the present in any particular favourable to the defendants, and that it governs this case. I, therefore, hold that the defendants' defence, founded on the lien claimed by them, fails.

Some subsequent authorities were referred to. As I understand them, they none of them, in any way, question that case; it being a decision of the House of Lords, they would not be likely to do so. Independently, however, of the authorities, I should have come to exactly the same conclusion. Counsel for the defendants contended that this case was not distinguishable from that of securities in a sealed up parcel, as to which I do not think it is. If a sealed up parcel had been deposited as the boxes were in the present instance, such a parcel would not be subject to the bankers' general lien. The remaining defence of the defendants is that of the charging and garnishee orders. I think it clear that the defendants, in order to obtain the orders in question, availed themselves of an affidavit of the plaintiff, Richard Leese, filed in this cause, and I suppose it was made for the purposes of the injunction. The affidavit never would have been filed, had the defendants not rendered this suit necessary, and had they not obtained the information which was desired by them from having opened the boxes; but I cannot allow them to set up orders so obtained as an answer to relief to which the plaintiffs, but for those orders, would be entitled. The plaintiffs, by their bill, ask for damages in addition to the delivery up of the documents; but under the peculiar circumstances of this case, Mr. Leese having become lunatic, there is not, I think, evidence of damage entitling the plaintiffs to an inquiry to ascertain the damage and assess the compensation in respect thereof. I, therefore, declare that the defendants are not entitled to a lien upon the boxes in the plaintiffs' bill mentioned, or any of the contents thereof, and I order that such boxes, with the contents thereof, be delivered up to the plaintiffs, the committees, and that, if necessary the defendants do concur in such delivery up. I order that the defendants be restrained by the order and injunction of this court from taking any proceedings upon the charging and garnishee orders, in the pleadings mentioned; but this is not to extend to the defendants taking such new proceedings for enforcing their judgments as they may be advised, and that the defendants pay the costs of the suit, including any costs which have been occasioned by reason of the boxes having been deposited at the Law Institution.

Judgment for plaintiffs.

A

JONES v. OGLE

[COURT OF APPEAL IN CHANCERY (Lord Selborne, L.C., James and Mellish, L.JJ.),
December 6, 9, 16, 1872]

B

[Reported 8 Ch. App. 192; 42 L.J.Ch. 334; 28 L.T. 245;
21 W.R. 236]

Apportionment—Dividend—Partnership—Profits divisible at direction of managing partner—Apportionment Act, 1870 (33 & 34 Vict., c. 35), s. 2, s. 5.

C

The payments made to the members of a private trading company or partnership out of the profits of the concern, though called dividends in the deed of the company or partnership, are not "dividends" within the meaning of s. 5 of the Apportionment Act, 1870, and are not apportionable as such under that Act. Nor are such payments apportionable as "periodical payments in the nature of income" under s. 2 of the Act when there is no obligation on the company or partnership to declare the dividend and make the payments periodically at fixed periods.

D

A testator, by his will made in 1865, bequeathed the dividends or income of his share in the L. company to J. for his life, and after his death to two persons as tenants in common. The testator died in October, 1870. The L. company was a private trading firm regulated by a deed of partnership. The accounts of the company were usually made up in January or February to the end of the preceding year, the profits of the previous year were then ascertained, and the accounts would be signed and approved by all the partners. The managing partner then decided what "dividend" should be paid to the partners, and this would be paid in four, sometimes three, instalments of varying amounts.

E

Held: a "dividend" declared by a private partnership at the discretion of one of the partners was not a dividend within the meaning of s. 2 of the Apportionment Act, 1870, which was confined to the dividends of public trading companies, and such "dividends" were not apportionable as "periodical payments in the nature of income" within s. 2 of the Act since there was no obligation on the partnership to declare the dividend and make the payments periodically at fixed periods; accordingly, J. was entitled to the whole of the "dividend."

F

G

Notes. Distinguished: *Capron v. Capron* (1874), L.R. 17 Eq. 288. Considered: *Re Cox's Trusts* (1878), 9 Ch.D. 159; *Patching v. Barnett* (1880), 43 L.T. 50. Applied: *Re March, Mander v. Harris* (1884), 27 Ch.D. 166. Considered: *Longsdon v. Minister of Pensions and National Insurance*, [1956] 1 All E.R. 83. Referred to: *Hasluck v. Pedley* (1874), 23 W.R. 155; *Constable v. Constable* (1879), 40 L.T. 516; *Re Griffith, Carr v. Griffith* (1879), 12 Ch.D. 655; *Re Lawrence, Lawrence v. Lawrence* (1884), 53 L.J.Ch. 982; *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297; *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685; *Macleay v. Treadwell*, [1937] 2 All E.R. 38; *Re Lynch-White, Smith v. Lynch-White*, [1937] 3 All E.R. 551; *Re Robbins, Midland Bank Executor and Trustee Co. v. Melville*, [1941] 2 All E.R. 601; *Re Berry (dec'd.), Lloyds Bank, Ltd. v. Berry*, [1961] 1 All E.R. 529.

H

I

As to apportionment under the Apportionment Act, 1870, see 23 HALSBURY'S LAWS (3rd Edn.) 555 et seq.; and for cases see 31 DIGEST (Repl.) 285 et seq. As to the effect of a new statute on the construction of a will, see 39 HALSBURY'S LAWS (3rd Edn.) 984-985; and for cases see 44 DIGEST 535 et seq. For the Apportionment Act, 1870, see 13 HALSBURY'S STATUTES (2nd Edn.) 867-869.

Cases referred to in argument:

Hartley v. Allen (1858), 27 L.J.Ch. 621; 31 L.T.O.S. 69; 4 Jur.N.S. 500; 6 W.R. 407; 20 Digest (Repl.) 298, 409.

Re Maxwell's Trusts (1863), 1 Hem. & M. 610; 1 New Rep. 549; 32 L.J.Ch. 333; 9 L.T. 224; 9 Jur.N.S. 350; 11 W.R. 480; 71 E.R. 267; 20 Digest (Repl.) 299, 410.

Browne v. Collins (1871), L.R. 12 Eq. 586; 23 Digest (Repl.) 475, 5446.

Re Rogers' Trusts (1860), 1 Drew. & Sm. 338; 30 L.J.Ch. 153; 3 L.T. 397; 6 Jur.N.S. 1363; 9 W.R. 64; 62 E.R. 408; 40 Digest (Repl.) 737, 2254.

Bates v. Mackinley (1862), 31 Beav. 280; 31 L.J.Ch. 389; 6 L.T. 208; 8 Jur.N.S. 299; 10 W.R. 241; 54 E.R. 1146; 40 Digest (Repl.) 719, 2118.

Clive v. Clive (1854), Kay, 600; 2 Eq. Rep. 913; 23 L.J.Ch. 981; 24 L.T.O.S. 33; 69 E.R. 255; 40 Digest (Repl.) 716, 2090.

Browne v. Amyot (1844), 3 Hare, 173; 13 L.J.Ch. 232.

McIntyre v. Connell (1851), 1 Sim. N.S. 225; 20 L.J.Ch. 284; 17 L.T.O.S. 197; 18 L.T.O.S. 24; 15 Jur. 529; 61 E.R. 87; 21 Digest (Repl.) 757, 2420.

Ibbotson v. Elam (1865), L.R. 1 Eq. 188; 35 Beav. 594; 12 Jur.N.S. 114; 14 W.R. 241; 55 E.R. 1027; 36 Digest (Repl.) 563, 1221.

Aldham v. Brown (1858), 1 L.T. 237.

Appeal from a decision of LORD ROMILLY, M.R., reported L.R. 14 Eq. 419, on a Special Case, holding that a dividend declared by the Lilleshall Iron Co. was not apportionable under the Apportionment Act, 1870.

By his will, dated Sept. 6, 1865, Herbert Moss Ogle made, among other things, the following bequest:

"And as to the share or interest which I have in the Lilleshall Iron Co., I bequeath the dividends and income thereof to James Taylor Ogle for his life, and after his death to his two daughters in equal shares, their heirs, executors, administrators, and assigns, as tenants in common."

The testator died on Oct. 21, 1870. In February, 1871, a dividend was declared, and the amount received in the year 1871 in respect of the share to which the testator was entitled amounted to £350 17s. 6d., which was claimed by James Taylor Ogle as specific legatee under the testator's will. The plaintiff, as legal personal representative of the testator, on behalf of the residuary legatees, claimed to be entitled to an apportioned part of the sum in respect of the period which elapsed between Jan. 1, 1870 and Oct. 21, 1870, the day of the testator's death. A Special Case was filed to settle the question. It stated that the Lilleshall Iron Co. was a private company, and that a statement of accounts for the preceding year was submitted by the directors to the shareholders in the month of January or February in each year, and a dividend declared, such as the profits justified, which was paid by four instalments, one immediately after the declaration of the dividend, and the others in the months of April, July, and October following. The Master of the Rolls having held that the Apportionment Act did not apply, it being in his opinion the clear intention of the testator that the tenant for life should take the whole of the dividend, the plaintiff appealed from this decision.

On the appeal coming on for hearing, on Dec. 6, their Lordships desired further evidence as to the nature and constitution of the company, and the mode in which the dividends were declared, and the case accordingly stood over for that purpose, and there was a further adjournment on Dec. 9 for the same purpose. The further evidence showed that the company was constituted by a deed, dated June 24, 1802, and made between Lord Leveson Gower of the one part, and James Bishton and three others of the other part. It was provided by the deed that the property of the company was to be considered as divided into sixteenths, of which Lord Leveson Gower was entitled to eight, Bishton to five, and the other three to one-sixteenth each. The business was to be under the sole management of Lord Leveson Gower and Bishton, who were to have power to call upon the partners, if necessary, to make advances for the purposes of the partnership. Accounts were taken in January or February in each year, and the profit or loss ascertained,

A and these accounts were to be settled and signed by the partners. And the deed provided that such dividends should be made from time to time amongst the partners according to their several shares and interests, as Lord Leveson Gower and Bishton should direct, and whenever a dividend should be made, each of the partners should be entitled to receive his part or proportion without preference or priority. The mode of declaring dividends was this: The accounts were taken
B in each January to the end of the preceding year, thus showing the net profits of the year. The accounts were then laid before Lord Granville, who decided how much of the profits should be divided and how much carried forward, and who gave verbal instructions on the matter to the manager, without making any written memorandum as to the dividend. The dividend was generally paid in four, but
C sometimes in three, instalments of varying amounts.

Fry, Q.C., and Cozens Hardy for the plaintiff.

Roxburgh, Q.C., and Phear for the defendant.

LORD SELBORNE, L.C.—We all think that the decision of the Master of the Rolls in this case is correct.

D First, to deal with the point upon the construction of the will. Before the Apportionment Act, 1870, it appears to be admitted, and we think it could not be contested, the language of the will would have been sufficient to carry the dividends in question, calling them dividends for the sake of convenience only. If it was necessary to decide, I should have very great difficulty indeed in seeing my way to the conclusion that the Act either was intended to alter, or has in this case had the effect of altering the proper construction of words contained in a will made before the Act passed. If a will had been made afterwards, I can quite follow the argument which would say that such a testator makes his will, having this Act of Parliament in view, and that the words he uses are not to be construed without regard to this Act of Parliament. But I apprehend that the construction of the words of a specific gift will be taken generally, according to the meaning of the words at the period when the will was made, and it would have taken a great deal to persuade me, if I had thought this case came within the Act of Parliament, that when the testator having a share or interest, part of which certainly is, whatever else could be, coming to him under any future declaration of dividend, makes an exhaustive gift of the whole of the share or interest dividing it between a tenant for life and remaindermen—it would, I say, have taken a great deal to persuade me that there is anything in the Act of Parliament which could possibly have the effect of causing some part of that share or interest not to pass to the specific legatee, but to go to the testator's general estate.

But the will does not stop there, for it goes on to bequeath the dividends, which must mean all the dividends and the income thereof. If a man says: "I give all the dividends," being able to give whatever he pleases, does not that gift include, as its natural meaning would seem to do, the whole dividends, irrespective of any apportionment, and why should it be limited to a share in the partnership and "income thereof?" Income is a general expression signifying what comes in; and that expression is used, as it happens, in the Act of Parliament itself, with reference to a periodical payment in the nature of income. Supposing the testator
I had given the whole income, why should it not include periodical payments in the nature of income? I should, therefore, have been disposed to agree with the Master of the Rolls in the construction of this particular will, even if I had entertained more doubt than I do about the reading of the Act of Parliament.

But I also think that this is not really a dividend or a periodical payment, in its nature apportionable under that Act. The real object of the statute was to obliterate technical distinctions between different kinds of fixed income recurring from time to time at stated periods, and which on account of their nature, those in receipt of income would rely on for their maintenance and their ordinary arrange-

ments in life. For one, I should be very sorry, and all the members of the court would be sorry too, to put any narrow construction on that Act of Parliament which would tend to diminish its beneficial operation for the purpose evidently intended. But, on the other hand, it is not for us to put upon it an interpretation going beyond that purpose, and which must tend materially to embarrass or interfere with the working out of trading partnerships and other kinds of businesses which involve what may be called dividends, but mainly rest on wholly different grounds and do not proceed upon the basis of a real and fixed income recurring from time to time.

In this particular case there was a mere private partnership; that is admitted. The deed of the partnership provided that the accounts should be made out annually in January or February, not to any specified, limited time. They might have fixed any time that was convenient as the period over which those accounts might extend. It was no doubt a very natural thing that they should take them to the end of the preceding year: if it suited them to take them at an earlier date, or had it been practicable to take them to a later date, there was nothing to prevent them doing so. All the partners are to concur in the statement, and settlement, and adjustment, of those accounts, and then no doubt, on the context which follows (but it is a particular fixed power given to the other persons), the managing partner or partners are to have power at their discretion, without the fixing of any period of time at which the power is to be exercised, to declare dividends. It is a discretionary power to be exercised from time to time and when they think fit. It seems to me that the use of the word "dividend" there does not make this the dividend mentioned in the Act of Parliament, which is either a dividend properly so called—by which I understand, such dividends as those upon stock in the public funds, where a person under the obligation to make the periodical payment hands to the persons through whose hands the payment is to be made, funds for that purpose which there was an obligation to divide; or, as s. 5 of the Act says:

"Payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise;"

where it will be observed the legislature thought fit to relax the rule and to make the dividends of that class of companies apportionable, even though they might be declared at variable times, because it was known that the shares of such companies were in the nature of investments for the production of ordinary income. Is this a trading or other public company? The word "other" plainly shows that the trading company must be a public company as well as the other, and it is admitted that this is not. So that this dividend in this private partnership cannot be brought at all within the meaning of the word "dividend" in the Act.

Can it then be brought in under the words of s. 2:

"All rents, annuities, dividends, and other periodical payments in the nature of income, when reserved or made payable under an instrument in writing or otherwise?"

The first observation I would make on the words, "and other periodical payments in the nature of income," is that dividends have been expressly mentioned; and evidently, therefore, other kinds of periodical payments, not in the nature of dividends, are in the contemplation of the Act. But further, they must be payments which are made periodically, recurring at fixed times, and not merely variable periods, or in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and then, secondly, they must be in the nature of income, that is, coming in clearly as the proceeds of an investment of the same kind as in other respects the Act deals with.

A It appears to me that the profit declared on these shares, though called by the name of dividend in the deed, is not a periodical payment in the nature of income within the true meaning of these words in this Act. I have already said that it is not a dividend, as the word dividend is used in the Act; and the conclusion I come to is that this is not the sort of payment the Act indicated. On the whole I have come to the conclusion that the judgment of the Master of the Rolls, **B** on whichever ground it proceeded, is correct.

JAMES, L.J.—I am of the same opinion. I entirely concur in the judgment of the Lord Chancellor on both points, as to the construction of the will and the construction of the Act of Parliament itself.

C **MELLISH, L.J.**—I am of the same opinion.

Appeal dismissed.

D

E

OSBORN v. GILLETT

[COURT OF EXCHEQUER (Kelly, C.B., Pigott and Bramwell, BB.), November 13, 1872, January 23, 1873]

[Reported L.R. 8 Exch. 88; 42 L.J. Ex. 53; 28 L.T. 197;
21 W.R. 409]

F

Master and Servant—Injury by third person to servant causing death—Loss of service—Action by master against wrongdoer—Need for prosecution of wrongdoer before action.

G

To a declaration in an action against the defendant for injuries caused to E. the “daughter and servant of the plaintiff” by the negligent driving of B., the defendant’s servant, by reason of which injuries E. died, so that the plaintiff lost her services and incurred burial expenses. The defendant pleaded, thirdly, that E. was killed on the spot, and, fourthly, that the act complained of amounted to a felonious act by B. and that B. had not been prosecuted for the offence. On demurrer to the pleas,

H

Held: (i) (BRAMWELL, B., dissentiente), the third plea was good and an answer to the action on the ground that a master could not maintain an action for loss of service by reason of injuries which cause the immediate death of the servant; (ii) the fourth plea was bad because such a plea only afforded a defence (if at all) when the action was brought before prosecution against the supposed criminal and not against a third party.

I

Higgins v. Butcher (1) (1606), Yelv. 89, and *Baker v. Bolton* (2) (1808), 1 Camp. 493, considered and approved by the majority of the court.

Notes. Applied: *Appleby v. Franklin*, [1881-5] All E.R. Rep. 1169. Approved: *Clark v. London General Omnibus Co.*, [1906] 2 K.B. 648. Considered: *Jackson v. Watson*, [1909] 2 K.B. 193; *Admiralty Comrs. v. S.S. Amerika*, [1916-17] All E.R. Rep. 177; *Berry v. Humm*, [1915] 1 K.B. 627; *In the Estate of G., M. v. L.*, [1946] 1 All E.R. 579. Referred to: *Smith v. Selwyn*, [1914-15] All E.R. Rep. 229; *Kent v. Atkinson*, [1923] All E.R. Rep. 28; *Rose v. Ford*, [1937] 3 All E.R. 359; *Mattouk v. Massad*, [1943] 2 All E.R. 517.

As to negligence causing death, see 28 HALSBURY'S LAWS (3rd Edn.) 34-40. As to liability to a third party in tort, see 25 HALSBURY'S LAWS (3rd Edn.) 535-548; as to personal injury to a servant, see *ibid.* 558-560; and for cases see 34 Digest (Repl.) 223 et seq.

Cases referred to :

- (1) *Higgins v. Butcher* (1606), Yelv. 89; 80 E.R. 61; sub nom. *Huggins v. Butcher*, 1 Brownl. 205; sub nom. *Higgins' Case*, Noy. 18; 74 E.R. 989; 34 Digest (Repl.) 227, 1656.
- (2) *Baker v. Bolton* (1808), 1 Camp. 493, N.P.; 34 Digest (Repl.) 227, 1655.
- (3) *Eden v. Lexington and Frankfort Railroad Co.*, 14 B. Monroe's Kentucky Reports, 204.
- (4) *Carey v. Berkshire Railroad Co.*, *Skinner v. Housatonic Rail. Corpn.*, 1 Cush. 475.
- (5) *White v. Spettigue* (1845), 1 Car. & Kir. 673; 13 M. & W. 603; 14 L.J.Ex. 99; 4 L.T.O.S. 317; 9 J.P. 761; 9 Jur. 70; 153 E.R. 252; 1 Digest (Repl.) 74, 557.
- (6) *Hodgson v. Stallebrass* (1840), 11 Ad. & El. 301; 8 Dowl. 482; 3 Per. & Dav. 200; 9 L.J.Q.B. 132; 113 E.R. 429; 34 Digest (Repl.) 228, 1663.
- (7) *Franklin v. South Eastern Rail. Co.* (1858), 3 H. & N. 211; 31 L.T.O.S. 154; 4 Jur.N.S. 565; 6 W.R. 573; 157 E.R. 448; 36 Digest (Repl.) 213, 1128.
- (8) *Cooper v. Witham* (1668), 1 Lev. 247; 1 Sid. 375; 2 Keb. 399; 83 E.R. 390; 27 Digest (Repl.) 210, 1669.
- (9) *R. v. Vann* (1851), 2 Den. 325; T. & M. 632; 21 L.J.M.C. 39; 18 L.T.O.S. 174; 15 J.P. 802; 15 Jur. 1090; 5 Cox, C.C. 379, C.C.R.; 7 Digest (Repl.) 550, 14.
- (10) *Ford v. Monroe*, 20 Wendell, 210.

Also referred to in argument :

- (11) *Gimson v. Woodfull* (1825), 2 C. & P. 41; 1 Digest (Repl.) 74, 558.
- (12) *Stone v. Marsh, Stracey and Graham* (1827), 6 B. & C. 551; 9 Dow. & Ry.K.B. 643; Ry. & M. 364; 5 L.J.O.S.K.B. 201; 108 E.R. 554; 1 Digest (Repl.) 454, 1053.
- (13) *Wells v. Abrahams* (1872), L.R. 7 Q.B. 554; 41 L.J.Q.B. 306; 26 L.T. 433; 36 J.P. 710; 20 W.R. 659; 36 J.P. Jo. 260; 1 Digest (Repl.) 76, 565.
- (14) *Dawkes v. Coveleigh* (1652), Sty. 346; 82 E.R. 765; 1 Digest (Repl.) 74, 554.
- (15) *Evans v. Walton* (1867), L.R. 2 C.P. 615; 36 L.J.C.P. 307; 17 L.T. 92; 15 W.R. 1062; 34 Digest (Repl.) 211, 1482.
- (16) *Martinez v. Gerber* (1841), 3 Man. & G. 88; Drinkwater, 231; 3 Scott, N.R. 386; 10 L.J.C.P. 314; 5 Jur. 463; 133 E.R. 1069; 34 Digest (Repl.) 224, 1629.
- (17) *Lumley v. Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 34 Digest (Repl.) 210, 1474.
- (18) *Ambrose v. Kerrison* (1851), 10 C.B. 776; 20 L.J.C.P. 135; 17 L.T.O.S. 41; 138 E.R. 307; 7 Digest (Repl.) 553, 47.
- (19) *Chapple v. Cooper* (1844), 13 M. & W. 252; 13 L.J.Ex. 286; 3 L.T.O.S. 340; 153 E.R. 105; 7 Digest (Repl.) 554, 52.
- (20) *Wheatley v. Lane* (1669), 1 Sid. 397; 1 Saund. 216; 1 Lev. 255; 2 Keb. 455; 82 E.R. 1179; 24 Digest (Repl.) 718, 7059.
- (21) *Dalton v. South Eastern Rail. Co.* (1858), 4 C.B.N.S. 296; 27 L.J.C.P. 227; 31 L.T.O.S. 152; 4 Jur.N.S. 711; 6 W.R. 574; 140 E.R. 1098; 36 Digest (Repl.) 214, 1129.
- (22) *Crosby v. Leng* (1810), 12 East, 409; 104 E.R. 160; 1 Digest (Repl.) 78, 583.
- (23) *Ashby v. White* (1703), 1 Bro. Parl. Cas. 62; Holt, K.B. 524; 2 Ld. Raym. 938; 6 Mod. Rep. 45; 1 Salk. 17; 14 State Tr. 695; 1 Smith, L.C., 12th Edn., 266; 1 E.R. 417; 1 Digest (Repl.) 26, 197.

- A (24) *Wellock v. Constantine* (1863), 2 H. & C. 146; 2 F. & F. 791; 31 L.J.Ex. 285; 7 L.T. 751; 9 Jur.N.S. 232; 159 E.R. 61; 1 Digest (Repl.) 76, 571.
- (25) *Hall v. Hollander* (1825), 4 B. & C. 660; 7 Dow. & Ry.K.B. 133; 4 L.J.O.S.K.B. 39; 107 E.R. 1206; 34 Digest (Repl.) 226, 1647.

B **Demurrer** in an action against the defendant by the plaintiff for damages for the loss and injury sustained by him through the death of his daughter, an infant, who had been killed by a wagon and horses belonging to the defendant, negligently driven by a servant of the defendant along a public highway.

C The action was brought under the Fatal Accidents Act, 1846, Lord Campbell's Act, for loss of the daughter's services. The declaration charged that, before and at the time of the accident, and until the time of her death, Elizabeth Osborn was the daughter and servant of the plaintiff; and that the defendant, by John Broadwater his servant, so negligently and unskilfully managed and drove a wagon and horses along a public highway, that the wagon and horses were forced and driven against Elizabeth Osborn, whereby she was wounded and injured, and afterwards died, whereby the plaintiff wholly lost her services, and the benefits and advantages which would otherwise have accrued to him from such services; and was put to expense in conveying to his house her body; and was necessarily put to and incurred expense in preparing for, and incidental to, the burial of the same.

D By his third plea the defendant contended that Elizabeth Osborn was killed on the spot by the acts and matters mentioned in the declaration, so that the plaintiff did and could not sustain any damage which entitled him to sue in this action for the acts complained of. By his fourth plea that the act and matters complained of in the declaration amounted in law to a felonious act committed by John Broadwater and that he, at the commencement of the suit had not been tried, convicted, or acquitted of, nor in any manner prosecuted for, the offence, although nothing ever existed to render such prosecution unnecessary, F improper, or inexpedient, or to entitle the plaintiff to sue in this action without the same having taken place. Demurrer and joinder.

G *W. Graham* for the plaintiff contended that the declaration was good, and both the pleas were bad. The defence to the action was two-fold: first, that, the servant being killed on the spot, no action lies by the master for loss of service; and, secondly, that, the act of the defendant's servant amounting to manslaughter, the action is not maintainable, at all events, until there has been a criminal prosecution of the wrongdoer for that offence. To take the second ground on which the fourth plea is founded, first; *White v. Spettigue* (5), in this court is a distinct authority in favour of the plaintiff on this point, and shows that the rule of law as stated by BEST, C.J., in *Gimson v. Woodfull* (11), that before a civil action for the recovery of stolen property can be maintained, there H must be a criminal prosecution of the thief, applies only to proceedings between the plaintiff (the party injured) and the felon, and those with whom he must be sued, and does not apply to a case in which the action is brought against a third party, as in the present instance, who is innocent of the felonious transaction. This court there approved of and followed the decision of the Court of Queen's Bench in *Stone v. Marsh* (12), which was subsequent to *Gimson v. Woodfull* (11).

I The present case is not an action against the wrongdoing servant, but against his master, and if the law were as laid down by BEST, C.J., in *Gimson v. Woodfull* (11), and contended for by the defendant, and the servant who committed the wrongful action were to abscond before prosecution, the plaintiff would lose his right of action altogether, and be without remedy for the injury done to him. *Higgins v. Butcher* (1), and a dictum of TANFIELD, J., there, will probably be relied on by the defendant on this point, but it is submitted that that case is overruled by *White v. Spettigue* (5). But even if the rule did apply it could

not be set up as a defence by the wrongdoer himself as the defendant by his servant here is. In a recent case in the Queen's Bench (*Wells v. Abraham* (13)), all the authorities are considered and commented on and BLACKBURN, J., there deals expressly with this point, and cites *Dawkes v. Coveleigh* (14), and the result is that the rule itself is of very doubtful authority. The death of the child, it is submitted, makes no difference, that death having been caused by a wrongful act on the part of the defendant's servant. The right of action on the part of the plaintiff as master is entirely collateral to the right of action on his part as father.

[BRAMWELL, B.—You allege a wrongful act and a consequential damage. If it be a service at will it may be questionable whether any damage was sustained.] In *Evans v. Walton* (15) it was held not necessary that there should be an express contract of service between a father and daughter to support an action by the father for enticing his daughter away from his service and seducing her.

[BRAMWELL, B.—Was not that put rather upon the point that there was an *animus revertendi*?] Here by the defendant's wrongful act the plaintiff has lost the services which, but for that wrongful act, he would have enjoyed. *Martinez v. Gerber* (16) shows that the injury to the servant and to the master are, as MAULE, J., there said, "collateral to each other, and not consequent upon one another," and that a master has an action for consequential damage arising to him from an injury to his servant, although such injury be not direct but consequential, and though the servant could not have maintained trespass, but must have sued in case for such injury; and that a general allegation of service is sufficient without stating that the servant was hired or was to receive a salary.

[BRAMWELL, B.—If the servant had survived the accident a month then, admittedly on all hands, the plaintiff would have had an action; if so, then if she had survived a week; and, if so, then if for a day or even for five minutes there would have been a right of action. It seems strange that if the servant lives for twenty-four hours there should be an action, but that there should be none if she is killed on the spot.] I contend that the rule *actio personalis moritur cum persona* does not apply here, where the action is brought by the master who has lost the servant's services. It may be difficult to assess the precise amount of damages, but still nevertheless the action lies.

[KELLY, C.B.—My difficulty is, assuming the service, that here the servant was killed instantaneously by a wrongful act. Is there, then, an action? BRAMWELL, B.—It seems to me that the burden of proof is on the other side. Why should it not be so? Here the plaintiff's servant has been killed, and her services lost. KELLY, C.B.—Suppose the case of an annuitant for the life of A., and that A. is run over in the street and killed? BRAMWELL, B.—In that case there is no status; no relation between the parties save that of debtor and creditor.] The question was much discussed in the Queen's Bench in *Lumley v. Gye* (17). [BRAMWELL, B.—I would put it thus: Relation of master and servant, wrongful act of defendant and damage to servant, and consequent damage to the master of that servant. Why is the master not to have an action?] There are two wrongful acts here, one to the servant and one to the master. The servant's action is gone by death, under the rule *actio personalis moritur cum persona*; but the servant's death, does not, I contend, deprive the master of his right of action. At all events, the plaintiff is entitled to recover the costs of the funeral of his child, whose dead body he was bound by the law to bury: see *R. v. Vann* (9); *Ambrose v. Kerrison* (18); *Chapple v. Cooper* (19).

Prentice, Q.C., for the defendant.—The first question here arises on the third plea, which states distinctly that the child was killed on the spot by the act of the defendant's servant, and that the plaintiff did not and could not sustain any damage by the act complained of. No case can be found in the English books

A to the effect that such an action can be maintained, but there are two cases in the American courts in which it was distinctly held that it cannot. The preamble of Lord Campbell's Act shows plainly that before that Act no action would have lain in a case like the present. It says "whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and
B expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him." The Act then proceeds to give a right of action against the wrongdoer to the representatives of the persons killed by the wrongful act.

[MARTIN, B.—In *Higgins v. Butcher* (1) the reason is given why such an action will not lie. It was there said by TANFIELD, J., "If a man beats the servant of J. S., so that he dies of that battery, the master shall not have an action against the other for the battery and loss of his service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is lost: Quod FENNER and YELVERTON, concesserant."]
C That is so; and the reason to the same effect is given by LORD ELLENBOROUGH, C.J., in *Baker v. Bolton* (2), where the plaintiff sued the proprietors of a coach which had upset, whereby the plaintiff and his wife, who were travellers by it, were injured, and the wife so severely that she died a month after the accident. The declaration, besides other special damage, stated that by means of the premises the plaintiff wholly lost, and became deprived of, the
D comfort, fellowship, and assistance of his wife, and had from thence hitherto suffered great grief and anguish of mind. The wife, it appeared, had been of use to her husband in his business as a publican. But LORD ELLENBOROUGH said: "The jury could only take into consideration the bruises which the plaintiff himself had suffered, and the loss of the wife's society and the distress of mind he had suffered on her account from the time of the accident till the moment of
E her death"; for, said his Lordship: "In a civil court the death of a human being could not be complained of as an injury, and in this case the damages as to the wife must stop with the period of her existence." To this case LORD CAMPBELL appended the following query: "If the wife be killed on the spot, is this to be considered a damnum absque injuria?"

In the American case, *Eden v. Lexington and Frankfort Railroad Co.* (3), it
G was held that the right of action for an injury to the person dies with the person, although a husband might maintain a civil action for an injury to his wife, so far as medical service and funeral expenses were concerned; or a parent for a child, up to its death, but not for the loss of life. So, again, in another American case, *Carey v. Berkshire Railroad Co.* (4), it was held that an action on the case could not be maintained by a widow to recover damage for the loss of her husband, or by a father for the loss of the services of his child, in consequence of the death of the husband or child occasioned by the carelessness or fault of the agents or servants of a railroad corporation. In that case an earlier American case, *Ford v. Monroe* (10), was commented on. In the present case the child's death was instantaneous, and the plea alleges that there was no loss of service. How then can there be an action?

I [BRAMWELL, B.—Suppose the father had prepaid her £100 for a year's service and she was killed on the spot, would you still say that the master did not sustain any damage? The plea says, "so that the plaintiff did and could not sustain any damage." It might be that he did not, but to say that he could not is, to my mind, nonsense.] In note (1) to *Whedley v. Lane* (20) (1 Wms. Sand. 216a) it is said: "It was a principle of the common law, that if an injury were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done." That was the law in all cases before Lord

Campbell's Act, and unreasonable enough it was. That Act altered the law in many cases, and gave executors and administrators a right of action. But this case does not come within it, and the Act itself shows that it does not. [He cited also ANGELL ON CARRIERS (2nd Edn.), p. 529, s. 600.] Then it is said that, at common law, an action would lie for the funeral expenses.

[MARTIN, B.—It must be made out that a master is bound to bury a servant.] *Dalton v. South Eastern Rail. Co.* (21) shows that in an action by a father, under Lord Campbell's Act, for the death of his son, funeral expenses could not be recovered. [KELLY, C.B.—Was the son of age in that case?] Yes. [BRAMWELL, B.—The allegation here is that the plaintiff was "necessarily put to expense," etc. There the action was by the son's administrator, but this is a common law action, and the daughter was under age, and living in her father's house. As his daughter, he could not recover for her death; as his servant he can recover for the loss of her services. As his servant he was not bound to bury her, but as his daughter and under age he was.]

In support of the fourth plea, *Crosby v. Leng* (22), and the judgment of LORD ELLENBOROUGH, C.J., that "the policy of the law required that, before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence," was referred to. Counsel referred also to *Ashby v. White* (23); *Wellock v. Constantine* (24); *White v. Spettigue* (5); *Stone v. Marsh* (12); *Wells v. Abraham* (13), and contended that the same reason applied for upholding the rule as laid down in *Crosby v. Leng* (22), whether the action was brought against the master of the offending person, or against the offending person himself. [BRAMWELL, B.—In my opinion *Wells v. Abraham* (13) very properly overruled *Wellock v. Constantine* (24).]

Graham in reply.—As to the fourth plea, the same reasons apply here as in *White v. Spettigue* (5). The defendant here is not the wrongdoer himself. That case and *Wells v. Abraham* (13) are conclusive authorities in the plaintiff's favour on this point. As to the other and more important point, the recital in the preamble of Lord Campbell's Act is only a recital of the law with respect to those matters with which the Act is dealing. If the plaintiff had only been the girl's master, he could not have recovered under the Act. The personal representatives only of the deceased can sue under it. The reasons given in the American cases as to the felony are concluded by the English cases. Here the wrong is done to the master, and he is not dead, so the rule *actio personalis moritur cum persona* is inapplicable. Then, as to loss of service, the judgment of MONTAGUE SMITH, J., in *Evans v. Walton* (15), is conclusive, and *Hall v. Hollander* (25), to which he refers, is similar to the present case. All the elements necessary to give a right of action to the plaintiff exist here, and no case or rule of law to the contrary has been shown. In principle the action is maintainable, and the child's death makes no difference.

Cur. adv. vult.

Jan. 23, 1873. The following judgments were read.

PIGOTT, B.—There were demurrers to the third and fourth pleas in this case. The action was brought for negligent driving by the defendant's servant, whereby Elizabeth, the daughter and servant of the plaintiff, was injured, and afterwards died; and in consequence the plaintiff lost her services, and was put to the expense of burying her. By the third plea the defendant says that "she was killed on the spot," and the first question is whether this plea affords a good defence in law to an action by a master for damage sustained by reason of the death of his servant. It may seem a shadowy distinction to hold that, when the service is simply interrupted by accident resulting from negligence, the master may recover damages, while, in the case of its being deter-

A mined altogether by the servant's death from the same cause, no action can be sustained. Notwithstanding, I am of opinion that the law has been so understood up to the present time; and, if it is to be changed, it rests with the legislature, and not with the courts, to make the change.

B It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to show that the general understanding has been to the effect laid down by LORD ELLENBOROUGH, in 1808, in *Baker v. Bolton* (2). It was, no doubt, a nisi prius decision, and loosely reported; but it does not appear ever to have been questioned. The ruling was, that the death of any human being could not be complained of as an injury (i.e., as an actionable injury), and the law, as there laid down, has C found its way into the various textbooks treating on the law of Master and Servant: see ADDISON ON TORTS, and 2 CHITTY ON PLEADING (7th Edn.), p. 488. There was nothing in that case to show that the negligence amounted to a felony, and, if death is caused without criminal negligence, or by merely injudicious driving, it would not.

D In addition to this authority, and the general acquiescence in it for so many years, there is a clear parliamentary recognition and statement that such is the law to be found in the preamble to Lord Campbell's Act. The language is not confined to cases to which the maxim "actio personalis moritur cum persona" applies, but it is perfectly general—namely:

E "Whereas no action at law is now maintainable against a person, who by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him. . . ."

The remedy is then given to the deceased's personal representatives, for the benefit of wife, husband, parent, and child only. Yet it must be manifest that F numerous other cases in which special damages of various kinds are sustained (master and servant being one), must have been present to the mind of the framers of this statute, and, if such had been the intention, an express remedy would have been afforded in cases where proximate special damage results from the death so caused. Several American authorities (*Eden v. Lexington and Frankfort Railroad Co.* (3); *Carey v. Berkshire Railroad Co.* (4)) were also cited, which G show that the law in America has followed the ruling of LORD ELLENBOROUGH, but I do not think it necessary to rely on these.

The result is, in my opinion, that we are not at liberty to disregard the law thus established so long ago and expressly recognised by the legislature; nor, in effect, to add, by the decision of this court, another clause to Lord Campbell's H Act. For these reasons, as regards the loss of service, therefore, I think this action is not maintainable, and the same reason applies also to the expense of the burial. I think the fourth plea is bad, for the reasons given on the argument—viz., that it only affords a defence (if at all) when the action is brought against the supposed criminal, and before prosecution.

I **BRAMWELL, B.**—The fourth plea in this case is clearly bad. *White v. Spettigue* (5) is in point. Indeed, this case is stronger. There, the plaintiff was owner of the books, and it may be said it was in some sense his duty to prosecute the man who stole them; but in this case I see no greater duty in the plaintiff than in anyone else to prosecute for the supposed felony.

I think the third plea bad also. The declaration shows that the deceased was the plaintiff's servant; that by a wrongful act, for which the defendant is responsible, she was wounded and killed, and that thereby the plaintiff lost her service and sustained damages, which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise. The

plea admits this, but says that the wrongful act and death of the servant were at the same moment of time. On this plea it is not alleged that the killing was manslaughter, and as against the defendant it would be taken that it was not, for it is not alleged, and there may be a killing under circumstances of sufficient negligence to maintain an action if death had ensued, although the negligence is not criminal so as to render the killing manslaughter.

These pleadings show a state of things such as that, if the loss of service had arisen from the servant being injured, maimed, crippled, or otherwise disabled from work but not killed, the action would be maintainable: see *Hodgson v. Stallebrass* (6); and the only question is whether the loss arising from a killing makes any difference. It is important to bear this in mind, as it gets rid of all the suggested difficulties about the impolicy of such an action being maintainable, and about the unreasonableness of its being maintainable when an annuitant for a man's life could not maintain an action for the wrongful killing of the cestui que vie. Because, supposing we could entertain such a consideration, this action is no more against good policy than one would be where the servant was crippled but not killed; and in the supposed case of the annuitant he could maintain no action for a wrongful crippling or disabling of the cestui que vie, whereby he could not pay the annuity, which, indeed, might have been granted to last during good health. Here a relation is shown to exist between the plaintiff and the servant in respect of which, if the master sustains damage in consequence of a wrongful act, which injures the servant, the law gives the master a right of action, and the only question is, whether to that general rule there is an exception where the servant is killed. I asked why there should be? No reason was or could be given, except the supposed impolicy. But it was said to be a positive rule of law that where a damage was caused by death no action lay. The burden of showing this is on the defendant who asserts it. He has to make out an exception to a general rule, and as no reason can be given for it, it seems to me to require very clear authority.

Counsel for the defendant relied, first, on the general rule or maxim, "*actio personalis moritur cum persona*"; but that clearly means, *moritur cum persona* who was to be party to the action as plaintiff or defendant. Dies with the person; what person? It is not any person or every person. If the servant here had lived six months, and during that period her service had been lost, this action would clearly be maintainable, although she had then died. Further, the maxim is, *actio moritur*, which supposes it was once alive; but here the argument is, that the plaintiff never had any action. In effect, the plaintiff's case is, "You killed my servant and caused me loss"; and the defendant's case is the same, "I did kill her, and therefore never was liable." The sense, in which I say the maxim is to be understood, is that put on it by Mr. Broom, and the many authorities he cites in his *MAXIMS* (5th Edn.), p. 904. Next, counsel for the defendant relied on the recital of Lord Campbell's Act, that

"no action is now maintainable against a person who, by his wrongful act, may have caused the death of another person."

Certainly the words are large enough to include this case, but, in justice to whomsoever is responsible for it, we ought to see what was the subject matter being dealt with. When that is done, it will appear manifest that such a case as this was not in contemplation. For (it is somewhat strange) the section proceeds to say that

"whenever the death of a person shall be caused by a wrongful act and the act is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then the person, who would have been liable if death had not ensued, shall be liable in an action for damages, notwithstanding the death of the party injured";

that means killed. So that the death is to make a man liable to an action, notwithstanding the death. But that the words "party injured," in the phrase

A "would have entitled the party injured," must mean the same as where they again occur, and, therefore, mean "party killed," the present case would be comprehended in this enactment, for the plaintiff is a "party injured." But it is manifest, by s. 2, that the statute is dealing with cases where no action lay by the representatives of a deceased person, to recover damages for his being wrongfully killed, and to this the recital must be limited. Further, with all
B respect to the legislature and the author of the section, I require some stronger authority for the anomaly the defendant contends for, than a loose recital in an incorrectly drawn section of a statute, on which the courts had to put a meaning from what it did not rather than what it did say: *Franklin v. South Eastern Rail. Co.* (7) (3 H. & N. at p. 214).

C The next authority relied on was *Baker v. Bolton* (2). Certainly, as reported, it favours the defendant's view, for LORD ELLENBOROUGH is reported to have said that

"in a civil court, the death of a human being could not be complained of as an injury, and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence."

D The report is very short, and I am by no means sure of its accuracy. For, although the evidence is, that the wife assisted in the plaintiff's business, the special damage alleged does not contain any damage to the plaintiff's business, and LORD ELLENBOROUGH is reported to have said that the jury could only take into consideration the plaintiff's hurts, and the loss of his wife's society, and
E distress of mind till the moment of dissolution. But why was not the plaintiff entitled to recover for the loss of a month's assistance, and how was he entitled to recover for distress of mind at all and especially why up to the time when the distress must have become greatest by the death? This is only a *nisi prius* case; the plaintiff got £100, and probably was content. No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the
F weight of the considered and accurately reported opinions of LORD ELLENBOROUGH after argument. The reporter puts a most significant query as follows: "Quære, if the wife be killed on the spot, is this to be considered *dammum absque injuria*?" Why should the answer be to it, Yes, as the defendant contends?

The next authority cited by the defendant is *Higgins v. Butcher* (1). According to the report in YELVERTON, 89, the plaintiff showed no damage to himself.
G He said his wife was beaten and died, to his damage. This shows no pecuniary damage to him. Then TANFIELD, J., expresses an opinion, which was overruled in *White v. Spettigue* (5), and which, as it does not give as the reason that death gives no cause of action, may be said by its silence on that to be in defendant's favour. The same case is reported in NOX, p. 18, which states the declaration, and in that report also no damage to the plaintiff is shown.
H Then the court say the King is to punish a felony, and TANFIELD, J., is stated to have said that the action will not lie because the wife is dead, and she ought to have joined in the action, but otherwise if a servant. This is rather an authority for the plaintiff than the defendant. This case is mentioned by TWISDEN, J., in *Cooper v. Witham* (8), as depending on the act being a felony.

I The remaining authorities are American, not binding on us, indeed, but entitled to respect as the opinions of Professors of English Law, and entitled to respect according to the position of those professors and the reasons they give for their opinions. The first case in date is in 1 CUSHING, 475, a case in the Supreme Court of Massachusetts. In one of the cases there reported, *Skinner v. Housatonic Rail. Corp.* (4), an action was brought by a father to recover damages for the loss of his son's service, killed by the negligence of the defendants, by an act not felonious. In the other case, *Carey v. Berkshire Railroad Co.* (4), an action was brought by a widow to recover damages for the death of her husband, killed in the same way. It seems strange that the two cases are supposed to

present a single question only for the court, while it is obvious that the case of master and servant raises a different question from that of wife and husband. Nor do I understand why the plaintiff in the father's case, unless there was no damage to the father as master, was nonsuited. That looks as though he had not proved some fact, possibly he had not proved damage, for the child was eleven years old only, and it is nowhere said that there was any damage. If so, the decision is right. However, the judgment is :

"If these actions, or either of them, can be maintained, it must be on some established principle of the common law."

That is true, and the principle is *injuria* and *damnum* for which the defendant is responsible. The judgment proceeds :

"and we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel, and we cannot find any. This is very strong evidence that such actions cannot be supported."

With great respect, the error of this reasoning is in supposing the burden of proof or argument is on the plaintiff. The general principle is in his favour, that *injuria* and *damnum* give a cause of action. It is for the defendant to show an exception to this rule when the *injuria* causes death. If the case had been viewed in this way, the reasons of the court tell for the plaintiff. For, in my judgment, the exception is not "upon any established principle of the common law"; it is not "applied in any adjudged case in the English books"; it is not "stated in any elementary treatise." They then cited and relied on *Baker v. Bolton* (2), on which I have commented. They then cited a case in which the contrary was assumed to be the law by all parties and the court, but suppose it may have passed sub silentio. I cannot be satisfied with this decision. The reasoning seems wrong, and the authority relied on insufficient.

The other case, *Eden v. Lexington and Frankfort Railroad Co.* (3), is in the Kentucky Court of Appeal. That was an action by a husband for the negligent killing of his wife. It is obviously, therefore, not in point. There is no relation of master and servant. If the wife had lived, she must have joined in the action, except to the extent of the husband's pecuniary loss for medicine, etc. But, in the judgment, the case of master and servant is mentioned. I do not very clearly understand it. The first position was that the rule that no action lies for a felonious act before prosecution, does not prevail in Kentucky. The second is this :

"But, according to the principles of the common law, injuries affecting life cannot in general be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon; but for injury to life, the civil remedy is considered as being entirely merged in the public offence. This was said to be the established common law doctrine in the case of *Baker v. Bolton* (2)."

It is true LORD ELLENBOROUGH is reported to have said that in a civil court death could not be complained of as an injury, but there is nothing else to justify the above opinion, and if this is the authority, *White v. Spettigue* (5) shows its inapplicability here. The judgment proceeds :

"The cause of action for injuries to the person dies with the person injured, and it follows, as a necessary consequence, that, the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential."

A I have dealt with this argument before. It is this: Wrongful death, which causes a damage, gives no action because it is death which causes it. The judgment proceeds to say "that damages may be recovered up to the time of death but not beyond." The reason of this seems to be that all injuries affecting life, caused by the misconduct of another person, involve the commission of a public wrong, which merges the remedy for all private loss arising after death has occurred, and occasioned by it. Why every death, caused by misconduct, is to be assumed to be a public wrong I know not. The misconduct may be actionable, although not criminal negligence. Nor do I know why, however this may be, the remedy for private loss should merge in it.

C I do not like criticising a variety of authorities, and escaping from their general effect by a variety of small differences and objections, but, in this case, it seems to me that the principle the plaintiff relies on is broad, plain, and clear—viz., that he sustained a damage from a wrongful act for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should show a clear and binding authority, either by express decision or a long course of uniform opinion, deliberately formed and expressed by English lawyers, or experts in the English law. I find neither. With the exception of a short note of *Baker v. Bolton* (2), there is no semblance of an authority on this side of the Atlantic; and the cases from the other side are merely founded on that one, and some vague notion of a merger in a felony. I may observe that MR. SMITH, in his excellent work on MASTER AND SERVANT (3rd Edn., p. 139), assumes as certain that this action would lie.

F On the main question, then, I think the plaintiff entitled to judgment. But it seems to me clear that he is entitled to the burial expenses. He says, in his declaration, that he necessarily incurred expenses in the child's burial. This must be taken to be true, if it can be. *R. v. Vann* (9), shows he was bound to bury the child if he had the means, which he may have had. On this the judgment in *Eden v. Lexington and Frankfort Railroad Co.* (3) is express; so also, in *Baker v. Bolton* (2), the plaintiff recovered for loss up to the wife's death. In my opinion the plaintiff is entitled to judgment.

G KELLY, C.B.—I think that the defendant in this case is entitled to the judgment of the court on the demurrer to the third plea. No decision is to be found in the books from the earliest times, by which an action for this cause has been sustained. No dictum is to be found by any judge, or on any competent authority, that such an action is maintainable.

H All the authority that exists is against it. *Higgins v. Butcher* (1), shows that a husband cannot maintain an action against one who kills his wife; and, by TANFIELD, J., a master has no action against one who kills his servant, though he loses his services. Here, however, the decision proceeds on the ground that the act is a felony; but on this it may be observed, that so would be the killing in the case before the court, if the act be such that the negligence makes it amount to manslaughter. In *Baker v. Bolton* (2) the facts are loosely stated, but they seem to show that the action was founded on negligence, and that the plaintiff had been deprived of the assistance, which may mean the services, of his wife. The decision did not, however, proceed on the ground that the killing was a felony, LORD ELLENBOROUGH observing, without any qualification, that,

"in a civil court the death of a human being could not be complained of as an injury."

Then we have the American cases (*Carey v. Berkshire Railroad Co.* (4) and *Skinner v. Housatonic Rail. Corpn.* (4)); deciding that no action for loss of service is maintainable where death has been inflicted through carelessness.

Ford v. Monroe (10), the point not having been taken, and being a *nisi prius* case, is of no authority. Finally, we have the express declaration of the legislature in Lord Campbell's Act that no action lies for damages sustained by the death of a human being, and the language of the preamble shows that it was intended to include more than is provided for by the operative enactments of the statute. Such, then, being the state of the authorities, I agree with *Pigott, B.*, that we must leave it to the legislature to provide for a case like this, and that we ought not to take upon ourselves to create a new cause of action, which would be to make and not to expound the law.

Judgment for defendant on the demurrer to the third plea, and for plaintiff on the demurrer to the fourth.

LYNCH v. PARAGUAY PROVISIONAL GOVERNMENT

[COURT OF PROBATE (Lord Penzance), May 4, June 20, 1871]

[Reported L.R. 2 P. & D. 268; 40 L.J.P. & M. 81; 25 L.T. 164;
35 J.P. 761; 19 W.R. 982]

Conflict of Laws—Succession—Movables in England—Property of foreigner with foreign domicile—Regulation by law of domicile—Change in law of foreign domicile of testator after death.

The succession to movables in England of a deceased foreigner is regulated by the law of his domicile as it existed at the time of his death.

L., a foreigner, domiciled in a foreign country, made a will disposing of personal property in England. After his death, but before a grant was made in England, the government of his country passed a decree confiscating all his property.

Held: the right to the grant and the succession to the property was governed by the law of his domicile as it existed at his death, and the foreign government, therefore, had no *locus standi* to oppose the grant of probate or contest the validity of the will.

Notes. Considered: *Blyth v. Whiffin* (1872), 27 L.T. 330. Applied: *Re Aganoor's Trusts* (1895), 64 L.J.Ch. 521. Distinguished: *Starkowski v. A.-G.*, [1953] 2 All E.R. 1272. Considered: *Adams v. National Bank of Greece*, [1960] 2 All E.R. 421. Referred to: *Re Marshall, Barclays Bank, Ltd. v. Marshall*, [1957] 3 All E.R. 172; *Adams v. National Bank of Greece and Athens S.A., Prudential Assurance Co. v. Same*, [1959] 2 All E.R. 362.

As to the law governing succession to movables, see 7 HALSBURY'S LAWS (3rd Edn.) 53 et seq.; and for cases see 11 DIGEST (Repl.) 393 et seq.

Cases referred to in argument :

Secretary of State in Council of India v. Kanachee Boye Sahaba (1859), 13 Moo.

P.C.C. 22; 7 Moo. Ind. App. 476; 19 E.R. 388; sub nom. *East India Co. v.*

Kanachee Boye Sahiba, 7 W.R. 722, P.C.; 11 Digest (Repl.) 617, 442.

Laneville v. Anderson and Guichard (1860), 2 Sw. & Tr. 24; 11 Digest (Repl.) 332, 54.

United States of America v. McRae (1867), 3 Ch. App. 79; 37 L.J.Ch. 129; 17 L.T. 428; 16 W.R. 377, L.C.; 18 Digest (Repl.) 160, 1428.

A **Demurrer** in an action for probate of a will.

Francisco Solano Lopez, late President of Paraguay, died a domiciled resident in that country on Mar. 1, 1870, leaving a will, of which he appointed the plaintiff, Eliza Alicia Lynch the sole executrix. He died possessed of property in England. The defendants who were the provisional government of Paraguay having lodged a caveat, were called on to propound their interest, and they, accordingly, filed the following declaration, which stated, first, that Francisco Solano Lopez, the deceased in this cause, was a native of Paraguay, and at the time of his death, which took place in Paraguay on or about Mar. 1, 1870, was domiciled there; secondly, that by the law of nations, and by the law of England, the succession to the personal estate and effects of the deceased, wheresoever situate, and also the right to administer to the estate, was to be governed by the law of Paraguay; thirdly, that by a decree of the government of Paraguay, dated May 4, 1870, all the property of the deceased, wheresoever situate, was declared to be the property of the nation of Paraguay, and that such decree was valid and now binding, and operative by the law of Paraguay; fourthly, that by the now existing law of Paraguay no will or testamentary paper whatsoever of Francisco Solano Lopez was entitled to probate, or had any validity whatsoever in England or elsewhere; fifthly, that by the now existing law of Paraguay, the government of Paraguay, or their officer or attorney, was entitled to become the sole personal representative in England of the deceased, and to take the grant of letters of administration in England of his personal estate and effects situate in England; sixthly, that Richard Lees, the defendant, was, by a power of attorney, duly executed by the President of the Republic of Paraguay, on behalf of the Republic, dated Dec. 22, 1870, duly authorised to oppose the grant of probate of any testamentary document of the deceased and the grant of any letters of administration of the estate of the deceased to any other person, and to apply for letters of administration of all the personal estate and effects of the deceased situate in England, and to be granted to him under such power of attorney, and that he was by reason of the premises entitled to be constituted the personal representative of the deceased in England.

To this declaration the plaintiff demurred on the ground that "the declaration did not set forth that the law of Paraguay referred to therein was in force at the time of the death of Francisco Solano Lopez, the deceased referred to in this cause." Joinder in demurrer.

G *Sir John Duke Coleridge, Q.C., Sir T. Twiss and Pritchard* for the plaintiff.
Dr. Spinks, Q.C. (Dr. Tristram and A. Brown with him) for the defendants.

Cur. adv. vult.

H June 20, 1871. **LORD PENZANCE.**—The defendants in this case having entered a caveat, were called on to propound their interest, and have done so. [His LORDSHIP read the declaration.] To this declaration the plaintiff has demurred, and the ground of demurrer relied on is that the decree on which the defendants' claim is based is not alleged to have been in force at the date of the testator's death. Some other points were taken in argument, raising a discussion of considerable interest; but on reflection I am satisfied that the date of the decree relied upon by the defendants is fatal to their claim in this suit. The general proposition that the succession to personal property in England of a person dying domiciled abroad is governed exclusively by the law of the actual domicile of the deceased was not denied. But it was affirmed by the plaintiff that this proposition had relation only to the law of the domicile as it existed at the time of the death of the individual in question, and that no changes made in that law after the date of the death, can by the law of this country, be recognised as affecting the distribution of personal property in England. This contention appears to me to be well founded.

A general statement of the rule of law on this head is to be found in s. 481 of *STORY'S CONFLICT OF LAWS*. He says : A

"The universal doctrine now recognised by the common law, although formerly much contested, is that the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death." B

The words "at the time of his death" are here carefully inserted as part of the principal proposition. And a long list of authorities is cited in support of that proposition, in none of which is any passage to be found indicating that these words are not a necessary part of it. But it was ingeniously argued that the decree in question has, by the law of Paraguay, a retrospective operation, and that though the decree was in fact made since the death, it has by the law of Paraguay become part of the law at the time of death. In illustration of this view, it was suggested that if the question were to arise in a court of Paraguay, such court would be bound by the decree, and, therefore, bound to declare the provisions of the decree to be effective at and from the time of the death. C

This may be so, but the question is whether the English courts are bound in like manner, or, more properly speaking, the question is, in what sense does the English law adopt the law of domicile? Does it adopt the law of the domicile as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in the law? No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust. Inconvenient for letters of administration or probate might be granted in this country which this court might afterwards be called upon, in conformity with the change of law in the foreign country, to revoke; unjust, for those entitled to the succession might, before any change, have acted directly or indirectly upon the existing state of things, and find their interests seriously compromised by the altered law. As, therefore, I can find no warrant in authority or principle for a more extended proposition, I must hold myself limited to the adoption and application of this proposition, that the law of place of domicile as it existed at the time of the death ought to regulate the succession to the deceased in this case. Under that law the present defendants have no *locus standi* to oppose any will the testator may have made, and no concern with his estate. The demurrer must, therefore, prevail. D E F

I will only further observe that if the decree upon which the defendants rely is one entitled to be recognised and enforced in this country in regard to the personal property of the deceased, the defendants' claim under it will be equally good, whether there is a will or not. It does not devolve upon this court to adjudicate upon the property of the deceased, but only to ascertain whether he has made a good will, and, if not, to grant administration of his effects. The defendants would, in any event, therefore, have to establish their claim under the decree in the proper courts of this country before they can obtain the right to appropriate the property of which the deceased died possessed in England. G H

If it should be held that this decree, penal in its character, and made after the death of the person to be affected by it, is one which the English courts will not enforce upon his personal property, this court will have done well in not permitting those who have no interest in the estate to provoke a litigation upon the validity of any will the deceased may have made. If a contrary conclusion should be arrived at, and the personal property of which the deceased died possessed shall be determined to have passed to the defendants by virtue of the decree upon which this discussion arises, no will, however made, can operate upon it, and the proceedings in this court can neither prevent nor retard the defendants in the acquisition of their rights. I

A

DAVIES v. DAVIES

[VICE-CHANCELLOR'S COURT (Stuart, V.-C.), June 23, 24, 1863]

B

[Reported 4 Giff. 417; 2 New Rep. 384; 9 L.T. 162;
9 Jur.N.S. 1002; 11 W.R. 1040; 66 E.R. 769]

*Undue Influence—Father and daughter—Father guardian of daughter's affairs—
Need for evidence that gift deliberate and voluntary act.*

C

The plaintiff, a young woman some twenty-two years of age, made a gift of one half of her property to her father who admitted that he was, at the material time, acting as the guardian of her affairs with her consent and that she looked up to him with implicit confidence as the only relative who was in a position to protect and assist her. In an action to set aside the gift,

D

Held: at the time when the gift was made the influence of the father over the plaintiff was in full force, and, in the absence of the clearest and least equivocal evidence that the gift was well understood by and was the deliberate and voluntary act of the plaintiff, the gift should be set aside.

Dictum of LORD ELDON, L.C., in *Hatch v. Hatch* (1) (1804), 9 Ves. at pp. 296, 297, applied.

Notes. Referred to: *Baker v. Loader* (1872), L.R. 16 Eq. 49.

E

As to undue influence, see 17 HALSBURY'S LAWS (3rd Edn.) 672 et seq.; and for cases see 12 DIGEST (Repl.) 110 et seq.

Case referred to:

(1) *Hatch v. Hatch* (1804), 9 Ves. 292; 1 Smith, K.B. 226; 32 E.R. 615, L.C.; 12 Digest (Repl.) 119, 705.

F

Also referred to in argument:

Archer v. Hudson (1844), 7 Beav. 551; 13 L.J.Ch. 380; 3 L.T.O.S. 320; 8 Jur. 701; 49 E.R. 1180; affirmed (1846), 15 L.J.Ch. 211, L.C.; 12 Digest (Repl.) 113, 666.

Hoghton v. Hoghton (1852), 15 Beav. 278; 21 L.J.Ch. 482; 17 Jur. 99; 51 E.R. 545; 12 Digest (Repl.) 112, 662.

G

Wright v. Vanderplank (1856), 8 De G.M. & G. 133; 25 L.J.Ch. 753; 27 L.T.O.S. 91; 2 Jur.N.S. 599; 4 W.R. 410; 44 E.R. 340, L.J.J.; 12 Digest (Repl.) 114, 668.

Bill for an order setting aside gifts which the plaintiff had made to her father.

H

In April, 1859, the plaintiff Jane Davies, wife of Joseph Davies, being then a single woman about twenty-two years of age, became entitled, as residuary legatee under the will of Sarah Davies, to property consisting of about £210 in cash, £400 standing to the account of Sarah Davies in the National Provincial Bank at Aberystwyth, and two sums of £305 and £375 standing in the name of Sarah Davies, or of her late husband. Shortly after Sarah Davies's death £200, part of the £210 cash, was invested in the purchase of a leasehold house in which Thomas Davies the plaintiff's father, was then living, which was assigned to him, and of which he remained in possession from the date of the purchase in November, 1859 until November, 1861, without paying any rent to the plaintiff.

I

On May 30, 1859, £400 stock was transferred to the account of Thomas Davies. The circumstances under which this took place were alleged by the plaintiff to be as follows: Shortly after the above transaction her father suggested to her that it would be expedient for her to transfer the money and stock bequeathed to her into his name as a trustee. She declined, but a few days afterwards, she having been advised to leave Aberystwyth for the benefit of her health, her father told her that before leaving she had better go to the National and Provincial

Bank to draw some money for her travelling expenses, and having done so he left the house, and shortly afterwards returned saying, A

"Mr. Jones (the cashier of the bank who had received the dividends on the stock) will be in the bank at two o'clock, and you must go up and sign some papers at that time to change the stock from the name of Sarah Davies before he can get the interest for you." B

By these representations the plaintiff was induced to go with her father to the bank for the purpose, as she believed, of executing documents to enable the cashier to receive and pay to her the dividends on the stock. At the bank the cashier endeavoured to prevail on her to transfer the moneys into the name of her father, but she positively refused to divest herself of her property in the manner proposed. The cashier afterwards informed the plaintiff that she must, in order to transfer the moneys into her own name, sign some eight or ten documents which were placed before her by him for, as she believed, that purpose. The plaintiff, who was on the point of leaving Aberystwyth by the steamer, had not time to read all, but she read the first three or four papers which were placed before her, and which purported to be transfers of stock into her own name, and concluding that the others were to the same effect, she signed them all without having the purport or effect of them explained to her. After the documents were all signed the cashier took up one of them and said, "By this paper you have signed the £400 that is in the bank for your father," and he delivered over the paper to Thomas Davies. In September, 1859, prior to her marriage, the plaintiff settled all her property. The trustees were foiled as parties in these proceedings. C D

The plaintiff by her bill sought to set aside the assignment of the house to her father and the transfer to him of the £400 and prayed a declaration that she was entitled to have the house and premises bought with the £200, and also the £400, assured, or certain houses which had been purchased by her father with the same sum of £400, assigned, in conformity with the settlement as reformed. The defendant Thomas Davies, by his answer, alleged that Sarah Davies had, shortly before her death, informed his wife of her having the sum of £210 in the house, and had desired her to take it after her death as an acknowledgment of her attention. He, therefore, considered this sum as his wife's, and for that reason thought himself entitled to the house and cottage purchased with it. He admitted, however, that his daughter had never acquiesced in this view, and that she always considered the money as hers. The plaintiff's name had at first been inserted as purchaser in the assignment of the leaseholds, but it was afterwards changed for her father's, by his direction, but without the plaintiff's knowledge. He now admitted that the gift of £210 was incomplete, and consented to give up the leaseholds. As to the £400, the defendant insisted that the plaintiff had repeatedly expressed her intention of making a gift to him; that she met the bank cashier, and signed the transfer for the purpose of carrying that intention into effect, and that she had afterwards expressed her satisfaction at having done so. The defendant, by his answer, admitted that he assumed the guardianship of his daughter's affairs with her consent, and said that she looked up to him with implicit confidence as the only relative who was in a position to protect and assist her. E F G H

Malins, Q.C., and *O. Morgan* for the plaintiff. I

Bacon, Q.C., and *Piggott* for the defendant Thomas Davies.

Rodwell for the defendant Joseph Davies.

Elderton for the trustees.

STUART, V.-C.—The main question is as to the validity of the transaction by which the defendant Thomas Davies obtained possession of the £400 from his daughter, and he insists that that sum of £400, which was in a bank at interest

A at the time of the transaction, became his property by a gift of it from his daughter, the plaintiff.

B There are certain relations existing between persons which, where any transactions of the nature of a gift are alleged to have taken place between them, induce this court always to hold that a gift is invalid on account of the influence arising from those relations, unless it be shown in the clearest and most unequivocal manner that the influence of those relations did not subsist at the time of the gift. That is done on grounds of public policy which have been repeatedly explained and expounded. On the ground of public policy alone the existence of the relation which creates the influence must of itself annul the gift, unless it can be shown that the transaction was wholly free from that influence. Freedom from the pressure of influence can be shown in many ways; for example, that there had been a long-continued intention, often expressed, to make a gift; or that the donor perfectly understood the nature of the transaction, and that he had resolved, perhaps by the advice of unbiased friends, to make the gift. In all cases where gifts have been supported it has been shown that nothing equivocal remained in reference to the existence of the relation.

D In this case, however, the father states the circumstances in which he stood to the plaintiff his daughter, and those circumstances show that the influence arising from the relation of parent and child was subsisting in full force at the time of the transaction. The relation of guardian and ward, and the relation of parent and child, are here exhibited in their most important points. The father, in his answer, distinctly states that he believes that in April, May and June, 1859, and until the marriage of the plaintiff in September, 1859, he being her father, assumed with her consent the guardianship or direction of her affairs and property, and that she looked up to him with implicit confidence as the only relative she had, who was of an age or in a position to protect and assist her in the management thereof. But he denies that by the means mentioned in the bill, or by any other means, he acquired or exercised the most complete influence and control over the plaintiff.

F It is impossible to state more strongly and distinctly the existence of the influence arising from the relation, and its existence at the very time when the transaction was entered into. The defendant states that the plaintiff implicitly confided in his assuming the direction of the management of her property. Then what do I find? That at the very time of this alleged gift of the £400 being made, the defendant had been dealing with the sum of £200 in a way which, taking his own account of all that was done, cannot be considered as proper, or as showing that he had discharged the duty which he undertook to discharge towards his child. The defendant said he considered the £200 to be his wife's property, although he knew that his daughter claimed it; and he also states in various paragraphs in his answer, that his daughter considered the money was her own; that she objected to a receipt for it being drawn up in his name, and that she wished the property, which she knew had been purchased with the money, to be assigned to her in her own name.

H All that is stated by the defendant in his answer; and what does he say about the conveyance of the property? That his solicitor had, by his instructions, when he paid the said purchase-money to the vendor, prepared a draft assignment of the leasehold house and premises, and of a small tenement adjoining it, and that such house, tenement and premises were, by his instructions, expressed in such draft to be assigned to the plaintiff for the residue of the term of years subsisting therein; but considering that the house had been purchased with his wife's money, he instructed his solicitor to alter such draft, and the solicitor, by his instructions did alter the draft by inserting his name in the place of that of the plaintiff as the purchaser under the deed, and that such draft was altered without any instructions from the plaintiff, and he believed without her knowledge or consent. That was a transaction by a father in whom there was implicit confidence placed, acting as the manager of his daughter's property, and that was the way in which he discharged his duty.

As to what took place on May 30, the day on which the gift of £400 was made—there is a conflict of evidence in the accounts given by the daughter, by the father and by the cashier, Mr. Jones who prepared the instrument which is called a gift. No two of them concur in their testimony respecting this transaction. The father says his daughter expressed a wish to give part of her property to him and her mother; and that his daughter asked him if he would be satisfied if she gave him £400. That is a very strange statement with reference to a transaction in the nature of a gift, which should be voluntary. To ask whether the father would be satisfied with £400 shows a state of mind not free from influence and control to the extent which is necessary in cases of this kind. Then as to what took place when the defendant went out early in the morning; the inference is, that he went to see Mr. Jones, respecting the transfer. [His LORDSHIP considered the conflicting evidence, and continued:] It is beyond doubt that at the bank she (the plaintiff) was told that she ought to sign her name, in order (as Mr. Jones stated) to make an effectual gift; but her own statement is wholly inconsistent with that. She says, she was told by her father that, as executrix, in order to obtain the interest on the moneys, it would be necessary that the name in which they stood should be changed, and that the moneys should be transferred into another name. Looking at all the circumstances and the evidence of the parties, it seems to me that there is a naturally coherent and consistent story told on the part of the plaintiff. She states that when Mr. Jones told her she had signed away the £400 to her father, she was quite startled, and that she believed that what had been done could not be undone. The matter was, therefore, allowed to rest.

At the time when the transaction of this gift took place, the influence of the father was in full force, and unless it can be proved that all influence was removed, the gift is vitiated. In cases of this kind, where there is a conflict of testimony, the rule of the court requires that the evidence should show, in the clearest and most unequivocal manner, that the transaction was well understood by, and was the deliberate and voluntary act of, the person who made the gift. That evidence is wanting in this case, and consequently the gift is one which cannot be sustained.

I cannot leave the case without referring to the law as stated by LORD ELDON in *Hatch v. Hatch* (1). LORD ELDON, on a question in reference to a case of guardian and ward, and not of parent and child, said (9 Ves. at pp. 296, 297) :

“This case proves the wisdom of the court in saying it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if a trustee having done his duty, the cestui que trust, taking it into his fair, serious and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it except quite satisfied that the act is of that nature, for the reason often given; and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a court of justice, that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression.”

The doctrine of the court cannot be more clearly stated than in that case. There is wanting, in this case, that degree of evidence which would show the removal of all influence on the part of the father, and that alone vitiates the gift to him, and he cannot be allowed to retain the £400. There will be a declaration to that effect, and that the defendant Thomas Davies must pay the costs of the suit. Declare that the gifts of the sums of £200 and £400 to Thomas Davies are invalid, and that he is bound to repay those sums to the trustees of the plaintiff's marriage settlement, and that he account for the rents received by him.

A

WAUGH v. MORRIS

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn and Mellor, J.J.), November 21, 1872, January 24, 1873]

B

[Reported L.R. 8 Q.B. 202; 42 L.J. Q.B. 57; 28 L.T. 265;
21 W.R. 438; 1 Asp.M.L.C. 573]

Contract—Avoidance—Illegality—Illegal enforcement of contract capable of legal performance—Need to prove mens rea.

C

Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties know the law or not; but in order to avoid a contract which can be legally performed, on the ground that there was an intention to enforce it in an illegal manner, it is necessary to show the existence of a wicked intention to break the law. Mens rea is as necessary to avoid a contract which can be legally performed because it was made with the object of satisfying an illegal purpose as it would be to render the parties criminally responsible.

D

Notes. Considered: *The Argos*, *Gaudet v. Brown*, *The Hewsons*, *Geipel v. Cornforth* (1873), L.R. 5 P.C. 134; *Foster v. Driscoll*, *Lindsay v. Attfield*, *Lindsay v. Driscoll*, [1928] All E.R. Rep. 130; *Regazzoni v. K. C. Sethia* (1944), Ltd., [1957] 3 All E.R. 286. Distinguished: *J. M. Allan (Merchandising), Ltd. v. Cloke*, [1963] 2 All E.R. 258. Referred to: *Grey v. Tolme and Runge* (1915), 31 T.L.R. 551; *Brightman v. Tate*, [1919] 1 K.B. 463; *Central India Mining Co. v. Société Coloniale Anversoise*, [1920] 1 K.B. 753; *Nash v. Stevenson Transport, Ltd.*, [1936] 1 All E.R. 906; *Hindley & Co. v. General Fibre Co.*, [1940] 2 K.B. 517; *Edler v. Auerbach*, [1949] 2 All E.R. 692; *A. V. Pound & Co. v. M. W. Harding & Co.*, [1956] 1 All E.R. 639; *Archibolds, Ltd. v. Spanglett, Ltd.*, [1961] 1 All E.R. 417.

F

L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Jur.N.S. 342; 14 W.R. 614;
12 Digest (Repl.) 294, 2264.

Cases referred to:

(1) *The Teutonia*, *Duncan v. Koster* (1872), L.R. 4 P.C. 171; 8 Moo. P.C.C.N.S. 411; 41 L.J. Adm. 57; 26 L.T. 48; 20 W.R. 421; 1 Asp.M.L.C. 214; 17 E.R. 666, P.C.; 12 Digest (Repl.) 459, 3428.

G

(2) *Pearce v. Brooks* (1866), ante p. 102; L.R. 1 Exch. 213; 4 H. & C. 358; 35 L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Jur.N.S. 342; 14 W.R. 614; 12 Digest (Repl.) 294, 2264.

(3) *M'Kinnel v. Robinson* (1838), 3 M. & W. 434; 1 Horn. & H. 146; 7 L.J.Ex. 149; 2 Jur. 595; 25 Digest (Repl.) 438, 202.

H

Also referred to in argument:

Haines v. Busk (1814), 5 Taunt. 521; 1 Marsh. 191; 128 E.R. 793; 1 Digest (Repl.) 612, 1993.

Hill v. Idle (1815), 4 Camp. 327; 1 Stark. 111; 171 E.R. 104, N.P.; 41 Digest 549, 3769.

I

Lewis v. Davison (1839), 4 M. & W. 654; 1 Horn. & H. 425; 8 L.J.Ex. 78; 3 J.P. 167; 3 Jur. 387; 150 E.R. 1583; 12 Digest (Repl.) 265, 2048.

Collins v. Blantern (1767), 2 Wils. 341; 95 E.R. 847; 12 Digest (Repl.) 290, 2229.

Brereton v. Chapman (1831), 7 Bing. 559; 5 Moo. & P. 526; 131 E.R. 216; 41 Digest 570, 3939.

Muller v. Gernon (1811), 3 Taunt. 394; 128 E.R. 157; 41 Digest 661, 4925.

Forster v. Taylor (1834), 5 B. & Ad. 887; 110 E.R. 1019; sub nom. *Foster v. Taylor*, 3 Nev. & M.K.B. 244; 3 L.J.K.B. 137; 12 Digest (Repl.) 305, 2343.

Cunard v. Hyde (1859), 2 E. & E. 1; 29 L.J.Q.B. 6; 6 Jur.N.S. 14; 121 E.R. 1; 12 Digest (Repl.) 327, 2528.

Elliott v. Richardson (1870), L.R. 5 C.P. 744; 39 L.J.C.P. 340; 22 L.T. 858; 18 W.R. 1157; 12 Digest (Repl.) 293, 2258.

Staines v. Wainwright (1839), 6 Bing. N.C. 174; 8 Scott, 280; 9 L.J.C.P. 107; 133 E.R. 68; 4 Digest (Repl.) 526, 4584.

Stevens v. Gourley (1859), 7 C.B.N.S. 99; 29 L.J.C.P. 1; 1 L.T. 33; 6 Jur.N.S. 147; 8 W.R. 85; 141 E.R. 752; 7 Digest (Repl.) 419, 324.

Rule Nisi to set aside a verdict for the plaintiff and to enter one for the defendant in an action brought by a shipowner against the charterers of his vessel to recover damages for the detention of the vessel.

Butt, Q.C., and *R. E. Webster* showed cause against the rule.

Milward, Q.C., and *MacLachlan* supported the rule.

Cur. adv. vult.

Jan. 24, 1873. **BLACKBURN, J.**, read the following judgment of the court.—This is an action brought by the owner of a ship against the charterers for detaining the ship, in which the plaintiff has obtained a verdict subject to leave to move to enter the verdict for the defendant, if the facts proved establish a plea of illegality.

On the trial before **SIR ALEXANDER COCKBURN, C.J.**, the material facts appeared to be that the charterparty was made in France between the agents of the defendant and the master of the ship. By this charterparty it was stipulated that the ship should proceed to Trouville, a port in France, there load a cargo of pressed hay, and proceed therewith direct to London, a term in the charterparty being to the effect that all cargo should be brought and taken from the ship alongside. The defendant's agent verbally told the master that the consignees would require the hay to be delivered to them at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, and this the master promised to do. On arriving in the Thames the master proposed to proceed to the wharf, but then for the first time learned that by an Order in Council, made under the authority of the Cattle Diseases Acts, France was declared to be an infected country, and it was made illegal to land in Great Britain any hay brought from that country. He could not, therefore, proceed to the wharf and there deliver the cargo, for that would have been landing the hay, and illegal. After some delay, the defendants received the cargo alongside the ship in the river, loaded it into another vessel, and exported it. There was no legal objection to this being done, but during the interval, eighteen days beyond the lay days elapsed, and it was for this detention that the plaintiff recovered. It appeared that the Order in Council had been made and published before the charterparty was entered into, but that, in fact, neither the master of the ship nor the defendant's agents were aware that it had been made. A rule was obtained which was argued in Michaelmas Term before **SIR ALEXANDER COCKBURN, C.J.**, **MELLOR, J.**, and myself, when the court took time to consider.

We are of opinion that the rule should be discharged. The charterparty provides that the cargo was to be taken from the ship alongside, and that being so, the consignee might select any legal and reasonable place within the port, at which to take it from alongside. He, by his agent in France, named this wharf, which he supposed, erroneously, to be a legal place, and the master under the same mistake, assented, and, indeed, he would have no right to refuse if it had really been a legal place. But when it turned out that the defendant had named a place for the performance of the contract where the performance was impossible because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance, by receiving the cargo alongside in the river without landing it at all, was both legal and practicable: see *The Teutonia* (1), a case which would have been precisely in point if the Order in Council rendering the landing illegal, had come into operation after the contract was made instead of before. It was on the fact that the

A Order in Council existed at the time the contract was made that the argument for the defendant was mainly grounded. It was said that the intention of both parties was that the hay was to be landed; that, therefore, they intended to violate the law; and that it may be shown by extraneous evidence that a contract on the face of it perfectly legal is void, because made with intent to violate the law, and ignorance of the law makes no difference.

B We think, however, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He, no doubt, contemplated and expected that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object, but all that the shipowner bargained for, and all that he can properly be said to have intended, was that on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship. If, unexpectedly, there had arisen a great demand for hay abroad, like that which existed when our army was in the Crimea, the consignee might have transhipped the hay, and exported it without the shipowner having the slightest ground for complaining that his intention was frustrated. We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brooks* (2), it is done for the very object of satisfying an illegal purpose; or, as it is expressed in *M'Kinnel v. Robinson* (3), "for the express purpose of the violation of the law."

In the present case the shipowner never did contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods, which he thought was lawful, but, if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods. We quite agree that where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties know the law or not. But we think that in order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner it is necessary to show that there was the wicked intention to break the law. If this be so, the knowledge of what the law is becomes of great importance. No one could for a moment contend that, if everything happening in France had happened within the jurisdiction of our country, the plaintiff's and defendant's agents could have been successfully indicted for a conspiracy to violate the law by landing these goods, for there would have been a want of *mens rea*. It seems to us that the *mens rea* is as necessary to avoid a contract, which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally responsible.

Rule discharged.

CHOWNE AND ANOTHER v. BAYLIS AND OTHERS

[ROLLS COURT (Sir John Romilly, M.R.), July 19, 1862]

[Reported 31 Beav. 351; 31 L.J.Ch. 757; 6 L.T. 739; 26 J.P. 579;
8 Jur.N.S. 1028; 11 W.R. 5; 54 E.R. 1174]*Assignment—Consideration—Debt due from assignor to assignee—Debt resulting from robbery of assignee by assignor—Assignment of assurance policies.*

D., a clerk in the plaintiffs' bank, robbed the bank of more than £50,000. When this was discovered he acknowledged his guilt and agreed to charge in favour of the bank freehold and leasehold property which he possessed and also to assign to the bank two policies of assurance which he had effected on his life. To give effect to the charge he instructed his solicitor to hand over the deeds of the freehold property to the bank, and he further gave notice to the insurance company that he wished to transfer his interest in the assurance policies to the manager of the bank.

Held: the robbery created a debt, due from D. to the bank, which constituted a good consideration for the assignment of the policies; it was not to be presumed that the notice to the insurance company was obtained from D. owing to his entertaining a hope that the bank would not prosecute him; and so there was a good equitable assignment of the policies to the bank manager: further, the deposit of the deeds of the freehold and leasehold property as security for D.'s debt to the bank having been completed, the bank held the deeds as equitable mortgagees of the property to which they related.

Notes. Referred to: *Clegg v. Rees* (1871), 25 L.T. 261.

As to assignments of life policies, see 22 HALSBURY'S LAWS (3rd Edn.) 281-285; and for cases see 29 DIGEST (Repl.) 404-411.

Cases referred to:

- (1) *Armory v. Delamirie* (1722), 1 Stra. 505; 93 E.R. 664; 3 Digest (Repl.) 68, 83.
- (2) *Stone v. Marsh* (1827), 6 B. & C. 551; 9 Dow. & Ry.K.B. 643; 5 L.J.O.S.K.B. 201; 108 E.R. 554; 3 Digest (Repl.) 132, 23.
- (3) *Marsh v. Keating* (1834), 1 Bing. N.C. 198; 8 Bli. N.S. 651; 2 Cl. & Fin. 250; 1 Mont. & A. 592; 1 Scott, 5; 131 E.R. 1094, H.L.; 3 Digest (Repl.) 132, 24.
- (4) *Dudley and West Bromwich Banking Co. v. Spittle* (1860), 1 John. & H. 14; 2 L.T. 47; 8 W.R. 351; 70 E.R. 642; 3 Digest (Repl.) 254, 704.

Action for a declaration that one John Durdin, who had been a clerk in the plaintiffs' bank, had effectually charged in their favour freehold and other hereditaments at Northampton and elsewhere, together with two policies of assurance on his life effected by him with the Victoria Legal and Commercial Life Assurance Co.

In February, 1861, it was discovered that Durdin had robbed the bank of sums of money to the amount of upwards of £50,000. On Feb. 11, 1861, immediately upon the discovery of the robbery, Robert Stacey Price and Thomas Winckworth, two of the directors of the bank, went to the residence of Durdin and charged him with the robbery. He at once acknowledged his guilt, and expressed his desire to make good as far as he was able the amount he had taken from the bank, stating that he had freehold and leasehold property at Northampton and elsewhere, as well as two policies of assurance effected on his own life with the Victoria Legal and Commercial Life Assurance Co., the one for £300 and the other for £200, and he agreed to create an equitable mortgage of the freehold hereditaments and to make over his interest in the policies and all the moneys which were then or might thereafter become payable thereunder to or in favour of the bank for securing the payment, so far as the securities would extend, of the amount which was owing

A from him to the bank. The mortgage, as to the freehold hereditaments, was to be effected by a deposit of the deeds relating thereto, and, as to the policies, by a notice to the office by which the same were granted of the transfer of Durdin's interest therein to the bank. Durdin agreed to create the charge without any promise being made to him on the part of the bank to forego a criminal prosecution, and without any inducement in that behalf held out to him by the bank.

B When Durdin agreed to give the security, the title-deeds of the freehold property were in the hands of Mr. E. Western, his solicitor, and to enable the bank to obtain the deeds, Durdin, on Feb. 16, 1861, wrote the following letter to Mr. Western, and gave it to the directors :

C "Dear Sir,—Have the goodness to hand over the deeds of my Northampton property to the Commercial Bank of London, whose receipt for the same be pleased to take, and oblige your obedient servant.—J. DURDIN."

On Feb. 17, 1861, the title-deeds were handed over to the bank. Part of the freeholds were subject to a mortgage, but that was paid off, and the legal estate in the property was conveyed to the plaintiffs in trust for the bank, who had since D been in the receipt of the rents and profits of the estates. With respect to the policies, they were both effected by Durdin on his own life in the Victoria Legal and Commercial Life Assurance Co., and were described as being, the one of them for £300, and the other for £200 at the annual premium of £5 9s. 10d.

At the interview between John Durdin and the two directors of the bank, on Feb. 16, 1861, Durdin wrote the following letter to the secretary of the assurance company, and gave it to the directors of the bank.

E "The Manager or Secretary of the Victoria Life Association.

"Please to take notice that I wish to transfer my interest in the policies taken out in your office for £200 and £300 respectively, to Alfred Richard Cutbill, Esq., manager of the Commercial Bank of London.

F "I am, Sir, yours truly,
"JOHN DURDIN."

On Mar. 11, 1861, that notice was served on the Victoria Assurance Company, who acknowledged such service on the next day.

In due course Durdin was indicted by the bank for the robbery committed by G him, and, on June 10, 1861, he was convicted, and sentenced to fourteen years' penal servitude. On Aug. 14, 1861, the defendant Baylis gave notice to the Victoria Assurance Company of an assignment by John Durdin to him, on May 4, 1861, of the two policies of insurance, to secure to him certain costs incurred in defending Durdin on his trial for the robbery. The bill stated that Baylis had notice, at the time of the alleged assignment, of the prior one made by Durdin to H the plaintiffs. The defendant Walker stated that John Durdin had, before his conviction, assigned all his property to him, and he claimed an interest in the freeholds and policies accordingly. The Attorney-General also claimed, on behalf of the Crown, to be entitled to the equity of redemption in the policies.

Cole, Q.C., and Langworthy for the plaintiffs.

I *Wickens* for the Attorney-General.

Baggallay, Q.C., Beaumont and F. Clifford for the defendants Baylis and Walker.

SIR JOHN ROMILLY, M.R.—The question in this case is whether the plaintiffs have any priority over the defendant Baylis in respect of two policies of assurance effected in the Victoria Life Assurance Co. on the life of John Durdin, formerly a clerk in the plaintiffs' company, and alleged by them to have been assigned to the manager of the company in February, 1861. The question depends on two points : first, whether John Durdin was, having regard to the circumstances in which he was placed, liable to the bank in such a debt as was sufficient to constitute a

good consideration for the assignment of the policies of assurance; secondly, whether, if that question be answered in the affirmative, the transaction itself constituted a good assignment of the policies.

The first question depends on the answer to this, viz., whether, when one man robs another the amount taken by the man who has committed the felony constitutes such a debt as may be made the consideration for an assignment of his property by the felon before conviction to secure the debt to the person robbed. To determine that question it is necessary to see what is already established by the decided cases. Some things seem to be very clearly settled by them. In the first place, after the commission of the felony and before his conviction, the felon may sell or assign over his personal property for valuable consideration. Secondly, a debt existing at the time of the commission of the offence is a sufficient consideration to warrant such an assignment. Thirdly, the sale must be bona fide, and not colourable merely for the purpose of avoiding the forfeiture consequent on conviction. Fourthly, the civil remedies for suing the felon, which belong to the person whose property has been feloniously taken, are suspended after the discovery of the commission of the offence until the conviction of the felon—until the dignity of the law, to use the fanciful and metaphorical expression which personifies it, has been vindicated by the prosecution and conviction of the felon; and, fifthly, that it is indifferent by whom the felon is prosecuted, provided that he be convicted on the prosecution of some one.

The fourth proposition, which applies to the suspension of the civil remedies, seems to point to some of the evils which may arise from a law founded on a principle of sentimentality applied not to a person, or a set of persons, but to a name. The effect of it is to suspend any power of suing the felon until all his property, which would be available for the payment of the creditors, is forfeited to the Crown, and in the meantime to enable the felon either to prefer one creditor to another at his option, or to sell his property for money, which money he may give away or employ as he pleases, before conviction. The law is the more singular on this subject as the nominal prosecutor—in the eye of the law the only real prosecutor—of the felon is the Crown itself. However, the law is established, and the province of this court is merely to administer it.

Applying the various points I have stated—as being the correct law on the subject—to the state of facts in the present case, the conditions there enumerated have all been here fulfilled, provided the amount taken from the plaintiffs, the stealing of which constituted the offence for which the felon was convicted, was a sufficient consideration for the assignment by the felon of his property to the plaintiffs, to secure the amount taken from them. Considering the transaction on principle, my opinion is that it does constitute a sufficient consideration for the assignment. The real question is: Does it constitute a debt due from the thief to the person robbed? One man takes the property of another; by every principle of law the man who has lost his property is entitled to recover it back from the taker, or to compel him to pay the value of it in the shape of damages. It cannot make any alteration in the respect that the taking of the property in one sense constitutes an offence which the law calls a felony.

This is not the place to pursue any philosophical inquiry into what is the foundation of the distinction between that species of taking the property of another which constitutes a felony and that which only entitles the person deprived of his property to bring a civil action against the taker—why taking a pocket-book from the pocket of a stranger should be a crime, and cutting down and taking away a tree from his estate should be the cause of a civil action only. Without attempting to do this, it is obvious that in many cases the line of distinction between tort and felony is very narrow. If a man finds a jewel on the high road, and, knowing, or having good reason to believe, who the person is to whom it belongs, he takes and appropriates it to his use—that is a felony. But if he do not know to whom it belongs it is no felony; and he acquires a property in it

A which he can maintain against all the world except the true and lawful owner. That is *Armory v. Delamirie* (1), which is frequently cited in the courts. It would seem to be impossible on any principle of law or jurisprudence to hold that the right of the lawful owner to recover his lost property can be in any manner affected by the knowledge of the taker that it belonged to the particular person who had lost it. It is obvious that the civil rights and remedies must be the same, subject B always to the suspension of those same rights for the purpose of vindicating the law. It is obvious also that, if that be so in the case of a personal chattel, it must be the same in the case of taking money. The actual notes and coin, if they could be discovered on the felon, would be the property of the person robbed, and would after conviction be returned to him; if not found, the property of the felon would, in my opinion, have been liable to make good the amount to the person robbed, were C it not that by reason of the forfeiture the property of the felon became vested in the Crown.

I am of opinion, therefore, that on every principle of civil law, not using that word in its technical sense, the robbing constitutes a debt due from the robber to the person robbed. Indeed, that is assumed by the terms of the rule laid down D (to which I referred in the fourth proposition), which only suspends the civil remedies of the person robbed until after the conviction of the robber, though it is true that the suspension necessarily operates as a prohibition as the remedies cannot be enforced against the property of the taker until that property no longer exists. The reported cases seem to me all to support that view. *Stone v. Marsh* (2), and *Marsh v. Keating* (3), so far as they go, tend in this direction; E and *Dudley and West Bromwich Banking Co. v. Spittle* (4), before PAGE-WOOD, V.-C., seems to me to be in point and to decide this very case. I am of opinion, therefore, both upon principle and authority, that a debt existed in this case, due from Durdin to the plaintiffs' company, good and valid for all purposes, with the exception that the company's civil remedies by action were suspended until after the conviction of Durdin; and that it constituted a good consideration for the F assignment, assuming an assignment to have been made by Durdin to the company.

I now come to consider whether what took place constituted a valid assignment of the policies in equity? Durdin, after the discovery of his offence, at the instance of two of the directors, wrote and signed a letter to the effect that he wished to transfer his interest in the policies to the bank. First, I will consider the effect of that apart from the felony. If so considered, I am of opinion that it constitutes G a good assignment of the policies to the manager of the bank. I do not see how it can be treated otherwise. A creditor comes to a debtor and asks for security for his debt, and the debtor writes a letter to an assurance company with which he has insured his life expressing his wish to transfer his interest therein to his debtor, and he gives that document to his debtor. It is impossible to say that such a transaction and such a document have no meaning, and that they were H intended to have no meaning; yet, unless it assigned his interest in the policy, the document means nothing. It is to be observed that no formal instrument is required for the purpose; all that is wanted is that the document should express the intention of the assignor thereby to constitute the assignment. I read it exactly as if written: "I hereby transfer." Unless it means that, what was there I for the office to take notice of? A desire not fulfilled? It is, I think, absurd to suppose that any person who wrote and signed such a document could so intend it, or that the office could so receive it. On the other hand, it was said that, though this might be so if it were merely a civil transaction not affected by any taint of felony, yet the circumstance that the debt sought to be secured was created by the felonious taking by the debtor of that amount from the creditor, creates a new element in the matter, and makes it highly dangerous to allow such an assignment to be effected by such means. It was also said that it is to be presumed that this document must have been obtained from Durdin under a hope entertained by him that the directors would not prosecute him to conviction, and

that, if the court countenanced such transactions, it would lead to the compounding of felonies or the obtaining securities from felons through the fraudulent representations held out to them, either expressly or impliedly, that their felonies would be compounded. A

That argument, so far as whether any debt exists under such circumstances, I have already considered. As to the rest of it, it is not, in my opinion, capable of being supported in this case. Undoubtedly, if the assignment had been obtained by any fraudulent representation to the effect suggested, or if the directors had made use of such a belief existing in the mind of Durdin, of which they had taken advantage for the purpose of obtaining this assignment, the document, however perfect in form, would be bad in this court, and would be set aside. In this respect I consider that equity would no more allow a deed to be supported which was obtained by fraud from a felon than if obtained from a man of spotless integrity. But that case, like all other cases of fraud, must be alleged and proved. Here, however, it is neither alleged nor proved; but merely suggested as possible. B

Further, it was suggested, that if this case is supported it will probably occasion such frauds to be committed hereafter. I am not able to concur in that view. It is probable, no doubt, that creditors will put such pressure on their debtors as they can fairly do to get security for their debts, but I cannot suppose, or act on the supposition that this decree will induce the creditor to commit a fraud, even in the case of a felonious debtor, any more than in the case of any other debtor. If I am right in considering that there was a good assignment by Durdin of his interest in the policies, then it follows that due notice of it was given to the Victoria Life office on Mar. 11, 1861, which was done by sending the letter to the actuary, the receipt of which was duly acknowledged by him on Mar. 12, 1861. That was prior to May 4, 1861, the date of the assignment in favour of the defendant Mr. Baylis. C

The deposit by Durdin of the deeds of his Northampton property as a security for the debt of the bank is also complete by his direction in writing to Mr. Western to hand them over to the bank on their receipt. That was done, accordingly, by Mr. Western, and they have since been retained by the Commercial Bank, as equitable mortgagees of the property to which they relate, as a further security for their debt. The legal estate in that property has since been conveyed by the first mortgagees to the plaintiffs in fee, in trust for the banking company upon payment of the mortgage-money. D

In that state of circumstances I am of opinion that the plaintiffs are entitled to the relief asked by the bill. E

Judgment for plaintiffs. F

G

A

COCKLE v. LONDON AND SOUTH EASTERN RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Sir Alexander Cockburn, C.J., Blackburn and Mellor, JJ., Pigott and Cleasby, BB.), February 10, May 25, 1872]

B

[Reported L.R. 7 C.P. 321; 41 L.J.C.P. 140; 27 L.T. 320;
20 W.R. 754]

Carriage of Passengers—Negligence—Train—Passenger alighting from carriage stopped opposite gap between carriage and platform—No lighting and no warning of danger.

C

The plaintiff was a passenger travelling in the last carriage of a train, and when the train arrived at his destination, although the platform was of sufficient length to take the full length of the train, the last carriage was stopped opposite a part of the platform at which passengers could not alight as there was about a four-feet gap between the carriage and the platform. Trains were not usually stopped at this point, but at a point further on where the platform was well lighted with gas lamps. It was a dark night and there were no lighted lamps near where the last carriage stopped. No express invitation was given by the railway servants to the passengers to alight; no warning of the danger in alighting was given. When the train had come to a standstill the plaintiff opened the door of the carriage, stepped out, fell into the gap between the carriage and platform, and sustained injuries for which she brought an action against the railway company.

E

Held: leaving, without any warning of the danger, a carriage which had been brought up to a place at which it was unsafe for a passenger to alight under circumstances which warranted him in believing that it was intended that he should get out and might do so with safety amounted to negligence on the part of the railway company, and, therefore, the action was maintainable.

F

Notes. Followed: *Gill v. Great Eastern Rail. Co.* (1872), 26 L.T. 945. Distinguished: *Lewis v. London, Chatham and Dover Rail. Co.* (1873), L.R. 9 Q.B. 66. Followed: *Robson v. North Eastern Rail. Co.*, [1874-80] All E.R. Rep. 1281. Considered: *Sharpe v. Southern Rail. Co.*, [1925] All E.R. Rep. 372. Referred to: *Bridges v. North London Rail. Co.* (1874), L.R. 7 H.L. 213; *Weller v. London, Brighton and South Coast Rail. Co.* (1874), L.R. 9 C.P. 126; *Rose v. North Eastern Rail. Co.* (1876), 2 Ex.D. 248; *Glasscock v. London, Tilbury and Southend Rail. Co.* (1902), 18 T.L.R. 295.

G

As to carrier's responsibility for passengers alighting from trains, see 4 HALSBURY'S LAWS (3rd Edn.) 181, 182; and for cases see 8 DIGEST (Repl.) 86 et seq.

H

Cases referred to:

- (1) *Praeger v. Bristol and Exeter Rail. Co.* (1870), 23 L.T. 366; reversed (1871), 24 L.T. 105, Ex. Ch.; 8 Digest (Repl.) 89, 600.
- (2) *Bridges v. North London Rail. Co.* (1871), L.R. 6 Q.B. 277; 40 L.J.Q.B. 188; 24 L.T. 835; 19 W.R. 824, Ex. Ch.; reversed (1874), L.R. 7 H.L. 213; 43 L.J.Q.B. 151; 30 L.T. 844; 38 J.P. 644; 23 W.R. 62, H.L.; 8 Digest (Repl.) 87, 587.

I

Also referred to in argument:

- Ryder v. Wombwell* (1868), L.R. 4 Exch. 32; 38 L.J.Ex. 8; 19 L.T. 491; 17 W.R. 167, Ex. Ch.; 22 Digest (Repl.) 25, 61.
- Harrold v. Great Western Rail. Co.* (1866), 14 L.T. 440; 8 Digest (Repl.) 87, 589.
- Siner v. Great Western Rail. Co.* (1869), L.R. 4 Exch. 117; 38 L.J.Ex. 67; 20 L.T. 114; 17 W.R. 417, Ex. Ch.; 8 Digest (Repl.) 87, 590.
- Plant v. Midland Rail. Co.* (1870), 21 L.T. 836; 8 Digest (Repl.) 88, 591.

Appeal by the defendants from an order of the Court of Common Pleas (BOVILL, C.J., BRETT, MONTAGUE SMITH, and KEATING, JJ.), reported L.R. 5 C.P. 457, discharging a rule nisi obtained by the defendants to enter a nonsuit in an action by the plaintiff, a passenger travelling on the defendants' railway, for damages for injuries caused by negligence of the defendants. The action was tried by BOVILL, C.J., with a jury and verdict was found for the plaintiff for £150. The defendants obtained a rule nisi to enter a nonsuit or verdict for the defendants on the ground that there was no evidence of negligence on the part of the defendants to go to the jury but that the accident arose from the plaintiff's negligence.

O'Malley, Q.C., and F. M. White for the defendants.

Gibbons and Macrae Moir for the plaintiff.

Cur. adv. vult.

May 25, 1872. **SIR ALEXANDER COCKBURN, C.J.**, read the following judgment of the court.—This was an appeal by the defendants against the decision of the Court of Common Pleas in discharging a rule obtained by the defendants upon a point reserved at the trial as to whether there was any evidence for the jury in support of the plaintiff's claim. The court having been divided in opinion the rule nisi had dropped.

The facts may be shortly stated. The defendants are carriers of passengers from the Spa Road station to Deptford station, on the line of railway between London and Greenwich. The plaintiff, who lived at Deptford, on Mar. 20, 1869, took a ticket from the Spa Road station to the Deptford station, and travelled on the journey in a train from the Spa Road station, which was due at Deptford station about midnight. The carriage in which she travelled was a third class carriage, and was the last carriage in the train. The platform at Deptford was of sufficient length for the whole train to have been drawn up alongside of it, but in addition to the part at which passengers could alight, it extended some distance, gradually receding from the rails. The train in question drew up with the body of the train alongside the platform; but the last carriage, in which the plaintiff rode, was opposite the receding part of it, at which passengers could not alight, and was about four feet from it. The trains did not usually draw up at this spot, nor could the passengers alight there with safety. The part of the platform at which the train would in the ordinary course have stopped, was well lighted with gas lamps, but the lights towards the place where the accident happened had been put out, because at that part the trains did not usually stop, or the passengers alight. There was a lamp post opposite the point where the plaintiff's carriage stopped, the lamp on which was not lighted, and the place was dark. It was a very dark night.

Just before the train stopped, a woman who was in the same carriage with the plaintiff, rose for the purpose of getting out, but was told by the plaintiff to wait until the train had stopped. When the train had stopped, the plaintiff waited for the woman to get out, but, as she did not do so, opened the door and stepped out. On doing so she fell in the space between the carriage and the platform, a space wide enough for three people to stand abreast, and was injured by the fall. There was no evidence of any invitation to alight having been given by any of the defendants' servants. But it is clear that the train had been brought to a final standstill, as it was not again set in motion until it started on its onward journey. No warning appears to have been given to the persons in the carriage in which the plaintiff was not to alight, until the plaintiff had been seen to fall, when, on the woman before referred to attempting to follow her, a cry of "hold hard" was heard. The question is whether these facts afford evidence to go to the jury of negligence on the part of the company's servants. We are of opinion that they do.

A It is difficult to reconcile all the cases on this subject. Each must, of course, very much turn on its own particular facts; but there is a recent case, decided in this court, which is analogous to the case now before us, and the principle of which appears to us applicable to it. The case to which we refer is *Praeger v. Bristol and Exeter Ry. Co.* (1). In that case a train, in which the plaintiff was a passenger, arrived at a terminus, and was stopped fifteen or twenty feet short of the fixed buffers placed at the extreme limit to which it might have gone. The platform of the station, at the end which was first reached by the train, instead of having its edge parallel with the line of rails used by the arriving trains, was bevelled off into a curve, so as to allow space for a siding which there joined that line of rails. The plaintiff sat in the last compartment of the last carriage, which was drawn up opposite the curved part of the platform, so that a space of eighteen inches or two feet was left between them. A guard opened the door, but said nothing. It was a dark evening, and the station was dimly lighted. The plaintiff stepped out, expecting to alight on the platform, and fell between the carriage and the platform, thereby sustaining injuries, in respect of which he brought his action against the company. Upon these facts, in the Court of Exchequer, KELLY, C.B., and PRGOTT, B. (MARTIN, B., dissentiente), held that there was no evidence of negligence to go to the jury. But the Court of Exchequer Chamber, consisting of seven judges, were unanimously of opinion that there was evidence of negligence, and reversed the decision.

As the case in question has not been more generally reported, it may be desirable to repeat the judgments pronounced on the occasion in question. [His LORDSHIP referred at length to the judgments, and continued:] The foregoing case appears to us in point to the present, as establishing that an invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence. It is true, that in the case before us there was not the invitation to alight which is implied in the opening of the carriage door, as occurred in *Praeger v. Bristol and Exeter Ry. Co.* (1). But it appears to us that the bringing up of a train to a final standstill, for the purpose of the passengers alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station. It is not necessary here any more than in *Praeger v. Bristol and Exeter Ry. Co.* (1) to say what would be the effect if a passenger should alight where the danger was visible and apparent; as where a passenger gets out in broad day trusting to his ability to overcome the difficulty.

In the case before us the place where the plaintiff was left to get out was not lighted, and she could not see, and was not aware of the interval which separated the carriage from the platform, and got out believing she was about to step on to the platform. We think that the leaving a carriage which has been brought up to a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may therefore do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, at least in the absence of contributory negligence on the part of the passenger, an action may be maintained. The present case is distinguishable from that of *Bridges v. North London Ry. Co.* (2), on the ground that in the latter case the carriage from which the passenger alighted had been drawn up in a tunnel in the vicinity of the station. In that case there was no evidence that the train had come to a final standstill, or, in other words, arrived at the spot where the company's servants intended the passengers to alight. The question, therefore, was whether there was evidence of anything done by the company's servants which induced the passenger to believe it had so arrived, and act on that belief. But in the present case the evidence of the conduct of the company's servants was such as to warrant

the jury in finding that the train had really come to the final standstill, and that the company's servants meant the passengers to get out there, or be carried on. Of course, a multo fortiori the jury might find that the conduct was such as to induce the plaintiff to think so, and act upon that belief. We are, therefore, of opinion that the rule nisi to enter the verdict for the defendants was properly discharged by the Court of Common Pleas.

Appeal dismissed.

Re LEVEY AND ROBSON. Ex parte TOPPING

[COURT OF APPEAL IN CHANCERY (Lord Westbury, L.C.), January 19, February 11, 1865]

[Reported 4 De G.J. & Sm. 551; 5 New Rep. 390; 34 L.J.Bcy. 13; 12 L.T. 3; 11 Jur.N.S. 210; 13 W.R. 445; 46 E.R. 1033]

Bankruptcy—Partnership—Debt due to co-partner—Debt arising from undisputed contract apart from co-partnership executed at time of bankruptcy—No surplus of bankrupt partner's estate possible whether or not proof admitted.

The general rule that a partner cannot be permitted to prove in bankruptcy against the estate of his co-partner does not apply where the debt sought to be proved arises from an undisputed contract apart from the co-partnership which was executed at the time of the adjudication in bankruptcy, and where it is certain that there cannot be any surplus of the co-partner's estate whether the proof be admitted or not.

Notes. Considered: *Lacey v. Hill*, *Leney v. Hill* (1872), 8 Ch. App. 44. Applied: *Nanson v. Gordon*, [1874-80] All E.R. Rep. 1040. Considered: *Re Wright, Ex parte Sheen* (1877), 6 Ch.D. 235; *Re Head, Ex parte Head*, [1894] 1 Q.B. 638.

As to proof by partner in general, see 2 HALSBURY'S LAWS (3rd Edn.) 506; and for cases see 4 DIGEST (Repl.) 496 et seq.

Cases referred to in argument :

Re Sheath, Ex parte Moore (1826), 2 Gl. & J. 166, L.C.; 4 Digest (Repl.) 501, 4410.

Re Minchin, Ex parte Carter (1827), 2 Gl. & J. 233, L.C.; 4 Digest (Repl.) 501, 4401.

Re Badnall, Ex parte Ellis (1827), 2 Gl. & J. 312; 6 L.J.O.S.Ch. 45, L.C.; 4 Digest (Repl.) 501, 4411.

Ex parte Rawson, Ex parte Lloyd (1821), Jac. 274; 37 E.R. 854, L.C.; 4 Digest (Repl.) 322, 2925.

Re Malachy, Ex parte May (1838), 3 Deac. 382; Mont. & Ch. 18; 8 L.J.Bcy. 1, Ct. of R.; 4 Digest (Repl.) 501, 4403.

Appeal from an order of Acting Commissioner WINSLOW on the bankruptcy of Charles Robson whereby he rejected a proof tendered by George Levey for the sum of £404 11s. 6d. against the separate estate of the bankrupt in respect of a private debt due from the bankrupt to Levey, they having been carrying on business in co-partnership with Francis Burdett Franklyn. It appeared on the face of the accounts that there could not possibly be any surplus from Robson's estate, even were the debt due to Levey deducted. The accounts of Robson's separate estate showed that there was a deficiency of £530 2s. 3d. The appellants

A were Charles Topping, an assignee of one of the creditors of the bankrupt, and also five separate creditors of Levey. The respondents to the motion were the other assignees of the estate and effects of the bankrupts and F. Dover, another private creditor of Robson who had proved for his debt against Robson's separate estate.

B *De Gex* for the appellants.

Martineau appeared for the other assignees of the estate.

R. Griffiths for Dover.

C **LORD WESTBURY, L.C.**—In this bankruptcy petition I was desired to give my opinion on a Case which was very conveniently stated in the abstract for the purpose of reviewing the course which has been taken by the commissioner.

The question was this. If there be an adjudication in bankruptcy against three partners, and one of them be indebted to his co-partner in a sum of money, can proof be made by the creditor partner against the separate estate of the debtor partner where it is clear that, whether such proof be admitted or not, there will be no surplus of the separate estate of the debtor partner available for the purposes of the joint creditors?

E The right of proof under such circumstances is regulated by arbitrary rules, which are derived from the principles of this court as to marshalling. They were embodied for the first time in the order of LORD LOUGHBOROUGH made in the year 1794. By the effect of that order separate accounts are kept of the joint estate and of the separate estate of each partner, and if there be any amount of joint creditors, the joint creditors are not admitted to prove against the separate estate, but must wait until the separate creditors are paid and then receive from the separate estate the surplus only which remains. The consequence is that it has been held that one partner cannot prove against his co-partner, because in ordinary cases that proof would diminish the estate of the debtor partner, and thereby the partner, if admitted to prove, would come into competition with his own creditors, namely the joint creditors, and detract, to the extent of the proof, from the benefit they would derive from the separate estate. Therefore, it has been laid down as a general rule that a partner cannot be permitted to prove against the estate of his co-partner.

G The question here is whether that rule, so expressed, should be confined within the limits of the purpose by reason of which it was framed, or whether it should be carried out to the letter when the reason or purpose ceases to have any application. There have been several cases before LORD ELDON, which are collected in vol. 2 of GLYN AND JAMESON'S REPORTS, but they have principally arisen under circumstances where the debt sought to be proved by one partner against his co-partner has arisen in respect of transactions which have arisen subsequently to the bankruptcy; as, for example, where the partner has paid to the joint creditors more than properly he ought to have paid, and is entitled, therefore, to contribution from his co-partners. But the case before me is of a different kind, and I regard it as consisting entirely of these circumstances to which I mean to limit my decision, namely, that the debt sought to be proved by the partner against his co-partner is a debt arising from an undisputed contract apart from the co-partnership which was executed at the time of the adjudication in bankruptcy. I also have to consider that one of the facts of this case is that by no means can there be any surplus of the partner's estate against which proof is proposed to be made, whether proof be admitted or not.

I Limiting my decision to the proof so admitted, I think it reasonable and just that the rule should not extend beyond the reason which introduced it, and was the cause of its being laid down, and if it be true that the estate of the co-partner cannot, by possibility, yield a surplus, it would be unreasonable and unjust to refuse the opportunity of proof being made. It has been very justly said by

counsel for the appellant in the argument, that the result would be to pay the creditors of one partner with the money of another; and also, as he has said, it would not be difficult to suggest a state of circumstances in which the joint creditors would be prejudiced by the rule being adhered to. I will put one case. Suppose the separate estate of one partner to be £10,000, and his separate debts to be £10,000, exclusive of a debt due to his co-partner, if proof of the co-partner's debt were not admitted, the other separate creditors would be paid in full. But if he owed £10,000 to his co-partner, and that proof were admitted, then the creditors would receive only 10s. in the pound. Suppose the co-partner to be indebted to the extent of £1,000, but to have no assets except the debt which is due to him from his partner. If you admit the co-partner to prove against the estate of his partner for this debt, you realise £5,000, and the surplus of that sum over £1,000 will be for the benefit of the joint creditors. So that, if the rule, which was intended for the benefit of the joint creditors, were adhered to, it would in reality deprive them of £4,000. Many cases of such injustice would arise, if we were to follow the letter, when the spirit of the rule ceases to have any application. Therefore, I am of opinion that the proof by one partner against the separate estate of another partner, ought in this case to be admitted. But, inasmuch as contingencies might arise which might render the separate estate of the partner larger than is now contemplated, there should be added to the order a declaration that the proof must be subject to be expunged, and the difference omitted, in case of any such surplus of the estate of that partner occurring for the benefit of the joint creditors. The costs of either party will come out of his estate.

Order accordingly.

Re WALKER. Ex parte TOPHAM

[COURT OF APPEAL IN CHANCERY (Mellish and James, L.JJ.), April 25, 1873]

[Reported 8 Ch. App. 614; 42 L.J.Bey. 57; 28 L.T. 716;
37 J.P. 628; 21 W.R. 655]

Bankruptcy—Fraudulent preference—Absence of intention to prefer creditor over other creditors.

An insolvent debtor, being pressed by a creditor who was aware of his insolvency for payment of a sum due in respect of goods supplied, delivered up the goods to the creditor instead of paying him the money. The debtor's action was induced partly by the pressure put on him by the creditor and partly in the hope that the creditor would continue to supply goods to him upon credit. Later in the same day the debtor, having in vain tried to obtain assistance to enable him to continue business, filed his bankruptcy petition.

Held: the delivery of the goods to the creditor did not amount to a fraudulent preference, inasmuch as the evidence did not show that it was done with a view to giving the creditor a preference over the other creditors.

Re Cheesebrough, Ex parte Blackburn (1) (1871), L.R. 12 Eq. 358, followed.

Notes. Section 92 of the Bankruptcy Act, 1869, has been replaced by s. 44 of the Bankruptcy Act, 1914.

Considered: *Re Brown, Ex parte London and County Banking Co., Ex parte Trickett* (1873), L.R. 16 Eq. 391; *Smith v. Pilgrim* (1876), 2 Ch.D. 127; *Re Bird*,

A *Ex parte Hill* (1883), 23 Ch.D. 695. Referred to: *Butcher v. Stead*, [1874-80] All E.R. Rep. 1198; *Re Cohen, Ex parte Trustee*, [1924] All E.R. Rep. 434.

As to fraudulent preference in general, see 2 HALSBURY'S LAWS (3rd Edn.) 556; and for cases see 5 DIGEST (Repl.) 929 et seq. For the Bankruptcy Act, 1914, s. 44, see 2 HALSBURY'S STATUTES (2nd Edn.) 381.

B Cases referred to:

(1) *Re Cheesebrough, Ex parte Blackburn* (1871), L.R. 12 Eq. 358; 25 L.T. 76; 19 W.R. 973; sub nom. *Re Cheesebrough, Ex parte Hitchcock*, 40 L.J.Bey. 79; 5 Digest (Repl.) 962, 7808.

(2) *Re Craven and Marshall, Ex parte Tempest* (1870), L.R. 10 Eq. 648; 39 L.J.Bey. 33; 23 L.T. 563; on appeal, 6 Ch. App. 70; 40 L.J.Bey. 22; 23 L.T. 650; 19 W.R. 137, L.J.J.; 5 Digest (Repl.) 944, 7728.

Also referred to in argument:

Hartshorn v. Slodden (1801), 2 Bos. & P. 582; 4 Esp. 60; 126 F.R. 1452; 5 Digest (Repl.) 940, 7699.

D **Appeal** from a decision of the Chief Judge in Bankruptcy, reversing a decision of the registrar of the Leeds County Court on an application by the trustee in bankruptcy of one Benjamin Walker for an order that one Moses Topham restore certain goods delivered to him by the bankrupt prior to the filing of his petition, on the grounds that the delivery amounted to a fraudulent preference.

E In August, 1872, Moses Topham, cloth manufacturer, of Bradford, was a creditor of Messrs. N. Walker & Co., cloth merchants, of Leeds, for a sum of £2,300. Towards payment of this he had received their acceptance at three months for £300, to fall due on Aug. 21, and he paid away this bill to Messrs. Crofts & Co., in part discharge of a debt of £1,200 which he owed to them. About a week before the debt fell due, Topham was informed by Benjamin Walker, one of the partners in the firm of N. Walker & Co., that they would not be able to meet the bill without assistance, and Topham thereupon agreed to take up the bill if they would find £200 towards it. On Aug. 17, Topham went to Leeds and had another interview with Benjamin Walker, who assured him that the firm would have the £200 for him by Aug. 21. At the same time he proposed to give Topham an order.

G for some goods, but Topham said that he would not supply them with any more goods till the bill for £300 had been paid. Benjamin Walker on the same occasion told Topham that the firm had some goods worth about £200, which they had bought of Topham and could not sell, and spoke of returning them to him instead of paying him the money. On the following day, which was a Sunday, Topham had another interview with Benjamin Walker, who, on being again pressed for payment, promised to bring him the £200 on the Monday or Tuesday. On the Tuesday, Aug. 20, Benjamin Walker, being unable to fulfil his promise to bring the £200, laid a statement of the affairs of the firm before Topham and one Whitehead, who was their principal other creditor. This statement showed, that while their debts amounted to £5,000, their assets were only £1,500. On the morning of Wednesday, Aug. 21, Benjamin Walker went over to Bradford and saw Wilson Topham, the son of Moses Topham, and the manager of his business.

I Before doing so he ordered the goods, which he had before proposed to return, to be packed up so that they might be ready for delivery to Topham or his order. When he saw Wilson Topham, he told him that the firm had failed in raising the £200. Wilson Topham then demanded the goods. Benjamin Walker then gave a consignment note of the goods to Wilson Topham, who at once telegraphed to Crofts & Co., to go to the warehouse of Messrs. N. Walker & Co. and take away the goods, and they did so on the same day. Later in the day Benjamin Walker applied to Whitehead and other friends for assistance, but to no purpose.

Accordingly, at a meeting of their creditors, which had been called for that afternoon, it was determined to file a petition for liquidation, which had been previously prepared, and it was accordingly filed late on that same day.

The county court registrar, on an application by the trustee under the liquidation to have the goods restored, on the ground that the delivery of them amounted to a fraudulent preference, held that the delivery was valid. On appeal, the Chief Judge in Bankruptcy reversed this decision, and ordered Topham to return the goods or to pay the value of them to the trustee. From this order Topham now appealed.

De Gex, Q.C., and *Ingle Joyce* for the appellant.

Roxburgh, Q.C., and *Marten* for the respondent.

MELLISH, L.J.—The Chief Judge himself says that there is evidence of pressure, and there is nothing to my mind showing that the goods were not delivered in consequence of that pressure. The Chief Judge, however, seems to have thought that under the circumstances of the case pressure was of no importance, Topham having previously to the delivery of the goods seen that the affairs of the Walkers were in a hopeless condition, and that the protection given by the provision at the end of s. 92 of the Bankruptcy Act, 1869, did not apply. But I am clearly of opinion that this was not a fraudulent preference within that section, for *Re Craven and Marshall, Ex parte Tempest* (2) both before the Chief Judge and before this court; and *Re Cheesebrough, Ex parte Blackburn* (1), show that it is still necessary in order to constitute a fraudulent preference that the voluntary payment or transfer should be made “with a view” of giving a particular creditor a preference over the other creditors.

I think the meaning of s. 92 was expounded with perfect accuracy by the Chief Judge in *Re Cheesebrough, Ex parte Blackburn* (1) where, after referring to the first words of the section, which provide that every payment made by any person unable to pay his debts as they become due, from his own moneys, in favour of any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making the same becomes bankrupt within a certain time, be void, he says (L.R. 12 Eq. at p. 364):

“If the clause stopped there, it no doubt gets rid of any question which can be raised respecting the ‘contemplation of bankruptcy,’ the solution of which had sometimes created considerable difficulty. The only condition prescribed by the statute in this respect is, that the debtor be ‘unable to pay his debts as they become due from his own moneys,’ and this, be it observed, is applicable to debtors generally, whether in trade or not. But then it adds another qualification or condition—which is the very life and essence of the enactment—the payment so made must, in order to be void, be made ‘in favour of any creditor with a view of giving such creditor a preference over the other creditors.’ So that unless it can be made clearly apparent, and to the satisfaction of the court which has to decide, that the debtor’s sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor. The act of the debtor is alone to be considered—the object and purpose for which the payment is made can alone be inquired into—and although it is perfectly legitimate, and in all cases requisite, that all the attending circumstances should be carefully investigated, yet if the act done can be properly referred to some other motive or reason than that of giving the creditor paid a preference over the other creditors, then I conceive neither the statute, nor any principle of law or policy, will justify a court of law in holding that the payment is fraudulent or void.”

In my opinion, that is a perfectly accurate statement of the law.

A What then, was the motive of the Walkers in returning these goods to Topham? Were they actuated by the desire of preferring him over the other creditors, or by the desire of inducing him to continue to supply them with goods upon credit, or by the pressure of Wilson Topham? In my opinion, the result of the evidence is, that they were actuated by one of the latter two motives. They still hoped to be able to go on, and they thought that by returning these goods
B and paying some part of their debt, they might gain further credit and be able to continue business, or they returned the goods merely on account of the pressure. In either of these views it was not a fraudulent preference. We have to try to find out what was passing in the Walkers' minds at the time of the transaction, and it seems to me to be reasonably clear that they were actuated by one or other
C of the motives which I have mentioned, and not by any desire to prefer this particular creditor. There was no reason why they should wish to give this particular creditor a preference; there was no relation of kinship between the parties, which is frequently the cause of such a preference, and there is nothing in the nature of the debt to lead me to think that these goods were returned with a view of giving this creditor a preference over the other creditors. Then it
D appears that the Walkers thought that they might be able to go on, if they satisfied Topham's demand by returning the goods; and in my opinion, there is nothing to show that on the morning when the goods were returned the Walkers knew that their affairs were in a desperate condition, or had made up their mind to stop business.

I, therefore, come to the conclusion that the Walkers, in returning the goods were
E actuated either by the hope that in the course of the day they would be able to make some arrangement with their creditors, or by the pressure put upon them by Wilson Topham. The principle of the decision of the Chief Judge in *Re Cheesebrough, Ex parte Blackburn* (1), was, that the law of fraudulent preference was not altered by the Act of 1869, and before that Act the law was, that however desperate the circumstances of a creditor might be, and however well a creditor
F knew those circumstances, still he was not deprived of his right to press his debtor for payment; and if he did so press, and payment was made, that did not amount to a fraudulent preference. I am, therefore, of opinion, that the order of the Chief Judge must be discharged, and that of the registrar of the county court restored, and that the appellants must have their costs of the appeal to the
G Chief Judge.

JAMES, L.J.—I entirely concur.

Appeal allowed.

Re EDWARDS

[COURT OF APPEAL IN CHANCERY (James and Mellish, L.J.J.), November 22, December 2, 6, 1873]

[Reported 9 Ch. App. 97; 43 L.J.Ch. 265; 29 L.T. 712;
22 W.R. 144]

Settlement—Marriage settlement—Covenant to settle after acquired property—Property acquired after death of spouse.

A covenant in a marriage settlement that if either of the spouses "should become entitled to any moneys or other property, real or personal, or both, by any means whatsoever, then in such case all such moneys or other property should be vested in the trustees upon the trusts of the settlement," **held** not to extend to property acquired by a wife after the death of her husband.

Dickinson v. Dillwyn (1) (1869), L.R. 8 Eq. 546, and *Carter v. Carter* (2) (1869), L.R. 8 Eq. 551, followed.

Stevens v. Van Voorst (3) (1853), 17 Beav. 305, overruled.

Notes. Followed: *Alleyne v. Hussey* (1873), 22 W.R. 203. Applied: *Holloway v. Holloway* (1877), 25 W.R. 575. Considered: *Fisher v. Shirley* (1889), 43 Ch.D. 290. Followed: *Re Coghlan*, *Broughton v. Broughton*, [1894] 3 Ch. 76. Applied: *Davenport v. Marshall*, [1902] 1 Ch. 82. Considered: *Re Simpson*, *Simpson v. Simpson*, [1904] 1 Ch. 1; *Re Ellis's Settlement*, *Ellis v. Ellis*, [1909] 1 Ch. 618. E Referred to: *Agar v. George* (1876), 34 L.T. 487.

As to property acquired after termination of the covenant, see 34 HALSBURY'S LAWS (3rd Edn.) 453; and for cases see 40 DIGEST (Repl.) 551 et seq.

Cases referred to:

- (1) *Dickinson v. Dillwyn* (1869), L.R. 8 Eq. 546; 39 L.J.Ch. 266; 22 L.T. 647; 17 W.R. 1122; 40 Digest (Repl.) 551, 580.
- (2) *Carter v. Carter* (1869), L.R. 8 Eq. 551; 39 L.J.Ch. 268; 21 L.T. 194; 40 Digest (Repl.) 551, 579.
- (3) *Stevens v. Van Voorst* (1853), 17 Beav. 305; 51 E.R. 1051; 40 Digest (Repl.) 552, 585.

Also referred to in argument:

Howell v. Howell (1835), 5 L.J.Ch. 242; 40 Digest (Repl.) 551, 578.

Reid v. Kenrick (1855), 3 Eq. Rep. 1031; 24 L.J.Ch. 503; 25 L.T.O.S. 193; 1 Jur.N.S. 897; 3 W.R. 530; 40 Digest (Repl.) 564, 708.

Re Clinton's Trusts, *Holloway's Fund*, *The Same*, *Weare's Fund* (1871), L.R. 13 Eq. 295; 41 L.J.Ch. 191; 26 L.T. 159; 20 W.R. 326; 40 Digest (Repl.) 560, 666.

Petition in lunacy presented by Joshua Falle Geary, heir-at-law of Elizabeth Braune Geary deceased, and Mrs. Caroline Rowley Robinson praying that the sum of consols standing to the credit of Charles Marshall Edwards, deceased, might be paid to them in equal moieties.

By an indenture of settlement, dated Oct. 13, 1843, and made in contemplation of the marriage, which was afterwards solemnised, of Caroline Rowley Edwards and George Robinson, all the interest of Caroline Rowley Edwards in the estate of her grandmother, Elizabeth Braune, was assigned to trustees upon trust for the wife for life for her separate use, with remainder to the husband for life if he survived her, with remainder to the children of the marriage as therein mentioned. The settlement contained a covenant by the husband and wife with the trustees, that in case after the solemnisation of the said intended marriage the said Caroline Rowley Edwards and the said George Robinson, or either of them, in

A her right should become entitled to any moneys or other property, real or personal, or both, by any means whatsoever, then in such case all such moneys or other property should be vested in the trustees upon the trusts of the settlement.

B Elizabeth Braune, the grandmother of Mrs. Robinson, by her will, dated July 4, 1829, devised three freehold cottages, situate on Mitcham Common, in the county of Surrey, to trustees upon trust for her daughter, Maria Elizabeth's sole use and benefit, and at her decease to be equally divided between her surviving children. Maria Elizabeth Braune, who was married to one Charles Edwards, died on Nov. 18, 1872, leaving her surviving three children, viz., Elizabeth Braune Geary, Charles Marshall Edwards, and Caroline Rowley Robinson. C The cottages were compulsorily acquired by a railway company and the purchase money of £500 was paid into court and invested in consols. The dividends thereon were paid to Maria Edwards until her death in November, 1872, and thereafter to the three children in equal shares. Charles Marshall Edwards was found a lunatic by inquisition in 1854 and he died intestate and a bachelor in June, 1873. The heir-at-law of Elizabeth Braune Geary deceased, D she having died in March, 1873, and Mrs. Robinson presented this petition in lunacy.

As George Robinson had died in September, 1870, the question arose whether Mrs. Robinson was bound by the covenant to vest her moiety in the trustees of her marriage settlement.

E *Bethune Horsbrugh* for the petitioners.
Ince for the trustees of the settlement.
Tweedy for the railway company.

F **The Court** made the order prayed for, subject to the consent of Mrs. Robinson's children being obtained, which would make it unnecessary to decide the question as to the effect of the covenant, it being believed that they were all adult and would consent.

Dec. 2, 1873. It was stated to the court that Mrs. Robinson's children were infants, and the petition accordingly was again mentioned to the court.

Cur. adv. vult.

G Dec. 6, 1873. **JAMES, L.J.**—We have consulted the Lord Chancellor on this point, and he is of opinion, and we agree with him in that opinion, that the rule laid down by MALINS, V.-C., in *Dickinson v. Dillwyn* (1), and *Carter v. Carter* (2), is more consonant with reason than that laid down by SIR JOHN ROMILLY, M.B., in *Stevens v. Van Voorst* (3). The object of such a covenant as that in question is H to bring into the settlement property of the wife to which the husband's marital right would otherwise attach. Property of the wife acquired after the death of her husband does not come within the reason of the covenant. Mrs. Robinson's share in this fund, therefore, is not bound by the covenant, and it must be ordered to be paid to her.

I **MELLISH, L.J.**, was of the same opinion.

Order accordingly.

Re DAVIES. Ex parte WILLIAMS

[COURT OF APPEAL IN CHANCERY (Mellish and James, L.JJ.), February 29, March 7, 1872]

[Reported 7 Ch. App. 314; 41 L.J.Bey. 38; 26 L.T. 303;
36 J.P. 484; 20 W.R. 430]

Bankruptcy—Secured creditor—Seizure under writ of fi. fa. incomplete before act of bankruptcy—Mere delivery of writ to sheriff.

The mere delivery of a writ of fi. fa. to the sheriff by the execution creditor before the debtor commits an act of bankruptcy, **held** not to make the execution creditor "a creditor holding a security upon the property" of the debtor within s. 12 of the Bankruptcy Act, 1869, and not to bind the debtor's goods so as to prevent them passing to the trustee in bankruptcy appointed under the debtor's petition presented before seizure of the goods.

Notes. Section 12 of the repealed Bankruptcy Act, 1869, has been replaced with amendments by s. 7 of the Bankruptcy Act, 1914, and by s. 40 of that Act execution has to be completed before the date of the receiving order and before notice, etc. (2 HALSBURY'S STATUTES (2nd Edn.) 336, 376).

Explained and Distinguished: *Re Jones, Ex parte Jones* (1875), 33 L.T. 61. Distinguished: *Re Watt, Ex parte Joselyne* (1878), 8 Ch.D. 327. Applied: *Lee v. Dangar, Grant & Co.*, [1892] 1 Q.B. 231. Referred to: *Emanuel v. Bridger* (1874), L.R. 9 Q.B. 286; *Lowe v. Blakemore* (1875), L.R. 10 Q.B. 485; *Re Balbirnie, Ex parte Jameson* (1876), 3 Ch.D. 488; *Re Hoare, Ex parte Nelson* (1880), 14 Ch.D. 41; *Re Clarke*, [1898] 1 Ch. 336; *Davies v. Thomas*, [1900] 2 Ch. 462; *Re A Debtor, Ex parte Smith*, [1902] 2 K.B. 260; *The James W. Elwell*, [1921] P. 351.

As to the rights of execution creditors as against trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 541 et seq.; and for cases see 5 DIGEST (Repl.) 867 et seq.

Cases referred to:

- (1) *Re Hall, Ex parte Rocke* (1871), 6 Ch. App. 795; 40 L.J.Bey. 70; 25 L.T. 287; 19 W.R. 1129, L.C. & L.JJ.; 5 Digest (Repl.) 869, 7295.
- (2) *Slater v. Pinder* (1871), L.R. 6 Exch. 228; 40 L.J.Ex. 146; 24 L.T. 631; 35 J.P. 744; 19 W.R. 778; affirmed (1872), L.R. 7 Exch. 95; 41 L.J.Ex. 66; 26 L.T. 482; 36 J.P. 532; 20 W.R. 441, Ex. Ch.; 5 Digest (Repl.) 868, 7292.
- (3) *Wilbraham v. Snow* (1670), 2 Keb. 588; 1 Lev. 282; 1 Mod. Rep. 30; 1 Sid. 438; 2 Wms. Saund. 47; 84 E.R. 370; 41 Digest 121, 767.

Also referred to in argument:

- Giles v. Grover* (1832), 9 Bing. 128; 6 Bli. N.S. 277; 1 Cl. & Fin. 72; 2 Moo. & S. 197; 181 E.R. 563, H.L.; 41 Digest 120, 762.
- Payne v. Drew* (1804), 4 East, 523; 102 E.R. 931; sub nom. *Paine v. Drew*, 1 Smith, K.B. 170; 21 Digest (Repl.) 562, 590.
- Hutchison v. Johnston* (1787), 1 Term Rep. 729; 99 E.R. 1346; 21 Digest (Repl.) 561, 575.
- Woodland v. Fuller* (1840), 11 Ad. & El. 859; 113 E.R. 641; 5 Digest (Repl.) 868, 7288.
- Edwards v. Scarsbrook* (1862), 3 B. & S. 280; 1 New Rep. 24; 32 L.J.Q.B. 45; 7 L.T. 275; 9 Jur.N.S. 537; 11 W.R. 33; 122 E.R. 106; 5 Digest (Repl.) 868, 7291.
- Hobson v. Thelluson* (1867), L.R. 2 Q.B. 642; 8 B. & S. 476; 36 L.J.Q.B. 302; 16 L.T. 837; 15 W.R. 1037; 5 Digest (Repl.) 1169, 9438.
- Boyle v. Blackstock* (1863), 8 L.T. 641; 5 Digest (Repl.) 1173, 9468.

A *Re Anderson, Ex parte Anderson* (1870), 5 Ch. App. 473; 39 L.J.Bcy. 49; 22 L.T. 361; 18 W.R. 715, L.J.; 4 Digest (Repl.) 45, 389.
Re Barron, Ex parte Potter (1864), 3 De G.J. & Sm. 240; 34 L.J.Bcy. 46; 11 L.T. 435; 11 Jur.N.S. 49; 13 W.R. 189; 46 E.R. 628, L.C.; 4 Digest (Repl.) 55, 464.

B **Appeal** by an execution creditor from an order of the Chief Judge in Bankruptcy reversing a decision of the registrar of Tredegar County Court.

On Nov. 3, 1871, Williams recovered judgment in an action in the Chester County Court for £17 2s. 2d. against Davies, and on the following day he recovered judgment in another action in the same court for £9 17s. 6d. On Nov. 4, 1871, two warrants of execution were issued by the registrar of the Chester County Court, and were forwarded by post to the registrar of Tredegar County Court, within which district the debtor resided and carried on business. **C** At 11.30 a.m. on Nov. 7, 1871, these warrants were re-issued by the registrar of the Tredegar County Court, and delivered to the high bailiff of the court, who ordered an under bailiff to go at once to the debtor's house and levy upon his goods. At 12.30 p.m. on the same day the debtor presented a petition in the **D** Tredegar County Court for liquidation by arrangement, and obtained at the same time an injunction restraining Williams from proceeding with his execution, and the appointment of a receiver. The debtor's house was at Beaufort, at a considerable distance from Tredegar, and the under bailiff did not arrive there till 4.30 p.m., when he found the receiver in possession.

On Nov. 27, 1871, the registrar of the Tredegar County Court, on the application **E** of the execution creditor, made an order dissolving the injunction, and authorising the bailiff to seize and sell the debtor's goods, chattels, and effects under the two warrants. The bailiff was then paid out under protest. On Nov. 28, 1871, a trustee was appointed, and he appealed from the order dissolving the injunction, and the Chief Judge in Bankruptcy reversed the decision of the county court judge, and restored the injunction. From this decision the execution creditor **F** appealed. The goods had been sold by arrangement, and the proceeds of sale paid into court.

Thesiger and Finlay Knight for the execution creditor.

De Gex, Q.C., and Bagley for the trustee.

G **MELLISH, L.J.**—The question in this case is whether an execution creditor, who under a judgment of the Chester County Court had a warrant issued to the bailiff of the Tredegar County Court enabling him to seize the goods of the debtor, was entitled to the goods in priority to the trustee under the liquidation, the warrant having been issued prior to the presentation by the debtor of his petition for liquidation, which was an act of bankruptcy. It was admitted that the **H** execution creditor could have no greater right under the warrant of a county court than under the writ of one of the superior courts. He might possibly have a less right, but he could not have a greater.

The question, therefore, is a general one, namely, whether when a writ of *fi. fa.* is delivered to the sheriff, so as to bind the goods of the debtor under s. 16 of the Statute of Frauds (1677), before the commission of an act of bankruptcy by the **I** debtor, the execution creditor is a creditor holding a security upon the property of the debtor, and has a better title to the goods than the trustee. This question depends upon what is the true construction of s. 12 of the Bankruptcy Act, 1869, which is in the following words :

“Where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt, except in manner directed by this Act. But this

section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realise or otherwise deal with such security in the same manner as he would have been entitled to realise or deal with the same if this section had not been passed."

It is perfectly clear that the present case comes within the first part of that section, for proceeding to seize the goods of the debtor would clearly be enforcing a remedy against his property. The question is whether the present case comes within the proviso at the end of the section.

It was held by the full Court of Appeal in *Re Hall, Ex parte Roche* (1), and by the Court of Exchequer in *Slater v. Pinder* (2), that where, in the case of a non-trader, the sheriff had actually seized the goods before the commission of an act of bankruptcy by the debtor, the execution creditor was entitled to them as against the trustee. Counsel for the execution creditor contended that seizure made no difference, because even in the case of a seizure the property in the goods continues in the debtor until sale. It is, therefore, necessary to consider what difference, if any, the seizure of the goods makes.

At common law the goods were said to be bound from the time of the teste of the writ. That meant that the sheriff was entitled to seize the goods which belonged to the debtor at the time of the issuing of the writ, if he could find them within his bailiwick, and no dealing with the goods between the issuing of the writ and the seizure could affect his right. The Statute of Frauds (1677), s. 16, made this difference in the common law, that the goods were not bound until the delivery of the writ to the sheriff. The debtor's goods might, however, be seized if he died before the writ was delivered to the sheriff, because as against the debtor himself the goods were still bound as from the issuing of the writ. Yet the sheriff, on the writ being delivered to him, had only a right to seize the goods; he had no property in them. This was clearly shown by the fact that the debtor might conceal the goods or remove them from the bailiwick without committing an illegal act. But after the sheriff had seized the goods he had a special property in them; he had power to sell them, and he could maintain trover for them. This was decided as long ago as *Wilbraham v. Snow* (3).

The effect of the seizure, therefore, is that the sheriff becomes absolutely liable to the execution creditor for the value of the goods, and he could maintain trover for them. Another effect of seizure is that, although until it was effected there might be a number of writs of *fi. fa.* equally enforceable against the same goods, yet when there had been a seizure under one writ, no other writ could be enforced until the first was satisfied. By seizure, therefore, the sheriff acquires a qualified property in the goods, with a power of sale, like the property acquired by a factor. The debtor might, however, always obtain the goods again by tendering the amount of the judgment debt and costs. The right of the sheriff is different from that of a mortgagee, for in the case of a mortgage the entire property is in the mortgagee at law, and the mortgagor must go into equity to redeem. The full Court of Appeal in *Re Hall, Ex parte Roche* (1), and the Court of Exchequer in *Slater v. Pinder* (2), held that by seizure the execution creditor acquired a security on the property of the debtor.

The question to be decided in the present case is whether the execution creditor had also a security upon the property of the debtor before seizure. Possibly the proviso at the end of s. 12 of the Bankruptcy Act, 1869, might, without any great straining of the words, be held to extend to that. But it is necessary to look at the whole course of legislation on the point. In the Bankruptcy Act, 1623, it was provided that, until seizure, the title of the assignee in bankruptcy must prevail over that of the execution creditor. That provision was re-enacted in all the subsequent Bankruptcy Acts until the Bankruptcy Act, 1849, which provided by s. 184 that there must be both seizure and sale. The law, then, having for so long a period been that seizure was necessary and then having been

A altered so as to make sale as well as seizure necessary, the question arises whether the legislature intended by s. 12 of the Bankruptcy Act, 1869, to make such a great alteration in the law as to give the execution creditor a superior right to the trustee in the absence of seizure. There does not seem to be the least reason for supposing that the legislature had any such intention, nor does the literal meaning of the language of s. 12 of the Bankruptcy Act, 1869, seem to be in
 B favour of such a construction. The words "to realise such security" can only properly be applicable where the creditor has acquired some property, and in my opinion the words were only intended to apply where the creditor has an actual right to the goods themselves. I am, therefore, of the opinion that in the present case the trustee is entitled to the money arising from the sale of the goods, and the appeal must be dismissed with costs.

C

JAMES, L.J., concurred.

Appeal dismissed.

D

KING v. ENGLAND

E [COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Blackburn and Mellor, J.J.), January 12, 1864]

[Reported 4 B. & S. 782; 3 New Rep. 376; 33 L.J.Q.B. 145;
 9 L.T. 645; 28 J.P. 230; 10 Jur.N.S. 634; 12 W.R. 308;
 122 E.R. 654]

F *Distress—For rent—Sale of goods distrained—"Sale"—Goods taken by landlord at appraised value—Goods remaining property of tenant till sale.*

The right of property in goods distrained for rent remains in the tenant until sale, and the taking of such goods to himself, at the appraised value, in discharge of the rent by the landlord, is not equivalent to a sale.

G

A tenant assigned certain goods to the defendant by bill of sale. Subsequently, the tenant fell into arrears with her rent, and her landlord levied a distress and seized the goods which were duly appraised. The landlord then gave the goods to the plaintiff, his daughter, but the defendant seized them under his bill of sale and the plaintiff sued for them in action of trover.

H

Held: until there was a sale the property in the goods remained in the tenant and did not pass to the landlord; since there was no sale the landlord could not give them to the plaintiff who, therefore, had no property in them; and her action failed.

Notes. The right of a landlord to sell goods distrained was given by the Distress for Rent Act, 1689.

I Approved: *Moore, Nettlefold & Co. v. Singer Manufacturing Co.*, [1904-7] All E.R. Rep. 810. Followed: *Plasycoed Collieries Co. v. Partridge, Jones & Co.*, [1912] 2 K.B. 345.

As to mode of sale after distress in general, see 12 HALSBURY'S LAWS (3rd Edn.) 146; and for cases see 18 DIGEST (Repl.) 342 et seq. For the Distress for Rent Act, 1689, see 6 HALSBURY'S STATUTES (2nd Edn.) 143 et seq.

Cases referred to in argument:

Lyon v. Weldon (1824), 2 Bing. 334; 9 Moore, C.P. 629; 3 L.J.O.S.C.P. 27; 130 E.R. 334; 18 Digest (Repl.) 331, 778.

Wallace v. King (1788), 1 Hy. Bl. 13; 126 E.R. 9; 18 Digest (Repl.) 385, 1372.

Rodgers v. Parker (1856), 18 C.B. 112; 27 L.T.O.S. 157; 20 J.P. 358; 2 Jur.N.S. 496; 4 W.R. 545; 139 E.R. 1308; sub nom. *Rogers v. Parker*, 25 L.J.C.P. 220; 18 Digest (Repl.) 342, 900.

Jacob v. King (1814), 5 Taunt. 451; 1 Marsh. 135; 128 E.R. 765; 18 Digest (Repl.) 363, 1146.

Moore v. Pyrke (1809), 11 East, 52; 103 E.R. 923; 18 Digest (Repl.) 292, 406.

Rule Nisi obtained by the defendant to enter a nonsuit in an action of trover brought by the plaintiff to recover certain articles of household furniture in the possession of the defendant.

At the trial before WIGHTMAN, J., in 1863, it appeared that the goods in question were included in a bill of sale given by the mother of the plaintiff to the defendant for money advanced, and that subsequently being in arrear for her rent, her landlord levied a distress upon them, and they were duly appraised; the mother and daughter being in bad circumstances, the landlord took possession of the goods so appraised for his rent, and gave them to the daughter (the plaintiff) in order that she and her mother might furnish lodgings with them. These goods being subsequently seized by the defendant under his bill of sale, the plaintiff (the daughter) brought the present action. A verdict was entered for the plaintiff for the value of the goods, leave being reserved to enter a nonsuit. The defendant obtained a rule nisi accordingly on the ground that the property in the goods in question had re-vested in the plaintiff.

Prentice showed cause against the rule.

Serjeant Ballantine and *Bullar* supported the rule.

SIR ALEXANDER COCKBURN, C.J.—I think the rule must be made absolute. By the common law a landlord had no right to sell goods taken as a distress; the property seized was in the nature of a pledge. By the Distress for Rent Act, 1689, s. 2, after certain preliminaries are complied with, he may now sell the property to satisfy the rent and charges, and until that sale takes place, the property, though in his possession, is not out of the tenant. As the property does not pass until there is a sale, the question is whether there was a sale. What took place was this. Goods, having been seized for rent, are appraised, and, instead of being sold, the landlord says: "I'll take them at the price," and he does so and gives them to the daughter. I cannot look upon this as a sale. The statute says, that after the goods have been appraised the parties shall proceed to sell them for the best price that can be got for them. This does not authorise the party distraining to take the goods to himself; the Act does not use language that will authorise any such proceeding. Until there is a sale, the goods remain in the ownership of the tenant. As, therefore, there was nothing like a sale, the landlord could not give them to the plaintiff, who, therefore, was not the real owner.

BLACKBURN, J.—The property seized remains the property of the tenant until sale, and he would have a right to bring trover for them. It is plain that, although the landlord had a right to retain them, he had no right to hand them over to another.

MELLOR, J., concurred.

Rule absolute.

A

BALL v. RAY

[COURT OF APPEAL IN CHANCERY (Lord Selborne, L.C., James and Mellish, L.JJ.),
December 18, 1873]

B

[Reported 30 L.T. 1; 22 W.R. 283]

Court of Appeal—Damages—Assessment by judge—Test for intervention by appellate court—Court below acting on wrong principle.

The Court of Appeal will not entertain an appeal from an order of the court below assessing damages unless it is shown that the court below has acted on a wrong principle in assessing the quantum of damages.

C

Notes. As to appeal as to assessment of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 306; and for cases see 17 DIGEST (Repl.) 193 et seq.

Cases referred to:

- (1) *Penn v. Bibby* (1866), 2 Ch. App. 127; sub nom. *Penn v. Bibby*, *Penn v. Jack*, 36 L.J.Ch. 455; 15 L.T. 399; 15 W.R. 208, L.C.; 36 Digest (Repl.) 696, 441.
(2) *Gray v. Turnbull* (1870), L.R. 2 Sc. & Div. 53.

D

Appeal by the plaintiff from a decision of LORD ROMILLY, M.R., as to the amount of damages awarded to him in an action brought by him to restrain a nuisance occasioned by the defendant having made certain changes in his stable, which was separated from the plaintiff's dining room by a party wall only. The Master of the Rolls dismissed the bill with costs, but on appeal the Court of Appeal in Chancery granted an injunction against the continuance of the nuisance, and directed an inquiry as to damages. The case went back to the court below, for the purpose of making inquiry as to damages. The plaintiff, being dissatisfied with the amount of damages awarded to him, appealed.

E

Higgins, Q.C., and *J. Chester* for the plaintiff.

Sir Richard Bagge, *Q.C.*, and *A. T. Watson* for the defendant.

LORD SELBORNE, L.C.—I am of opinion that there is no reason to disturb the judgment of the Master of the Rolls. It is a mere question of the quantum of damages, and certainly this court, when it directed the inquiry as to damages, meant that a fair compensation should be paid to the plaintiff, for the loss which he had sustained. They did not mean that vindictive or speculative damages should be granted to him. It is not shown that the Master of the Rolls in deciding upon the quantum of damages has applied to the measure of those damages any wrong principle. It is not shown that the actual amount of damages were or could be demonstrated to the court. On the contrary it is admitted that the plaintiff kept no books whatever, was not able to prove as a fact what he did receive and what he did not receive, and as against the general evidence which he gave, partly on his own information, confirmed by his housekeeper, swelling the amount of damages to a very large sum, there was to be opposed his own statement not being on oath, but under the obligation of law when he was bound to make a true statement, putting the profits of this business at a lower amount than that allowed him by the Master of the Rolls.

F

In that state of things it was surely in an eminent degree for the court to discharge the office of a jury; and it would be easy to refer to authorities such as *Penn v. Bibby* (1) before LORD CHELMSFORD, L.C., and *Gray v. Turnbull* (2) in the House of Lords, and to numerous cases before the Privy Council, which show that where upon questions of fact the court appears to have fairly discharged the same duty which a jury would have to discharge upon conflicting or doubtful evidence, it will be a very difficult thing to induce the Court of Appeal to go into

the merits for the purpose of forming that judgment upon the balance of the evidence which possibly might have been formed if it had come before them in the first instance. If that rule has been established and held a satisfactory one as to questions of fact in general which stand in the position which I have described, it appears to me to be of still greater importance to establish and maintain a similar rule as to mere questions of the quantum of damages. In all cases in which you deal with the verdict of a jury, or of a judge in this court, or at common law, giving a verdict properly so called without a jury under the statute which enables that to be done, the verdict is conclusive unless a principle can be shown in respect of which there is miscarriage, and as to which it ought by a proper proceeding to be disturbed. I think the analogy of that ought to be applied in this court to all these questions of damages, and that if the judge has settled the amount of damages and it cannot be shown that there are grounds for interfering with his judgment, which would be applicable to the verdict either of a jury or of a judge, properly so called, the Court of Appeal ought not to disturb it.

JAMES, L.J.—I entirely concur in the principles which the Lord Chancellor has laid down. I think the evil would be intolerable to suitors in this court, if upon every question of damages there was to be an appeal to the Court of Appeal, to see whether they would take a different view of the facts from that which the court below has taken upon a mere question of fact, and if from that decision of the Court of Appeal there could be an appeal to the House of Lords to see whether they did or did not concur with the concurrent decision of the two courts, and to decide which of the two had been right in the mere estimate of damages. This case is a striking illustration of what the mischief would be. How is it possible to say to what extent one court would believe, or ought to believe, the evidence as to what the exact receipts of a man were from a lodging house, or the exact profits made from going to one market or another, and catering, and making a profit from boarding his lodgers, depending entirely upon that which before a comparatively recent Act was wholly inadmissible—the plaintiff's own testimony—as to which I have often had occasion to say that when a plaintiff relies upon testimony of his own, which is not capable of contradiction, it is very necessary for the court to be very careful, how it gives implicit credence to such testimony. The nature of the testimony here shows how very dangerous it would be, and how very mischievous it would be to the suitors if appeals of this kind were allowed to be brought.

MELLISH, L.J.—I am of the same opinion. It is quite clear to my mind that in a case like this, if it happened in a court of law, there would not be the slightest ground for disturbing the verdict of the jury. The jury always do exercise a certain discretion in cases of this kind, and never think themselves bound to follow the exact estimate which a plaintiff may choose to give. In my opinion it would be a very great misfortune if this court were to assess damages upon a higher scale than juries ordinarily do.

Appeal dismissed.

A

Re GREGSON'S ESTATE

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), July 28, November 4, 23, 1864]

B

[Reported 2 De G.J. & Sm. 428; 5 New Rep. 99; 34 L.J.Ch. 41; 11 L.T. 460; 10 Jur.N.S. 1138; 13 W.R. 193; 46 E.R. 441]

Will—Real estate—Devise—Gift to tenant for life, devisees and survivors—Division of fund among survivors of tenant for life.

C

Where realty is given to a tenant for life and at his death to devisees in remainder or the survivors of them, the fund should be divided among such only of the devisees in remainder as survived the tenant for life.

Notes. Considered: *Richardson v. Power* (1865), 19 C.B.N.S. 780. Referred to: *Marriott v. Abell* (1869), L.R. 7 Eq. 478; *Re Maunder, Maunder v. Maunder*, [1902] 2 Ch. 875.

D

As to ascertainment of survivors at date of distribution, see 39 HALSBURY'S LAWS (3rd Edn.) 1047-1048; and for cases see 44 DIGEST 1190 et seq.

Cases referred to:

E

- (1) *Doe d. Long v. Prigg* (1828), 8 B. & C. 231; 2 Man. & Ry. K.B. 338; 6 L.J.O.S.K.B. 296; 108 E.R. 1030; 44 Digest 1196, 10356.
- (2) *Wilson v. Bayly* (1760), 3 Bro. Parl. Cas. 195; 1 E.R. 1265, H.L.; 44 Digest 1052, 9050.
- (3) *Cripps v. Wolcott* (1819), 4 Madd. 11; 56 E.R. 613; 44 Digest 1187, 10267.
- (4) *Stringer v. Phillips* (1730), 1 Eq. Cas. Abr. 293; 21 E.R. 1054; 14 Digest 1188, 10280.
- (5) *Rose d. Vere v. Hill* (1766), 3 Burr. 1881; 97 E.R. 1149; 44 Digest 978, 8332.
- (6) *Garland v. Thomas* (1804), 1 Bos. & P.N.R. 82; 127 E.R. 389; 44 Digest 978, 8334.
- (7) *Edwards v. Symons* (1815), 6 Taunt. 213; 2 Marsh. 24; 128 E.R. 1016; 44 Digest 1188, 10284.
- (8) *Buckle v. Fawcett* (1845), 4 Hare, 536; 5 L.T.O.S. 236; 9 Jur. 891; 67 E.R. 760; 44 Digest 1192, 10312.
- (9) *Taylor v. Beverley* (1844), 1 Coll. 108; 13 L.J.Ch. 240; 2 L.T.O.S. 516; 8 Jur. 265; 63 E.R. 342; 44 Digest 1191, 10309.
- (10) *Wordsworth v. Wood* (1847), 1 H.L.Cas. 129; 9 L.T.O.S. 489; 11 Jur. 593; 9 E.R. 702, H.L.; 44 Digest 1192, 10317.
- (11) *Young v. Robertson* (1862), 4 Macq. 314; 8 Jur.N.S. 825, H.L.; 44 Digest 1189, 10293.

H

Appeal from an order of PAGE-WOOD, V.-C., on a petition to take out of court, a fund as to which the appellants were survivors of six devisees in remainder and the respondents were the devisees in remainder under the will of James Gregson.

I

James Gregson, the testator, devised real estate to his wife for her life, and upon her decease directed that the estate should be shared amongst twelve persons, whom he named, "or the survivors of them." All the twelve were living at his death, but several of them died before his widow, and the corporation of Liverpool, having purchased a part of the property, and paid the purchase-money into court, a question arose upon a petition to take the fund out of court, whether the persons entitled were those only who survived the widow, or whether the representatives of those who survived the testator, but died before the widow, were entitled to a share of the fund.

Rolt, Q.C., and Turner for the survivors of the devisees in remainder.

Sir Hugh Cairns, Q.C., and *Kay* for the representatives of the devisees in remainder who died in the lifetime of the tenant for life.

North for the corporation of Liverpool.

Cur. adv. vult.

Nov. 23, 1864. **KNIGHT-BRUCE, L.J.**—The controversy in the present case is as to the construction to be put on the word “survivors” contained in the will, dated in the year 1832, of Mr. James Gregson, who died several years ago, survived by all the persons mentioned in it.

The will was thus :

“I, the undersigned James Gregson, junior, do hereby bequeath unto my wife Margaret Gregson all moneys, debts, furniture, plate, etc., that I may die possessed of, for her own sole use and benefit. I also bequeath unto my said wife Margaret Gregson the whole of my freehold property in Sir Thomas’s Buildings and in Sir Thomas’s Court, and also the whole of my freehold property situated in Combermere Street, Toxteth Park, and I hereby authorise her to have the benefit of all the rents arising from the above property situated in Sir Thomas’s Buildings and in Sir Thomas’s Court, in the borough of Liverpool, and in Combermere Street, in the township of Toxteth Park, after paying the interest on the mortgages on the said properties, so long as she doth live, and on my wife Margaret Gregson’s decease my will is, that the whole of the above freehold properties, situated as aforesaid, shall be shared, share and share alike, amongst the following persons, or the survivors of them, viz., Edward Williamson, Jane Williamson and Betsy Williamson, of Kirkham in the Hyde, also my nephews and nieces, Alice Garlic, James Garlic, Daniel Garlic, John Garlic, and George Garlic, also — Cort, and — Cort, also my sisters Flavilla Gregson and Alice Gorton. And I further authorise my wife Margaret Gregson to sell my freehold property situated in Combermere Street, Toxteth Park, should she find that it would be advantageous to the estate, and the proceeds, after paying the mortgage, to be appropriated to the sole use and benefit of my freehold property situated in Sir Thomas’s Buildings and Sir Thomas’s Court, in the borough of Liverpool, and I hereby appoint my said wife Margaret Gregson my sole executrix to this my last will and testament.”

The testator’s widow has lately died, having outlived six, and been outlived by the other six of the twelve persons who, besides herself, were named in it as devisees of his real estate. On her death, the question I have already mentioned has arisen between the surviving six and the representatives of the other six devisees in remainder, the surviving six claiming the whole, and the representatives of the other six disputing that claim, the dispute turning, I repeat, on the meaning of the word “survivors” as used in the will.

If the instrument is read and construed according to the ordinary rules of the English language as spoken and written by ordinary persons on ordinary occasions, the word “survivors” must be understood in the manner desired by the appellants, that is to say, as excluding the representatives of the deceased six. But it is said against the appellants, that the rules of English law concerning real estate, and especially concerning contingent remainders in real estate, as those rules existed before and when the will was made, render it incumbent on the court to lean in favour of ascribing to the testator an intention to give to the twelve devisees in remainder respectively, if surviving him, interests vested at his death, and not as to any of them contingent interests, or interests liable to be divested after his death. In support of this proposition *Doe d. Long v. Prigg* (1) and many other authorities have been cited. It has not, however, nor could it reasonably have been, denied that the intention ascribed to the testator by the

A appellants was an intention which he had a right by law to entertain and effectuate if he thought fit; or that, if he had inserted in the will such a clause as this, "It is to be observed that, by the word 'survivors' I mean such and only such of the twelve devisees in remainder herein named as shall outlive both myself and my wife," the appellants would have been entitled to what they seek.

B My opinion is that the will in its actual state as plainly exhibits and declares the testator's meaning and intention, in using the word "survivors," to have been what the appellants contend, as if such a clause as I have just suggested had been inserted in it. The testator had a right to say, and has I think said, that those of the twelve who should die, leaving his wife, should be excluded in favour of those of the twelve who should survive both her and the testator himself; and, if we are contradicting any authority in so holding, I consider
C that we are not contradicting *Wilson v. Bayly* (2) or any other authority binding on the court.

TURNER, L.J.—The question to be decided upon this appeal depends upon the construction to be put upon the will of James Gregson the younger. My
D learned brother has stated the substance of the will, and I will only add that it contains a clause :

"And I further authorise my wife, Margaret Gregson, to sell my freehold property, situated in Combermere Street, Toxteth Park, should she find that it would be advantageous to the estate, and the proceeds, after paying the mortgage, to be appropriated to the sole use and benefit of my freehold
E property situated in Sir Thomas's Buildings and Sir Thomas's Court, in the borough of Liverpool."

The facts, as they have been stated by my learned brother, were that all the twelve devisees who were named in the will survived the testator, and six of them died in the lifetime of the wife, the tenant for life. The question has
F come into this court in consequence of the Liverpool corporation having, under the powers of the Liverpool Improvement Act, incorporated with the Lands Clauses Consolidation Act, taken part of the property devised by the will, the proceeds having been paid into court, and invested in £1,856 Consolidated Annuities, which were in future to be disposed of by the court.

The widow died on Oct. 29, 1863, and a petition having been presented soon
G after her death for the distribution of the fund, the vice-chancellor, by the order made upon this petition, declared that according to the true construction of the testator's will, and in the events which had happened, the devised estates vested at the death of the testator, subject to the life-interest therein of the widow in the twelve persons named in the will, in equal shares, as tenants in common, and he ordered the fund to be distributed accordingly, and he also ordered the
H costs to be paid by the corporation of Liverpool. It is from this order that the appeal is brought. It is brought by several of the persons named in the will who survived the widow, the tenant for life, contending that the declaration contained in the order and the directions consequent upon it are erroneous, and that the fund ought to be divided amongst such only of the twelve persons named as
I survived the tenant for life.

The question which thus arises between the persons who survived the testator and those who survived the tenant for life certainly cannot fairly be stated otherwise than as a question of doubt and difficulty, having regard to the state of the authorities upon it; but it may as certainly be stated that it is in all cases purely and simply a question of intention. The sole question is, Did the testator intend to give the property in question to such of the twelve persons named in his will as should survive him, or to such of them only as should survive both him and his wife, the tenant for life under his will? This question must of course depend mainly, if not wholly, upon the construction to be put upon the particular

devise contained in the will. The terms of the devise have been already stated. A
The doubt which arises upon it is, to what period did the testator intend the
survivorship to be applied—to his own death, or to the death of his wife, the
tenant for life?

I will first consider this point without reference to the authorities. The
principle which in this point of view ought to be applied to the determination
cannot, as I apprehend, be disputed. The words of a devise are to be construed B
according to their common and ordinary meaning, and in the sense in which
they would be understood by persons of common understanding. The word
“survivors” is a term of relation. It must have reference to some particular
period of time. It is in this will placed in immediate connection with the death
of the testator’s widow, the tenant for life under the will,

“and on my wife’s decease my will is, that the above freehold property shall
be divided, share and share alike, among the following persons, or the
survivors of them.” C

No other period of time except that of the death of the wife is referred to by
the testator. There is not in this clause, or indeed in any part of the will, any
reference to the period of the testator’s own decease. According to the ordinary D
and grammatical meaning of the word “survivors,” it ought therefore, as it
seems to me, to be referred to the death of the tenant for life. Besides, every
testator must *prima facie* be taken to assume that his devisees will survive him.
The very fact of his devising to them proves that he is acting upon this assumption,
for he must know that his will will take effect at his death, and that it cannot E
take effect in favour of persons who have died in his lifetime.

Where, therefore, a testator uses words of survivorship with reference to his
devisees, the words ought not, as I conceive, to be construed as referring to the
event of the devisees dying in the testator’s lifetime, if there be any other period
to which they can reasonably be referred. If, indeed, the devise be immediate
the words must necessarily be referred to death in the testator’s lifetime, for in F
that case there is no other period to which they can be referred, and the testator
by using the words of survivorship shows that he had in contemplation that the
devisees might die in his lifetime; but if the devise be not immediate, if there
be an estate created prior to the devise in which the words of survivorship are
contained, it is surely more reasonable not to confine those words to the event
of the devisees dying in the testator’s lifetime—an event which the testator is G
prima facie to be assumed not to have had in his contemplation. Considering
the case, therefore, without reference to the authorities, it seems to me that,
according to the true construction of this will, the property in question ought
to have been held to belong to such only of the devisees in remainder as survived
the tenant for life, and that the decision under appeal, if to be supported at all,
must be supported not upon principle but upon the authorities. It is upon the H
authorities, indeed, that the vice-chancellor has rested his decision.

How then does the case stand in this point of view? It is now perfectly well
settled that in dispositions of personal estate words of survivorship are to be
construed as referring to the period of distribution. This is established by
Cripps v. Wolcott (3), and a long train of decisions following upon that case, I
and it was not even attempted to be denied at the Bar that this is the state
of the law as to personal estate; but it was said that as to real estate the law is
otherwise, and that in cases of devises of real estate words of survivorship are
to be referred not to the period of distribution, but to the period of the testator’s
death, and several cases were referred to in support of this position. The cases on
which reliance was placed were *Stringer v. Phillips* (4); *Rose d. Vere v. Hill* (5);
Wilson v. Bayly (2); *Garland v. Thomas* (6); *Edwards v. Symons* (7); and
Doe d. Long v. Prigg (1); and they are a fair sample of the numerous cases in
which the same conclusion has been arrived at by the courts of law, for it cannot

A be denied that the courts of law have, as to real estate, leaned strongly in favour of the vesting at the death of the testator, whilst the courts of equity have, as to personal estate, leaned as strongly to the vesting at the period of division. The cases upon this subject are indeed irreconcilable, and in saying so I am only repeating what has been frequently said by other judges. It is to be observed, however, as I have already said, that the question is one of intention, and that in the great majority of the cases there has been some context in the will which has been held to affect the decision.

In *Rose d. Vere v. Hill* (5) and *Wilson v. Bayly* (2), for instance, there were other dispositions in the will which were taken, in the one case in the judgment, and in the other in the reasons of appeal, to support the vesting at the death of the testator. In *Stringer v. Phillips* (4) and *Doe d. Long v. Prigg* (1), however, there does not appear to have been any such context; and it was upon these cases, and especially upon the latter of them, the respondents mainly relied, but these cases do not stand unaffected by adverse decisions. In *Buckle v. Farecett* (8), a case in which both real and personal estate was involved, SIR JAMES WIGRAM, V.-C., notwithstanding *Doe d. Long v. Prigg* (1) was cited, held that the survivorship ought to be referred to the period of division; and in *Taylor v. Beverley* (9), which, however, was a case of personal estate only, my learned brother came to a similar conclusion; and what is more important, the House of Lords, in *Wordsworth v. Wood* (10), pointedly disapproved of *Doe d. Long v. Prigg* (1). Whether this disapproval was meant to apply generally, or to apply only to survivorship being referred to the death of the testator in the case of a devise to a class, does not indeed appear; and I do not think, therefore, that too much reliance ought to be placed upon the dicta in *Wordsworth v. Wood* (10); but in the subsequent case of *Young v. Robertson* (11) the House of Lords appears to me to have held very decidedly that the general rule must be taken to be that survivorship is to be referred to the period of distribution.

In this almost painful conflict of authority we must consider the reasons of the conflicting decisions. It is plain enough upon what grounds the decisions in the case of personal estate have proceeded. They are founded, and for the reasons I have given they are, in my opinion, strongly founded, upon the intention of the testator, and we may confine our attention, therefore, to the decisions as to real estate. It was said for the respondents that the difference between those decisions and the decisions as to personal estate is attributable to the different sources from which the law as to real and as to personal estate is derived; but the governing question under both the laws is, and always has been, treated as being the intention of the testator. The law is subordinate to the intention. It comes into force only when the intention has been ascertained, and it cannot, as it seems to me, constitute the medium by which the intention is to be ascertained. If, indeed, it were settled that, in all cases of real estate survivorship was to be referred to the death of the testator, and that in all cases of personal estate survivorship was to be referred to the period of division, it might possibly be that a different intention ought to be imputed to the testator, according to the different natures of the property to which his disposition might apply; but, as every case in which the question arises depends upon the intention to be collected from the will, it certainly cannot be said that the law is settled to this extent. I quite agree with the observations which WIGRAM, V.-C., has made upon this point in *Buckle v. Farecett* (8).

The cases as to real estate in which the survivorship has been referred to the death of the testator appear to have proceeded upon one or other of these grounds, that, unless the vesting was held to take place at the death of the testator, the remainders would be contingent and would be liable to be destroyed; that, in order to avoid this, and other inconveniences incidental to the tenure of real estates, the law favours the early vesting of estates, and that the danger of lapse is avoided or diminished by the survivorship being referred to the period

of the testator's death. But the danger of lapse is common both to personal and to real estate; and as to the other ground I confess it is not satisfactory to my mind, that a forced and strained construction should be put upon the words of a testator's will in order to meet the inconveniences of tenure. I think that the words of a will ought to be construed according to their natural and ordinary meaning, unless they are qualified by context, or there be a settled rule of law affixing a different meaning to them.

It was objected to *Young v. Robertson* (11), to which I have already referred, that the case depended upon the law of Scotland, and that the disposition in that case was of real and personal estate blended together; but the judgment warrants me in saying that the law of Scotland, as to questions of this nature, is the same as the law of England, and no reliance is placed in the judgment upon the blending of the real and personal estates.

Upon the whole, looking to the intention of this testator (which, in my opinion, is the governing point of the case), and looking also to the state of the authorities, I cannot but think that, however this case might have been decided in times long gone by, it ought now to be decided in favour of the appellants, and that the fund in question ought to be divided amongst such only of the devisees in remainder as survived the tenant for life. Our order, therefore, will be in accordance with that view.

I have said nothing as to the effect of the power of sale given to the widow, because I prefer to decide this case upon broad and general grounds; but, having regard to some of the cases, I am not sure that the creation of this power does not furnish the appellants with further ground of argument. We were asked, on the part of the corporation of Liverpool, to alter the order as to the costs; but the corporation has not appealed, and, in my opinion, this is not a case in which the order, even if wrong (which I by no means say that it is), can be altered in their favour without an appeal on their part. The question of costs is entirely distinct from the question of right, and depends upon wholly different considerations. The costs of all parties to the appeal should, I think, be paid out of the fund.

Order accordingly.

BEAL AND ANOTHER v. SOUTH DEVON RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Sir Alexander Cockburn, C.J., Wightman, Crompton, Willes, Byles and Keating, JJ.), February 11, 1862, June 21, 1864]

[Reported 3 H. & C. 337; 11 L.T. 184; 12 W.R. 1115; 159 E.R. 560]

Carriage of Goods—Contract—Special contract—Railway—Special condition excluding liability for any cause whatsoever "other than gross neglect or fraud"—Want of reasonable care, skill, and expedition.

A railway company stipulated that fish would only be conveyed upon the railway on the special condition that the company would not be "responsible, under any circumstances, for loss of market, or for other loss or injury arising from delay or detention of train, exposure to weather, stowage, or from any cause whatever, other than gross neglect or fraud." Two consignments of fish were delivered late by the railway company, the consignors suffered loss in not being able to catch the early market, and they claimed damages from the railway company.

- A** **Held** (SIR ALEXANDER COCKBURN, C.J., and WIGHTMAN, J., dissenting): In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty, gross negligence included the want of that reasonable care, skill and expedition which might properly be expected from persons so holding themselves out and their servants; accordingly, the special condition was not unreasonable, and, while the company could properly exclude liability as insurers they could not exclude liability for want of care, skill and expedition.

C **Notes.** The Railway and Canal Traffic Act, 1854, has been repealed by the Transport Act, 1962 (42 HALSBURY'S STATUTES (2nd Edn.) 558), s. 43 (4) and Sched. 8 of which provides that s. 7 of the 1854 Act, which regulated the liability of railways and canals for negligence in the carriage of goods, should cease to have effect, and by s. 43 (6) railways are no longer liable as common carriers.

Approved: *Giblin v. McMullen* (1868), 5 Moo. P.C.C.N.S. 434. Considered: *Manchester, Sheffield and Lincolnshire Rail. Co. v. Brown* (1883), 8 App. Cas. 703. Referred to: *Grill v. General Iron Screw Collier Co.* (1866), Har. & Ruth. 654; *Lord v. Midland Rail. Co.* (1867), L.R. 2 C.P. 339; *Rooth v. North Eastern Rail. Co.* (1867), 15 L.T. 624; *Dickson v. Great Northern Rail. Co.* (1886), 18 Q.B.D. 176; *Sutcliffe v. Great Western Rail. Co.*, [1910] 1 K.B. 478.

As to special contract or condition, see 4 HALSBURY'S LAWS (3rd Edn.) 164 et seq.; and for cases see 8 DIGEST (Repl.) 60 et seq.

Cases referred to:

- E** (1) *Peek v. North Staffordshire Rail. Co.* (1863), 10 H.L.Cas. 473; 3 New Rep. 1; 32 L.J.Q.B. 241; 8 L.T. 768; 9 Jur.N.S. 914; 11 W.R. 1023; 11 E.R. 1109, H.L.; 8 Digest (Repl.) 60, 394.
(2) *Wyld v. Pickford* (1841), 8 M. & W 443; 10 L.J.Ex. 382; 151 E.R. 1113; 8 Digest (Repl.) 15, 73.

Also referred to in argument:

- F** *M'Manus v. Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327; 28 L.J.Ex. 353; 33 L.T.O.S. 259; 24 J.P. 4; 5 Jur.N.S. 651; 7 W.R. 547; 157 E.R. 865, Ex. Ch.; 8 Digest (Repl.) 64, 416.
Coggs v. Bernard (1703), 2 Ld. Raym. 909; 1 Com. 133; Holt, K.B. 13, 131; 1 Salk. 26; 3 Salk. 11; 92 E.R. 107; 8 Digest (Repl.) 18, 92.

G **Appeal** by the plaintiffs from a decision of the Court of Exchequer (POLLOCK, C.B., BRAMWELL and MARTIN, BB.), reported 5 H. & N. 875, making absolute a rule obtained by the defendants to set aside the verdict entered for the plaintiffs at the trial of the action by MARTIN, B., at the Devon Spring Assizes, 1860, and to enter a nonsuit in an action brought by the plaintiffs against the defendants for damages for breach of contract.

H The plaintiffs were fishmongers at Torquay and had for ten years sent fish from Torquay to Billingsgate for sale by the defendants' railway. The fish left Torquay by a train leaving at 6.15 p.m. and arrived at Paddington at 4.45 a.m. on the following morning in time for the early Billingsgate market at 6 a.m. The stationmaster at Torquay had been informed that it was necessary for the plaintiff's business for this to be done. A consignment of 499 baskets of sprats sent on Oct. 20, 1859, and a further consignment of 207 baskets of sprats sent on Oct. 21, 1859, both arrived at Paddington too late for the market and the plaintiffs suffered a loss of £70 12s. All fish was carried on special contracts and on each occasion of delivering the fish at Torquay station, and before it was loaded in the defendants' trucks, plaintiffs signed a printed "order and declaration," which contained the following clause:

"That fish will be conveyed upon the railway by special agreement and by particular trains, which are stated in the time bills of the company; also, on

the express condition that the sender or his agent shall, on delivering the fish at the company's station, or other place where the same shall be loaded on the company's carriages, sign the order and declaration subjoined:—And the said company for themselves, and also for the Great Western and Bristol and Exeter Railway Cos. give public notice that neither of the said companies will undertake to convey fish or other perishable articles, excepting under the general conditions published at the railway stations, in the train tables, or other notices of the said companies, excepting under the following special conditions, viz.: That neither of the said companies shall be responsible, under any circumstances, for loss of market, or for other loss of injury arising from delay or detention of train, exposure to weather, stowage, or from any cause whatever, other than gross neglect or fraud; and also that the consignee shall sign the subjoined order and declaration, and that his signature thereto shall in all cases constitute his special agreement to abide by these conditions and by the printed rules and regulations of the said company."

The following form, partly printed and partly written, was filled up and signed by one of the plaintiffs, at the foot of the above, on each occasion:—

"To the South Devon Railway Co.

Oct. 20, 1859.

Receive the undermentioned goods from Mr. Beale, of Torquay, to be conveyed, at the risk of the owner, by the South Devon Railway Co., subject to the above notice and generally to the terms and conditions specified in the published notices and train tables of the company.

(Signed) J. BEALE, sender."

There followed a description of the goods (baskets of fish) sent on each occasion, and the names and addresses of the consignees.

The plaintiffs contended that the defendants had agreed to deliver for reward the consignments of fish within a reasonable time and that they had not been so delivered. The defendants claimed that the fish was carried on special contracts the terms of which exonerated the defendants from liability except for gross negligence of which there was no evidence. At the trial the learned judge held that the contracts contained unreasonable conditions, and, therefore, the contracts were void under s. 7 of the Railway and Canal Traffic Act, 1854, and entered a verdict for the plaintiffs for the sum claimed. Leave was given to the defendants to move to set the verdict aside and enter a verdict or a nonsuit and a rule was obtained for this purpose.

By the Railway and Canal Traffic Act, 1854, s. 7:

"Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any horse, cattle, or other animal, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void. Provided always, that nothing herein contained shall be construed to prevent the said company from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable."

Collier, Q.C., S. Carter and Beresford for the plaintiffs.

Karslake, Q.C., and Montague Smith, Q.C. for the defendants.

Cur. adv. vult.

A June 21, 1864. **CROMPTON, J.**, read the following judgment of the court.— This case was argued before the Lord Chief Justice, my late brother WIGHTMAN, my brothers WILLES, BYLES, KEATING and myself. We delayed delivering our judgment until after the decision of the House of Lords in *Peck v. North Staffordshire Rail. Co.* (1).

B In the present case the question was whether the condition imposed by the company, and signed by the plaintiffs, with reference to the carriage of fish, was a reasonable condition within the provisions of the Railway and Canal Traffic Act, 1854. The condition restricted the liability of the company to the cases of gross neglect or fraud. We think that this was not an unreasonable condition with reference to the carriage of a perishable commodity, especially where, as in the present case, the company were liable to be called upon to carry large quantities at unexpected times, and where a very slight delay might create the loss of the market, or the entire or partial destruction of the goods consigned. In the case of a carrier, or other agent, holding himself out for the careful and skilful performance of a particular duty, gross negligence seems to include the want of that reasonable care, skill and expedition which may properly be expected from persons so holding themselves out, and their servants: see the note in 1 D SMITH'S LEADING CASES (5th Edn.), 189; also *Wyld v. Pickford* (2), and the other cases cited in the note. It is said that there may be difficulty in defining what "gross negligence" is, but I agree in the remark of the Lord Chief Baron in the court below, where he says:

E "There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them."

The authorities are numerous, and the reasonings of the judgments various, but for all practical purposes the rule may be stated thus: That the failure to exercise F reasonable care, skill and diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has; from the latter is reasonably expected care and diligence such as are usual, or, in the absence of usage, are to be expected by an analogy to the ordinary and usual course of similar business, and such skill as G he undertakes to have, namely, the skill usual in the business for which he receives payment. The company, therefore, properly speaking, exclude their liability as insurers, and not their liability for want of care, skill, and expedition. This is well illustrated by the case of actions against attorneys, where the law only attaches the liability in the case of gross negligence, which a jury has always been supposed competent to deal with under the direction of a judge; and it H seems to me that the degree of negligence which the law points out as that which is necessary to make a professional paid agent liable, is not an unreasonable species of negligence to be taken as a criterion of the reasonableness of the limit to which the carrier seeks to restrict his liability. We think that such a restriction leaves the individual sufficiently protected, as put by my brother KEATING in the course of the argument; and we think that, in looking at this enactment, the I real question is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly. The provision in question being a provision on that part of s. 7 of the Railway and Canal Traffic Act, 1854, which enacts that the companies shall, notwithstanding their notices, be liable for neglect or default, and qualifying that enactment, seems to me already to contemplate that the companies, by contracts which are reasonable and duly signed, under the Act, may protect themselves from some species of negligence; and we do not think that a condition which leaves them liable, in all cases where carriers are liable, for gross negligence is an unreasonable condition in

such a contract, as in the present case, for the carriage of so perishable a commodity as fish, under the circumstances in which they are called upon to carry it. **SIR ALEXANDER COCKBURN, C.J.**, does not agree in the conclusion to which the rest of the court have arrived, thinking that the decision in *Peek v. North Staffordshire Rail. Co.* (1) leads to a contrary conclusion; and I think that my late brother WIGHTMAN took a different view of the case from that which we take. The judgment, therefore, will be affirmed.

Appeal dismissed.

Re STRAY. Ex parte STRAY

[COURT OF APPEAL IN CHANCERY (Lord Cairns and Turner, L.JJ.), March 2, 1867]

[Reported 2 Ch. App. 374; 36 L.J.Bey. 7; 16 L.T. 250;
15 W.R. 600]

Bankruptcy—Act of bankruptcy—Fraudulent assignment—Estoppel—Assent by petitioning creditor.

S. being in embarrassed circumstances, a meeting of his creditors was held on Nov. 25, at which G., who afterwards became the petitioning creditor, attended. Nothing was done at the meeting, but it was stated that there was already an execution on some part of the property, that other executions were threatened, and that, if any arrangement were to be made, there must be protection in the shape of some assignment against these. After the meeting broke up, S. and some of the creditors continued in discussion, and ultimately S. executed an assignment to trustees in the form prescribed by Schedule D to the Bankruptcy Act, 1861 [repealed]. G. was present during a great part of the discussion and preparation of the deed, but left before its execution. On Dec. 7 a second meeting was held to bring the assignment before the creditors, when, upon S. showing unwillingness to assist in carrying the deed into effect, a resolution was carried to wind-up the estate in bankruptcy. Three days were, however, allowed him to determine upon his course, but upon their expiration without any arrangement being come to, G. petitioned for adjudication.

Held: by assenting to the execution of the deed and taking advantage of it to protect the estate G. was estopped from asserting that it was fraudulent and from relying on it as an act of bankruptcy.

Notes. The corresponding provisions of the Bankruptcy Act, 1861, s. 192, are in s. 3 of the Deeds of Arrangement Act, 1914: 2 HALSBURY'S STATUTES (2nd Edn.) 310.

Followed: *Re Brindley, Ex parte Taylor, Sons & Co.*, [1904-7] All E.R. Rep. 1027. Distinguished: *Re Walker* (1910), 26 T.L.R. 260. Applied: *Re Mills, Ex parte Mills*, [1916] 1 K.B. 389; *Re Debtor (No. 11 of 1935)*, [1935] All E.R. Rep. 615; *Re Debtor (No. 382 of 1938)*, *Debtor v. Petitioning Creditors and Official Receiver*, [1938] 3 All E.R. 744. Referred to: *Re Michael, Ex parte Michael* (1891), 8 Morr. 305; *Re Adamson, Ex parte Viney* (1894), 71 L.T. 579; *Re Hawley, Ex parte Ridgway* (1897), 76 L.T. 501; *Re Carr, Ex parte Jacobs* (1901), 85 L.T. 552; *Re Mendelssohn, Ex parte Mendelssohn*, [1903] 1 K.B. 216; *Re Jones, Ex parte Newnes and Associated Newspapers* (1912), 107 L.T. 236; *Re Beesley* (1913), 109

- A L.T. 910; *Re A Debtor, Ex parte Petitioning Creditors*, [1924] B. & C.R. 105; *Re Debtor (No. 5 of 1936)*, [1936] Ch. 728; *Weston (Victor) (Fabrics), Ltd. v. Morgens-terns*, [1937] 3 All E.R. 769; *Re Debtor (No. 23 of 1939), Debtor v. Petitioning Creditor and Official Receiver*, [1939] 2 All E.R. 338.

As to creditors who assent to an assignment by a debtor, see 2 HALSBURY'S LAWS (3rd Edn.) 261-263; and for cases see 4 DIGEST (Repl.) 139-143.

B

Case referred to :

- (1) *Re Rees, Ex parte Alsop* (1859), 1 De G.F. & J. 289; 29 L.J.Bey. 7; 1 L.T. 285; 6 Jur.N.S. 282; 8 W.R. 106; 45 E.R. 370, L.J.J.; 4 Digest (Repl.) 142, 1277.

C

Also referred to in argument :

Back v. Gooch (1815), 4 Camp. 232; Holt, N.P. 13, N.P.; 4 Digest (Repl.) 140, 1256.

Hicks v. Burfitt (1812), 4 Camp. 235, n.; 4 Digest (Repl.) 140, 1255.

D

Appeal by the bankrupt Mr. Frederick Stray from an order, dated Jan. 17, 1867, of Mr. Commissioner GOULBURN, refusing an application made by the bankrupt that an adjudication of bankruptcy made against him might be annulled.

De Gex, Q.C., and *Bagley* for the bankrupt.

Druce, Q.C., and *Ernest Reed* for the petitioning creditor.

E

LORD CAIRNS, L.J.—This is an appeal from an order made by Mr. Commissioner GOULBURN, by which he refused an application made by the bankrupt to annul the adjudication, on the ground of the invalidity of the act of bankruptcy alleged by the petitioning creditor. The act of bankruptcy alleged by the petitioning creditor was the execution by the bankrupt of a deed coming within the statutory provision which declares that a fraudulent gift, delivery, or transfer of any of the goods or chattels of the bankrupt with intent to defraud or delay his creditors, shall be an act of bankruptcy.

F

It is well settled by a series of authorities, of which *Ex parte Alsop* (1) may be mentioned as the last, that any creditor who is a party or privy to a deed of this description mentioned in the Bankruptcy Act, 1861, or who has acted in any way which would be equivalent to an assent, recognition, or approval of the deed, cannot allege that the execution of such a deed is the foundation of an act of bankruptcy. I apprehend that the principle upon which those cases, the authority of which cannot be now questioned, has gone, is that, inasmuch as under the statute you are obliged to allege that the act in question is a fraudulent act, any person who has been a participator or sharer in the fraud cannot be heard in this court, or in the Court of Bankruptcy, to claim any benefit or advantage from the act which must be thus described.

H

The question, therefore, which is raised in this case is, whether Mr. Goody and his partner, trading, I think, under the name of Bull and Wilson, have in any way within the meaning of these authorities been privy to the execution of the deed in question by the bankrupt. It has not been contended, and I apprehend could not be contended, that the deed in question never having reached the point at which, under s. 192 of the Bankruptcy Act, 1861, it would become a valid deed, is not in itself, in the hands of any one who is not estopped from complaining of it, a valid act of bankruptcy.

I

There is a certain degree of dispute and controversy as to the facts of the case, but to a very considerable extent there appears to me to be no serious contradiction between the witnesses as to what took place. A meeting of the creditors of the bankrupt was held on Nov. 23, and at that meeting Mr. Goody was present. I think that the proper conclusion to be derived from all the affidavits is that at that meeting nothing was done or determined upon, binding upon any person.

Proposals were made with reference to the composition which might be accepted if the creditors were so minded. The creditors, on the other hand, required for some purpose or other (whether by way of security or not, there may be a controversy), that the debtor should execute an assignment for the benefit of his creditors. That assignment, during the continuance of the meeting, he was unwilling to execute, and the meeting broke up and came to an end on that point. But, it is important to bear in mind that it was distinctly stated on that day, by Mr. Honey, I think, to Mr. Goody, and to the other creditors, that there was at that moment an execution upon some part of the property, and that there was a danger of other executions being issued, and it was clearly within the contemplation of every person present at the meeting that it was necessary, if any arrangement between the debtor and his creditors was to be made, that there should be a protection of the property against executions of this kind in the shape of some assignment of his estate and effects until the arrangement should be completed.

In that state of things the meeting broke up. Some persons remained in the room where the meeting had been held, and among others the debtor and his solicitor, and Mr. Honey, and Mr. Clapham representing an important creditor Mr. Parnall, and also Mr. Goody, one of the firm of petitioning creditors. I ought to state that it was on this occasion, and at this time, that the deed of assignment in question was executed. It was a deed produced by Mr. Clapham, representing Mr. Parnall, in the shape of a piece of parchment, the greater part of which was printed, the remaining part to be appropriately filled up in order to constitute a deed suitable for the bankrupt to execute. Mr. Goody admits he was present during some parts of the conversation which took place antecedent to the execution of the deed. He says he left before the deed was executed; but I do not find that he denies the truth of the very important statements in the affidavit of the bankrupt and his solicitor which are contained in the earlier part of the eleventh paragraph, to which I called the attention of counsel during the argument. I allude to the statements which say that:

"Mr. Clapham then produced a parchment form of assignment and commenced to fill up the same, Mr. Goody standing close to him and looking over his shoulder while he was writing; and upon Mr. Clapham making inquiry as to what was the number of Mr. Parnall's house [he being the creditor to whom the assignment was about to be made] Goody turned to me [the bankrupt], and said, 'Do you know, Mr. Stray?' whereupon I replied that I thought the number was 187. I was at that time standing on the opposite side of the table to which Mr. Goody was standing and Mr. Clapham was writing."

He then goes on to say that Mr. Goody was present at the actual execution of the deed. Mr. Goody, on the contrary, says—not denying anything I have read—that he left the room before the deed was actually executed.

Taking this in connection with what I have already mentioned (namely, that a great point had been made at the meeting of the bankrupt executing a deed before his creditors would accept any composition), the fact also that it was present to the minds of all the parties that the property was in danger of being made subject to executions, the fact also that Mr. Goody and his firm would not become creditors with the capacity of issuing executions until after Dec. 4, a day subsequent to the day of which I am speaking, I think it would be impossible to shrink from the conclusion that at this time Mr. Goody was at this place approving, and in the most marked way approving, of the execution by the bankrupt of this deed. I do not mean at all to say that Mr. Goody was not in a position, when the quantum of composition to be offered and to be accepted came to be discussed, of canvassing the amount to be offered, and of withdrawing from any assent to be bound by the contents of this deed, or by any particular composition; but that he was encouraging the bankrupt to execute

A this assignment, and thereby protect his property until an arrangement with his creditors should be made, and to go with this assignment to the creditors in order to persuade them to come into an arrangement, I cannot, on the facts I have mentioned, entertain any doubt.

But it does not stop there. A meeting was called on Dec. 7, for the purpose of presenting the creditors with this deed, and settling with them then as to whether they would accept the composition, and what amount of composition they would accept. Two resolutions were passed at that meeting, certainly somewhat contradictory upon the face of them. The first is a resolution referring to the deed of assignment, accepting it on the part of the creditors, and expressing a desire that the estate should be administered under that deed. It is stated in evidence that after this resolution was passed the bankrupt was called in, and that from an attitude which he assumed, indicating unwillingness to give the assistance which would be required to carry the deed into effect, the mind of the meeting was changed, and they passed what I may term a counter resolution, that the estate of the bankrupt should be wound-up by proceedings in bankruptcy. But then a further qualification in the mind of the meeting immediately afterwards took place—whether suggested by the meeting or the bankrupt is quite immaterial—and three days further are given to him (and this is evidence which both sides agree to) during which he might cast about and obtain, if he could, the assent of the secured creditors, and make this deed a deed binding under s. 192 of the Bankruptcy Act, 1861. It seems to have been assumed that, during those three days, no step was to be taken adversely by any of the creditors, because Mr. Goody says he waited until the end of the three days and then commenced proceedings in bankruptcy. Therefore, the creditors here, including Mr. Goody (and that is the important part of the case) again seem to have, for a qualified purpose, appealed to this same deed, the execution of which, as I have already said, in my judgment, Mr. Goody permitted, and appealed to it for the purpose of shielding the estate for a certain number of days before any step should be taken against it, and with the view, if assents sufficient could be got at the end of those three days, of the deed becoming binding under the Bankruptcy Act, 1861.

I myself have no doubt at all that the facts which I have thus stated bring the case entirely within the principle of the cases to which I have referred, and I cannot look on Mr. Goody otherwise than as a person who held with the execution of this deed, was taking advantage of the deed for the purpose of shielding the estate for a certain length of time, and was willing, if certain other arrangements such as were contemplated could be made, to take still further advantage of the deed. I again repeat that I think nothing passed actually to bind Mr. Goody entirely to abide by the deed, and to come in under the deed as a person who would take no other proceedings for the recovery of his debt; but I also think that Mr. Goody is estopped from saying that this deed at the moment it was executed, under the circumstances I have mentioned, was a fraudulent deed, and one of which he can complain, for the purpose of alleging an act of bankruptcy committed by the debtor. I, therefore, think that the adjudication in this case must be annulled.

TURNER, L.J.—I entirely agree. The sole question here, as I understand it, is whether Mr. Goody was a party or privy to the execution of this deed in the sense that he has debarred himself from setting it up as an act of bankruptcy. That he did, in what passed after the meeting of Nov. 23, so act as to debar himself from insisting upon that right of proceeding upon the deed as an act of bankruptcy, I think no reasonable doubt can be entertained; for he stands by, though he was not present at the time of the execution of the deed, sees the deed being filled in, and then before the deed is executed goes out of the room. But it cannot be said, because he went out of the room before the deed was actually executed, that he was not a party and privy to the execution of the

deed, in the sense that he intended that the deed, which was in course of preparation and to be executed, should take effect. I can find nothing upon these affidavits, voluminous and contradictory as they are, which displaces, to my mind, the effect of that conduct on the part of Mr. Goody in what took place after the meeting of Nov. 23. Everything which subsequently took place is reconcilable with the notion that he was not to be bound by the terms of the deed as a binding and operative deed upon him, so that he was bound to come in under it; but everything which took place is equally consistent with the notion that he was bound by the deed to the extent that he was prevented from using its execution as an act of bankruptcy. He has, besides that, taken advantage of the deed from the time of its execution down to the period of Dec. 7, and after that period for three days, as a protection against any execution which might be lodged against the bankrupt's estate. I cannot think that, under these circumstances, he can be permitted to turn round at this period and say: "Now I will use that deed as an act of bankruptcy, which on Nov. 23 I could not have so used." My opinion, therefore, agrees with that of my learned brother.

Adjudication annulled.

Druce, Q.C., then applied for liberty to register the deed under s. 194, notwithstanding that more than twenty-eight days had elapsed from the date of its execution.

THEIR LORDSHIPS thought that there was no original jurisdiction here, and that such an application should be made to the learned commissioner.

DUKE OF PORTLAND v. LADY TOPHAM

[HOUSE OF LORDS (Lord Westbury, L.C., Lord Cranworth, Lord St. Leonards and Lord Chelmsford), April 6, 7, 1864]

[Reported 11 H.L.Cas. 32; 34 L.J.Ch. 113; 10 L.T. 355;
10 Jur.N.S. 501; 12 W.R. 697; 11 E.R. 1242]

Power of Appointment—Fraud on power—Appointee ignorant of ownership of fund, and mere agent for carrying out purpose of appointor—Right of appointor to make new appointment.

By an indenture dated June 24, 1843, a fund was settled on trust after the death of the late Duke of Portland for the benefit of his daughters H. and M. as the Duke of Portland for the time being should appoint. The late duke had disapproved of the proposed husband of M., and it was his wish that he (the proposed husband) should receive no benefit from the property. M. married this man after the death of her father. The new duke decided to give effect to the wishes of the late duke. He appointed the whole fund to H. under a revocable appointment, made in 1854, in circumstances that H. thought she owned only half of what was appointed to her, and she signed an order directing that the other half of the fund should be invested so that it might or might not be given to M. as trustees would think proper. In so doing, H. acted merely instrumentally for the purpose of giving effect to what she was told to do.

Held: the donee of a power must, at the time of the exercise of the power and for any purpose for which it is used, act with good faith and with a single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any extraneous object, whether laudable or not; and the appointment would, therefore, be set aside.

A Per LORD WESTBURY, L.C.: The deed of appointment having been set aside as null and void, it is possible (on which no opinion is given or implied by the House) that the donee of the power may still exercise his original power.

Notes. Considered: *Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595; *Re Crawshaw, Hore-Ruthven v. Public Trustee*, [1947] 1 All E.R. 643; *Re Burton's Settlements, Scott v. National Provincial Bank, Ltd.*, [1954] 3 All E.R. 193. Referred to: *Ranking v. Barnes* (1864), 3 New Rep. 660; *Cooper v. Cooper* (1869), 5 Ch. App. 203; *Thacker v. Key* (1869), L.R. 8 Eq. 408; *Re Huish's Charity* (1870), L.R. 10 Eq. 5; *Palmer v. Locke* (1880), 15 Ch.D. 294; *Whelan v. Palmer* (1888), 39 Ch.D. 648; *Vian't v. Cooper* (1897), 76 L.T. 768; *Molyneux v. Fletcher*, [1898] 1 Q.B. 648; *Saunders v. Shafto* (1904), 91 L.T. 282; *A.-G. v. Richmond (No. 1)*, [1908] 2 K.B. 729; *Clouette v. Storey*, [1911] 1 Ch. 18; *Re Greaves' Will Trusts, Public Trustee v. Ash*, [1954] 1 All E.R. 771.

As to fraud on a power, see 30 HALSBURY'S LAWS (3rd Edn.) 275 et seq.; and for cases see 37 DIGEST (Repl.) 375 et seq.

Appeal by the Duke of Portland against a decree of the lords justices (KNIGHT-BRUCE and TURNER, L.JJ.) discharging an order of SIR JOHN ROMILLY, M.R., reported 31 Beav. 525, and declaring that four appointments made in 1854 in exercise of power of appointment contained in a deed dated June 24, 1843, were void, and that Lady Harriett Bentinck and Lady Mary Topham took in equal shares. (The House of Lords at the same time also heard appeals raising similar facts and issues in connection with the exercise of powers of appointment in other settlements affecting Lady Mary Topham, which could not be distinguished from the appeal here reported.)

E By an indenture dated June 24, 1843, the late Duke of Portland covenanted with trustees to transfer a sum of £52,000 consols, into their names upon trust, to invest the dividends during the life of the duke, and after his decease the said trust fund and all accumulations should be held by them on trust for Lady **F** Harriet Bentinck and Lady Mary Bentinck (two daughters of the duke), as the Duke of Portland, for the time being, by any deed, etc., should appoint. And in default of such appointment upon trust, during the joint lives of Lady Harriet and Lady Mary, to pay the dividends to them as tenants in common for their respective absolute use and benefit; and after the decease of either, to pay the whole of the dividends to the survivor for life; and after the decease of the **G** survivor, the trust fund and dividends were to go to such person as should then be Duke of Portland. In fact, £50,000 of this sum had been invested on mortgage; the rest was invested in consols.

The indenture of June 24, 1843, was made and executed under the following circumstances: Prior to the month of June, 1843, it became known to the late Duke of Portland that one of his daughters, the respondent Lady Mary Topham **H** (then Lady Mary Bentinck), had agreed and intended, contrary to the will of the late duke and duchess, to intermarry with the respondent Sir William Topham after his, the late duke's, decease; and in consequence thereof the late duke determined that no property or funds of his, or over which he had any control, should after his death come to the hands of, or be enjoyed by, the respondent Lady Mary Topham, unless the Duke of Portland for the time being should so **I** direct, and the indenture of June 24, 1843, was prepared and executed with a view to give effect to that determination.

The late Duke of Portland died on Mar. 27, 1854. The new duke determined to carry into effect the wishes of his father as to Lady Mary. For this purpose he consulted Mr. C. Heaton Ellis, who, in a letter dated June 22, 1854, noticing difficulties raised by the legal advisers of the duke, suggested the appointment of all the dividends and interest of the £52,000 to Lady Harriet, remarking that "no bargain or arrangement should be made with her beforehand, lest the appointment be vitiated. I dare say it will occur to her ladyship afterwards, or it can

prudently be suggested to her, that one-half of the interest and dividends, and one-half of the annuity, as it is paid, should be laid out to accumulate, as she would not like in the present state of things, to benefit personally beyond her own moiety." There was a great deal of correspondence to the same effect. At that time the fund consisted of £50,000 on mortgage, and £21,844 consols. A direct and absolute appointment to Lady Harriet was not, however, then adopted, and it was proposed to make from time to time provisional appointments of the dividends of these sums. These were made in two particular instances by deeds dated on Sept. 21, 1854. A

After the appointments of Sept. 21, 1854, the income of the fund, subject to the trusts in the deed of June 24, 1843, was paid to Messrs. Drummond, bankers, to the account of the duke and Lord Henry Bentinck as trustees, and then carried over in pursuance of their order to an account in their names marked "Account S," (Sister's account). They were then transferred from that account to the account of Lady Harriet, and one moiety was under her order invested, the other moiety was applied to her own use. Mr. Ellis had prepared this order by direction of the duke, and Lady Harriet signed it at Mr. Ellis's request. The order was in the following terms: B

"October 18, 1854. C

"Messrs. Drummond,—Please to invest one-half the payments in future to be made to my credit from the joint account of the Duke of Portland and Lord Henry Bentinck (marked 'S,') in the purchase of three per cent. consols, in the names of the Duke of Portland, Lord Henry Bentinck, and myself. D

"Harriet M. Bentinck." E

On Oct. 5, 1854, Lady Mary Elizabeth Bentinck married Colonel Topham.

On Dec. 19, 1854, the Duke of Portland (the appellant) executed a deed poll reciting the marriage of his sister, and declaring that in pursuance of the power in that behalf contained in the deed of June 24, 1843, he appointed that, until further or other appointment, etc., and subject thereto, all the dividends to accrue during the life of Lady Harriet on the said sum of £52,000 and the accumulations, should be paid and belong to Lady Harriet. And power was reserved to the Duke of Portland for the time being to revoke the appointment thereinbefore contained, and to declare such other trusts of the dividends, etc., during the lives of Lady Harriet and of Lady Mary, or of the survivor of them, as he should from time to time think fit. F

On July 13, 1860, Lady Mary E. Topham filed her bill which, inter alia, prayed that she might be declared entitled to one moiety of the income of the fund, subject to the trusts of the indenture of June 24, 1843, and the accumulations thereon; and that it might be declared that the appointments made by the said deeds poll were void as against her, and that she was entitled to one moiety of the income accrued due on the fund since the death of the late Duke of Portland, subject to the trusts of the indenture of June, 1843. G

Answers were put in and evidence taken, and a great many letters passing to and from the late and the present duke, and Mr. C. H. Ellis, and other documents of a like kind were read. These letters were relied on as showing the intentions of the parties in executing the deeds of 1843 and 1854, the difficulties that had been found in the way of carrying these intentions into effect by legal forms, the scheme (without formal communication of the purpose) to put Lady Mary's share under the control of Lord Henry, or of Lady Harriet, by giving either or both an apparent absolute interest in the fund, on a private understanding that Lady Mary's share of the funds that should be accumulated during the life of Lady Mary's husband, to be then disposed of as it was known that the late duke had desired. H

- A In her answer to the plaintiff's bill, Lady Harriet declared that it was not till she saw the bill that she was informed of the legal effect of the deeds of December, 1854; she believed that under the deeds of 1843 she had become absolutely entitled for life, for her own use, to a moiety of the dividends of the £52,000; she did not know that she had any beneficial right in respect of the other moiety. She knew that her father desired that, in the event of Lady Mary marrying Sir W.
- B Topham, she should not derive any benefit from any settlement made by the duke, but this was better known to the present duke and Lord Henry than to herself. She never before claimed this other moiety, but she now submitted that the whole had been validly appointed to herself.

- The cause was heard before SIR JOHN ROMILLY, M.R., on April 23, 1862, and he dismissed the bill so far as it related to the matters in dispute in the present
- C appeal. Lady Mary appealed. The lords justices made an order dated May 2, 1863, directing that the decree made by the Master of the Rolls should be discharged; and it was declared that Lady Harriet and Lady Mary were entitled, in equal shares, to the dividends, etc., from the death of the late duke. The Duke of Portland appealed against the order of the lords justices.

- D Sir Hugh Cairns, Q.C., Hardy and A. Bailey for the appellant the Duke of Portland.

Giffard, Q.C., T. Stevens and C. R. Freeling for Lady Harriet Bentinck.

Osborne, Q.C., and F. P. Morris for Lord Henry Bentinck.

- Sir Roundell Palmer, Q.C., Rolt, Q.C., C. Hall and Rowcliffe* for the respondent Lady Mary Topham.

- E
- LORD WESTBURY, L.C.**—The case which is presented to your Lordships on behalf of the noble appellant his Grace the Duke of Portland, in effect may be represented thus: that his Grace, feeling it incumbent upon him to carry into effect what he received as the solemn wish and desire of his father, did, therefore,
- F execute the two or rather the four deeds substantially, which have been the subject of the present case. It is unnecessary to dwell upon the different views of the case presented by the counsel for the duke at the Bar, and presented by his sister Lady Harriet Bentinck in her answer. I can myself have no possibility of doubt that the duke desired that Lady Harriet should know everything that was passing in his own mind, but in reality that was not done, and these deeds were
- G executed, no doubt retained, by the solicitor of the duke, and neither communicated, nor their effect explained or stated, to Lady Harriet antecedently to the institution of this suit. The truth, therefore, was that Lady Harriet was never placed in the position, in which it is clear that the duke desired that she should be placed, namely, the character of a person having the absolute ownership of the fund, and left at liberty to deal with the whole or any part of the fund in such
- H manner as she should think right. The duke by his agents controlled the whole of the disposition of the fund. Lady Harriet states, of which there can be no possibility of doubt, that she herself was entirely ignorant of the fact that she had, or was intended to have, any absolute interest or control in or over these funds, and that what she did for the purpose of giving effect to what the duke originally
- I desired should be done, but which he had been told could not be legally done, she acted merely instrumentally, merely for the purpose of giving effect to what she was told to do, and did not in that respect exercise any control, any will, or any right of disposition. The whole thing, therefore, is in truth an arrangement proceeding and emanating wholly from the donee or owner of the power, and assumes that shape in which, from the very case of the owner of the power, it is quite clear that he was advised the matter could not be supported.

Without dwelling on the matter further, inasmuch as your Lordships concur in opinion, I think we must all feel that the settled principles of the law must be upheld, namely, that the donee, the appointor under the power, shall, at the time

of the exercise of that power, and for any purpose for which it is used, act with A
 good faith and sincerity, and with an entire and single view to the real purpose
 and object of the power, and not for the purpose of accomplishing or carrying
 into effect any bye or sinister object (I mean sinister in the sense of its being beyond
 the purpose and intent of the power) which he may desire to effect in the
 exercise of the power. I think it would be endangering the whole of the established B
 principles of our law upon this subject if we were to permit a transaction of this
 kind to stand, or to hold that it is a transaction which can be reconciled with the
 faithful, sincere, just and honest exercise of the power committed to the appointor,
 and which he is to exercise as a trustee. I will abstain from going further into
 the case. I think your Lordships will concur entirely in the conclusion which
 has been arrived at in the court below.

But, there is a further point. The court below has rightly set aside the deed of C
 appointment. It is wholly unnecessary, therefore, to refer to the power of
 revocation contained in that deed; but that deed of appointment having been set
 aside as null and void, it is possible (on which no opinion is given or implied by
 the House) that the donee of the power may still exercise his original power,
 and, therefore, in confirming the decree for the purpose of setting aside D
 the deed of appointment, it may be desirable to include the words "without prejudice
 to any question as to any future exercise of the power of appointment" in order
 to prevent the decree being used hereafter as an argument that will bar any
 attempt to exercise the power by the duke. With that alteration, I should move
 your Lordships to confirm the decree, and to dismiss the appeal, and which must
 be dismissed, I think, in the usual manner, namely, with costs.

LORD CRANWORTH.—On the facts as they have transpired now, from the
 answer of Lady Harriet, I confess, in concurrence with what has fallen from my
 noble and learned friend on the Woolsack, I do not entertain a particle of doubt.
 The only reason why I rise to say a single word is this, that if the facts had been
 as I had supposed them to be from the opening of counsel for the appellant, F
 namely, that the duke had said to Lady Harriet: "I wish, in order to carry into
 effect that which we know to have been our father's intention, to accumulate one
 moiety of this fund, the accumulation to continue during the married life of my
 sister Mary; I find that is impossible, I shall give you the whole—make it
 entirely your own—you may spend it all yourself, or you may accumulate one-half
 if you think fit": if that had been what had passed, I confess, not wishing to G
 commit myself to any point that does not arise, as at present advised, I should
 have thought that was a perfectly legitimate mode of dealing with the fund.

LORD ST. LEONARDS.—The rules on this subject are so well settled that it
 is quite unnecessary to go through any authorities on the subject. A party having
 a power like this must fairly and honestly execute it without having any ulterior H
 object to be accomplished. He cannot carry into execution any indirect object, or
 acquire any benefit for himself directly or indirectly. It may be subject to
 limitations and directions, but it must be a pure, straightforward, honest dedication
 of the property as property to the person to whom he affects or attempts to give
 it in that character.

Here it is impossible not to see that Lady Harriet was made use of, not only I
 as an intended donee, but also as an instrument (an agent wholly unconscious of
 the real character of the donation) to carry into execution the intention of the
 duke. If you look to the dates, you cannot help being struck with them.
 Temporary appointments were made for the mere purpose of keeping the thing
 alive, so as to prevent the property vesting in Lady Mary if she did marry
 contrary to the wish of the late duke. Those temporary appointments were
 dated in September, 1854. Then comes that extraordinary letter from Mr. Ellis
 to Lady Harriet, who was then entitled under the temporary appointments, and

A he says he does not believe he had before seen her, or had any conversation with her on the subject, and his only communication was this letter of Oct. 4, 1854 :

B "Dear Madam,—I have the honour to enclose an order for your ladyship's signature, and in doing so I should explain, that the duke latterly executed deeds revocable at any time, but under which no payment beyond £600 a year can for the present be made to Lady Mary. The half-yearly dividend on £21,400 Three-and-a-Quarter per Cents. will this month be paid to your credit by the trustees, as well as £680 less property tax for the quarter's double annuity. The arrangement made, which will be completed by the inclosed order setting aside and making a fund for future disposal, has appeared to be the best, if not the only, mode of faithfully carrying into effect the late duke's views and intentions."

C Then there is an order enclosed, which she signs, being, as she tells you now (for her counsel has read her own answer, in which she states), that she was wholly without knowledge that she had the slightest beneficial interest in that half of the fund over which the order operates. Then that order, the fund having been invested in the names of the three, is carried further on Oct. 28, 1854, by an arrangement which is to bind in all future time that moiety. Then what comes afterwards. Why the absolute appointment.

D But the duke by his arrangement had already fixed this sum as an appropriated fund, not for Lady Harriet, but for Lady Mary, to be tied up for Lady Mary, so as to prevent her from marrying before the actual appointment was executed.

E The temporary appointments were set aside after those orders for the investment and the appropriation of the money, and then the absolute appointments are executed which give the property in form absolutely to Lady Harriet, but not in form even, until she had executed that warrant which gave the order to the bankers to continue and keep that money at all times in the way it was understood between the parties. She was no more an appointee of the funded property than

F I am. She was an agent or a hand made use of for the purpose of carrying into effect what might be a very proper thing for anything I know on the part of the duke, but which he was not justified in doing under his execution of the power. I confess I never saw a more naked case. There is really nothing to decide. The parties have shown that it was not a real transaction, as such appointments must be, but that it was a transaction founded upon an intention

G to give one-half absolutely, and no more, to Lady Harriet, and to make her the instrument of tying up the other half for Lady Mary, so that they might give it to her or not, just as they thought proper. There is that account with the bankers marked S., which is admitted to be "sister," and which we know means Lady Mary, and it was partially carried to that account.

H Upon the whole, therefore, this is a case in which it cannot for a moment be contended that the appointment is good. If not good for the moiety, which it is not, then it cannot be good for the other part, for the part is given to the appointee who is to execute that purpose, which of itself destroys the whole appointment.

I I think, therefore, the moment you understand the facts you cannot have the least doubt about the case. The difficulty, I confess, which I felt was on the power of revocation, as to whether that power continues or not, on which I decline to give an opinion. I think it is quite enough for this House to declare it is a void appointment, and to set aside the appointment; but unless the whole case was raised in argument so as to put an end to the question as to the power of revocation, I think with my noble and learned friend we are not at all called upon to prejudge that question. On the other hand I wish it to be distinctly understood that this House gives no opinion on the power of the duke to execute the power of revocation now that we have declared the appointment itself is void.

LORD CHELMSFORD.—My noble and learned friends having so perfectly A expressed my views of the case, it is not necessary for me to add anything to what I have said.

Decree affirmed with a variation.

R. v. ISAACS

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Pollock, C.B., Channell, B., Williams, Wightman and Mellor, JJ.), November 15, 1862]

[Reported Le. & Ca. 220; 1 New Rep. 67; 32 L.J.M.C. 52;
7 L.T. 365; 9 Jur.N.S. 212; 11 W.R. 95; 9 Cox, C.C. 228]

Criminal Law—Abortion—Procuring abortion—Supplying noxious thing—Intent.

Under s. 59 of the Offences against the Person Act, 1861, the thing supplied to procure the miscarriage of a woman with child must be noxious in its nature.

Notes. Distinguished: *R. v. Cramp* (1880), 5 Q.B.D. 307.

As to procuring abortion, see 10 HALSBURY'S LAWS (3rd Edn.) 730-732; and for cases see 15 DIGEST (Repl.) 1002 et seq. For the Offences against the Person Act, 1861, s. 59, see 5 HALSBURY'S STATUTES (2nd Edn.) 811. E

Case referred to:

(1) *R. v. Coe* (1834), 6 C. & P. 403.

Case Stated for the opinion of the Court of Crown Cases Reserved by Dorset F Quarter Sessions.

The prisoner, Louisa Isaacs, was tried at the sessions for the county of Dorset, on Oct. 14, 1862, under the Offences against the Person Act, 1861, s. 59, for that she unlawfully supplied to one William Broadway a large quantity of a certain noxious thing to the jurors unknown, knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of one G Emma Wardner. It was proved that Emma Wardner, the prosecutrix, was at the time of the commission of the alleged offence a single woman in the service of Mr. William Smith of Blandford, and, while in such service, became pregnant by William Broadway. On or about August 1, 1862, the prosecutrix then being about three months gone with child, William Broadway, in consequence of what he had heard from someone, went to the prisoner's house in which she lived with her H husband, and asked her (her husband was not present, and did not in any way interfere) if she knew anything that would bring on the regular courses of the prosecutrix. The prisoner replied that she would try as she had done for others, and then asked Broadway how long the courses had stopped. He said for three months. The prisoner answered: "I will make that all right for her, if she will take the stuff I give you." The prisoner then gave Broadway three bottles and one I half-pint bottle all full of something of a dark colour, and at the same time stated that the prosecutrix was to take a wine-glass full of the stuff in the large bottles three times a day, and that she was to take the small bottle in two doses about two days after she had begun the first bottle. This, the prisoner added, would make it all right for her in about eight or nine days. She said, "It will not hurt her." Broadway took away the bottles and carried them to the prosecutrix and informed her of the directions how to take the stuff contained in them as given to him by the prisoner.

A The prosecutrix the same evening they were given to her opened one of the large bottles and drank a wine-glass full of the stuff that came from it. She then went to bed; she felt dizzy in the head, and the next morning she felt stupid in the head. Becoming in consequence apprehensive that the stuff in the bottles would hurt her, she took no more. The bottles, with their contents, were subsequently handed over to a Mr. Daniell, a surgeon of Blandford, to be analysed by him. On being
 B so analysed, with the assistance of Dr. Ordington, a considerable quantity of starch of some plant, and some woody fibre, was deposited. The liquid evaporated and the gas escaped, and the result of the analysis was that, in Mr. Daniell's judgment, the liquid in the bottles was some vegetable decoction of a harmless character, and such as would not procure a miscarriage. He added that, if taken
 C with the belief that it would produce a miscarriage, it might, by acting on the imagination, produce that effect, although otherwise of a perfectly harmless character.

The chairman left the case to the jury, and in doing so said that it seemed to be doubtful, on the authorities, whether it was necessary that the thing supplied should be of a noxious character or not, and that the reported cases were conflicting on this subject. He read to them the judgment of VAUGHAN, B.,
 D in *R. v. Coe* (1), where, referring to words similar to those employed in s. 59 of the Act of 1861, he said :

"It is with the intention the jury have to do, and if the prisoner administered a bit of bread merely with the intent to procure abortion, it is sufficient to constitute the offence contemplated by the Act of Parliament
 E [9 Geo. 4, c. 31, s. 13];"

and added, that a more recent case threw so much doubt on this point that he would not direct them positively on this head.

The chairman did not give any direction whether the stuff above mentioned was, in his opinion, a noxious thing. He read to the jury the words of the indictment, and told them to decide first on the intent (suggesting that the
 F prisoner might have had no such intention, but used her reputation, such as it was, as a means of making money), and, if necessary, then to consider whether the evidence satisfied them that the stuff was "noxious." The jury found the prisoner guilty of the intent and that the thing was noxious. The prisoner was discharged on recognisance of bail to appear and receive judgment when called
 G on to do so. The question for the decision of the court was whether, on the facts set out, taken in conjunction with the remarks in summing-up, the prisoner was rightly convicted.

The prisoner was not represented.
Fooks for the prosecution.

H **POLLOCK, C.B.**—We are all of opinion that the thing intended by s. 59 of the Offences against the Person Act, 1861, must be noxious in its nature.

Conviction quashed.

SCHIBSBY v. WESTENHOLZ AND OTHERS

[COURT OF QUEEN'S BENCH (Blackburn, Mellor, Lush and Hannen, JJ.), November 22, 26, December 10, 1870]

[Reported L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; 24 L.T. 93;
19 W.R. 587]

Conflict of Laws—Foreign judgment—Enforcement—Judgment by default—Defendants not subjects of or resident in foreign country.

Judgment was obtained in a foreign court in default of appearance against the defendants who were not subjects of the foreign State, not resident there at the time the proceedings were instituted, and owned no property there. The defendants had notice of the proceedings sufficient for them to have appeared and defended them. On the plaintiff's action in an English court to enforce the judgment of the foreign court,

Held: no duty was here imposed on the defendants to obey the judgment of the foreign court, and, therefore, the action failed.

Semble: Had the defendants been subjects of the foreign country at the time of the judgment or resident there when the proceedings were instituted, they would have been bound by the judgment.

Quære: Whether, if the defendants had, at the time the obligation was contracted, been resident in the foreign country, but had left before the proceedings were instituted, they would have been bound by the judgment.

Notes. Considered: *Copin v. Adamson*, *Copin v. Strachin* (1874), L.R. 9 Exch. 345; *Meyer v. Ralli*, [1874-80] All E.R. Rep. 1086. Considered and Distinguished: *Rousillon v. Rousillon* (1880), 14 Ch.D. 351. Distinguished: *Voinet v. Barrett* (1885), 55 L.J.Q.B. 39. Considered: *Nouvion v. Freeman* (1889), 15 App. Cas. 1. Followed: *Turnbull v. Walker* (1892), 67 L.T. 767. Considered and Explained: *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670. Considered: *Emanuel v. Symon*, [1908] 1 K.B. 302; *Gibson v. Gibson*, [1913] 3 K.B. 379; *Harris v. Taylor*, [1914-15] All E.R. Rep. 366. Referred to: *Ochsenheim v. Papelier* (1873), 8 Ch. App. 695; *Abouloff v. Oppenheimer & Co.*, [1881-5] All E.R. Rep. 307; *Re Trufort*, *Trafford v. Blanc* (1887), 36 Ch.D. 600; *Meek v. Wendt* (1888), 21 Q.B.D. 126; *Crozat v. Brogden* (1894), 63 L.J.Q.B. 325; *Bouchet v. Tulledge* (1894), 11 T.L.R. 87; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Fracis, Times & Co. v. Carr* (1899), 81 L.T. 50; *Feyerick v. Hubbard* (1902), 71 L.J.K.B. 509; *Rayment v. Rayment and Stuart*, *Chapman v. Chapman and Buist*, [1910] P. 271; *The Dupleir*, [1912] P. 8; *Ross Smith v. Ross Smith (otherwise Radford)*, [1962] 1 All E.R. 344.

As to essentials to recognition of foreign judgments, see 7 HALSBURY'S LAWS (3rd Edn.) 144 et seq.; and for cases see 11 DIGEST (Repl.) 502 et seq.

- Cases referred to :

- (1) *Godard v. Gray* (1870), L.R. 6 Q.B. 139; 40 L.J.Q.B. 62; 24 L.T. 89; 19 W.R. 348; 11 Digest (Repl.) 522, 1360.
- (2) *Russell v. Smyth* (1842), 9 M. & W. 810; 11 L.J.Ex. 308; 152 E.R. 343; 11 Digest (Repl.) 512, 1277.
- (3) *Williams v. Jones* (1845), 13 M. & W. 628; 2 Dow. & L. 680; 1 New Pract. Cas. 227; 14 L.J.Ex. 145; 4 L.T.O.S. 318; 153 E.R. 262; 11 Digest (Repl.) 527, 1401.
- (4) *Buchanan v. Rucker* (1807), 1 Camp. 63; subsequent proceedings (1808), 9 East, 192; 103 E.R. 546; 11 Digest (Repl.) 506, 1226.

- A** (5) *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877; 13 L.J.Ex. 168; 152 E.R. 1061; 11 Digest (Repl.) 502, 1209.
- (6) *Simpson v. Fogo* (1860), 1 John. & H. 18; 29 L.J.Ch. 657; 6 Jur.N.S. 949; 8 W.R. 407; 70 E.R. 644; sub nom. *Liverpool Bank v. Foggo*, 2 L.T. 594; subsequent proceedings sub nom. *Simpson v. Fogo* (1863), 1 Hem. & M. 195; 1 New Rep. 422; 32 L.J.Ch. 249; 8 L.T. 61; 9 Jur.N.S. 403; 11 W.R. 418;
- B** 1 Mar. L.C. 312; 71 E.R. 85; 11 Digest (Repl.) 380, 426.
- (7) *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; 30 L.J.Ex. 238; 158 E.R. 123; 11 Digest (Repl.) 521, 1353.
- (8) *Douglas v. Forrest* (1828), 4 Bing. 686; 1 Moo. & P. 663; 6 L.J.O.S.C.P. 157; 130 E.R. 933; 11 Digest (Repl.) 504, 1215.
- C** (9) *London and North Western Rail. v. Lindsay* (1858), 30 L.T.O.S. 357; 4 Jur.N.S. 343; 6 W.R. 396; 3 Macq. 99, H.L.; 11 Digest (Repl.) 537, 1470.

Also referred to in argument :

- Cavan v. Stewart* (1816), 1 Stark. 525, N.P.; 11 Digest (Repl.) 506, 1227.
- Crawford v. Whittall* (1773), 1 Doug. K.B. 4n.; Lofft, 154; 99 E.R. 2; 11 Digest (Repl.) 527, 1398.
- D** *Maubourquet v. Wyse* (1867), I.R. 1 C.L. 471; 11 Digest (Repl.) 512, *777.
- Bank of Australasia v. Nias* (1851), 16 Q.B. 717; 20 L.J.Q.B. 284; 16 L.T.O.S. 483; 15 Jur. 967; 117 E.R. 1055; 11 Digest (Repl.) 503, 1212.
- Becquet v. MacCarthy* (1831), 2 B. & Ad. 951; 109 E.R. 1396; 11 Digest (Repl.) 511, 1265.
- E** *Don v. Lippmann* (1837), 5 Cl. & Fin. 1; 7 E.R. 303, H.L.; 11 Digest (Repl.) 438, 809.
- Vallee v. Dumergue* (1849), 4 Exch. 290; 18 L.J.Ex. 398; 14 L.T.O.S. 108; 154 E.R. 1221; 11 Digest (Repl.) 508, 1245.
- Meeus v. Thellusson* (1853), 8 Exch. 638; 22 L.J.Ex. 239.
- F** *Bissell v. Briggs*, 9 Mass. Rep. 462.
- Jefferys v. Boosey* (1854), 4 H.L.Cas. 815; 3 C.L.R. 625; 24 L.J.Ex. 81; 23 L.T.O.S. 273; 1 Jur.N.S. 615; 10 E.R. 681, H.L.; 2 Digest (Repl.) 174, 46.
- Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; Sea. & Sm. 49; 29 L.J.P. & M. 34; 1 L.T. 194; 6 Jur.N.S. 24; 8 W.R. 134; 164 E.R. 866; 11 Digest (Repl.) 471, 1025.

G

Rule Nisi obtained by the defendants to set aside the verdict and enter it for them in an action by the plaintiff to enforce a judgment entered for him by the Tribunal of Commerce, at Caen, France, against the defendants, for 11,537 francs and 60 centimes, in English money £461 10s. Averment, that the court was duly held and had jurisdiction in the matter.

- H** The defendants pleaded: (i) Never indebted. (ii) Denial that the Tribunal of Commerce at Caen was a court duly held and had jurisdiction. (iii) That the action was commenced according to the laws then and still in force in the Empire of France by process and summons, and that the defendants were not, nor were any of them, at the time of the commencement thereof, or at any time previous to the recovery of the judgment, resident or domiciled within the jurisdiction of the court, nor were the defendants or any of them natives of the Empire of France; and they were not at any time before the recovery of the judgment served with any process or summons in the action, nor did the defendants appear in the action; nor had they, before the recovery of the judgment, any notice or knowledge of any process or summons, or of any proceedings in the action, or any opportunity of defending themselves therein. On these pleas issue was joined.

I

The action was tried before BLACKBURN, J., at the London sittings, after Hilary Term, 1870, when a verdict was found for the plaintiff, leave being given to the defendants to move to enter a verdict for them, on the ground that the French

Court had no jurisdiction. A rule nisi was, accordingly, obtained by the A defendants.

Brown, Q.C., and *Murphy* showed cause against the rule.

Honyman, Q.C., and *Watkin Williams* supported the rule.

Cur. adv. vult.

Dec. 10, 1870. **BLACKBURN, J.**, read the following judgment of the court.— B
This was an action on a judgment of a French tribunal, given against the
defendants for default of appearance. The pleas to the action were, among others,
a plea of never indebted, and, thirdly, a special plea asserting that the defendants
were not resident or domiciled in France, or in any way subject to the jurisdiction
of the French court, nor did they appear, and that they were not summoned, C
nor had any notice or knowledge of the pending of the proceedings or any
opportunity of defending themselves therefrom. On these pleas issue was joined.

On the trial before me, the evidence of a French advocate was given, by which
it appeared that, by the law of France, a French subject may sue a foreigner,
though not resident in France, and that for this purpose an alien, if resident in
France, was considered by the French law as a French subject. The mode of D
citation in such a case, according to the French law, is by serving the summons
on the Procureur Imperial. If the foreign defendant thus cited does not, within
one month, appear, judgment may be given against him, but he may still, at any
time within two months after judgment, appear and be heard on the merits: after
that lapse of time the judgment is final and conclusive. The practice of the
Imperial government is, in such a case, to forward the summons thus served E
to the consulate of the country where the defendant is resident, with directions
to intimate the summons, if practicable, to the defendant; but this, as was
explained by the advocate, is not required by the French law, but is simply done
by the Imperial government voluntarily from a regard to fair dealing.

It appeared by other evidence that the plaintiff in the case was a Dane, resident
in France. The defendants were also Danes resident in London, and carrying F
on business there. A written contract had been made between the plaintiff
and defendants, which was in English, and dated in London, but no distinct evidence
was given as to where it was signed. We think, however, that if that was
material, the fair intendment from the evidence was that it was made in London.
By this contract the defendants were to ship in Sweden a cargo of Swedish oats
free on board a French or Swedish vessel for Caen, in France, at a certain rate for G
all oats delivered at Caen. Payment was to be made on receipt of the shipping
documents, but subject to correction for excess or deficiency, according to what
might turn out to be the delivery at Caen. From the correspondence it appeared
that the plaintiff asserted and the defendants denied that the delivery at Caen
was short of the quantity for which the plaintiff had paid, and that the plaintiff
made some other complaints as to the condition of the cargo, which were denied H
by the defendants. The plaintiff very plainly told the defendants that if they
would not settle the claim he would sue them in the French courts. He did
issue process in the manner described, and the French consulate in London served
on the defendants a copy of the citation.

The following admissions were then made—namely: That the judgment was
regular according to French law; that it was given in favour of the plaintiff, I
a foreigner domiciled in France, against the defendants domiciled in England, and
in no sense French subjects, and having no property in France. I then ruled
that I could not enter into the question whether the French judgment was
according to the merits, no fraud being alleged or shown. I expressed an opinion
(which I have since changed), that, subject to the third plea, the plaintiff was
entitled to the verdict, but reserved the point.

The jury found that the defendants had notice and knowledge of the summons
and the pendency of the proceedings in time to have appeared and defended the

A action in the French court. I then directed a verdict for the plaintiff, but reserved leave to enter the verdict for the defendants on these facts and this finding. No question was raised at the trial as to the sufficiency of the pleas to raise the defence. If there had been I should have made any amendment necessary; but in fact we are of opinion that none was required. A rule was accordingly obtained by counsel for the defendants, against which cause was shown
B in the last term and in the sittings after it, before MELLOR, LUSH, HANNEN, JJ., and myself.

During the interval between the obtaining of the rule and the showing cause, *Godard v. Gray* (1), on which we have just given judgment, was argued before MELLOR and HANNEN, JJ., and myself, and we had consequently occasion to consider the whole law of England as to enforcing foreign judgments. LUSH, J.,
C who was not a party in the discussion in *Godard v. Gray* (1), has, since the argument in the present case, perused the judgment prepared by the majority in *Godard v. Gray* (1), and approves of it; and, after hearing the argument in the present case, we are all of opinion that the rule should be made absolute.

It is unnecessary to repeat again what we have already said in *Godard v. Gray* (1). We think that for the reasons there given the true principle on which
D the judgments of foreign tribunals are enforced in England, is that stated by PARKE, B., in *Russell v. Smyth* (2), and again repeated by him in *Williams v. Jones* (3), that the judgment of a court of competent jurisdiction over the defendant, imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and, consequently, that anything which negatives that duty or forms a legal
E excuse for not performing it, is a defence to the action. We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act, 1852, s. 19, conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and, in case they do not, giving judgment against them by default. It was this consideration principally
F which induced me at the trial to entertain the opinion which I then expressed, and have since changed.

We think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain in circumstances hardly, if at all, distinguishable from those in which we, *mutatis*
G *mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down. Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country, and desire to be discharged, the only question which our courts could entertain would be whether the Acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner; for we must obey
H them. But if, judgment being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation, which the American courts would recognise, to submit to the jurisdiction thus created.
I This is precisely the question which we have now to determine, with regard to a jurisdiction assumed by the French jurisprudence over foreigners.

Again, it was argued before us that foreign judgments obtained by default, where the citation was (as in the present case) by an artificial mode prescribed by the laws of the country in which the judgment was given, were not enforceable in this country, because such a mode of citation was contrary to natural justice; and if this were so, doubtless the finding of the jury in the present case would remove the objection. Although it appears from the report of *Buchanan v. Rucker* (4) (1 Camp. 63) that LORD ELLENBOROUGH, in the hurry of *nisi prius*, at

first used expressions to this effect, yet, when the case came before him in banco (9 East, 192), he entirely abandoned what (with all deference to so great an authority) we cannot regard as more than declamation, and rested his judgment on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction. "Can," he said, "the island of Tobago pass a law to bind the rights of the whole world?" A

The question we have now to answer is, Can the empire of France pass a law to bind the whole world? We admit with perfect candour that, in the supposed case of a judgment obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, 1852, being sued on in a court of the United States, the question for the court of the United States would be, Can the island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No; but every country can pass laws to bind a great many persons; and therefore the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce? B C

On this, we think some things are clear on principle. If the defendants had been, at the time of the judgment, subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been, at the time when the suit was commenced, resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think that the laws of the country bound them, though, before finally deciding this, we should like to hear the question argued. Every one of those suppositions is, however, negatived in the present case. Again, we think it clear, upon principle, that if a person, as plaintiff, selected the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him. D E F

In *General Steam Navigation Co. v. Guillou* (5), on a demurrer to a plea, PARKE, B., in delivering the considered judgment of the Court of Exchequer, then consisting of LORD ABINGER, C.B., PARKE, ALDERSON and GURNEY, BB., thus expresses himself (11 M. & W. at p. 894):

"The substance of the plea is, that the cause of action has been already adjudicated upon in a competent court against the plaintiffs, and the decision is binding upon them, and that they ought not to be permitted again to litigate the same question. Such a plea ought to have had a proper commencement and conclusion. . . . It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance, but it is not to be understood that we feel much doubt on that question. They do not state that the plaintiffs were French subjects, or resident or even present in France when the suit began, so as to be bound by reason of allegiance or temporary presence by the decision of a French court, and they did not select the tribunal and sue as plaintiffs, in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer in an adverse suit in a foreign country, whose laws they were under no obligation to obey." G H I

It will be seen from this that those judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment, merely by appearing to defend themselves against it.

On the other hand, in *Simpson v. Fogo* (6), where the mortgagees of an English ship had come into the courts of Louisiana to endeavour to prevent the

A sale of their ship, seized under an execution, against the mortgagors, and the courts of Louisiana decided against them, the vice-chancellor and counsel who argued in the case all seem to have taken it for granted that the decision of the court in Louisiana would have bound the mortgagees, had it not been in contemptuous disregard of English law. *General Steam Navigation Co. v. Guillou* (5) was not referred to, and, therefore, cannot be considered as dissented from; but it seems clear that they did not agree in the latter part of the opinion there expressed. We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal.

C We must observe that the decision in *De Cosse Brissac v. Rathbone* (7) is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour, he is bound. In *Douglas v. Forrest* (8) the court, deciding in favour of the party suing on a Scottish judgment, says (4 Bing. at p. 703):

D "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, while the debtor resided in it."

E Those circumstances are all negatived here. We should, however, point out that, while we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas v. Forrest* (8), we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, while every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. F It is unnecessary to decide this, as the defendants had in this case no property in France. As to this, see *London and North Western Railway Co. v. Lindsay* (9).

G We think, and this is all that we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal. We think, therefore, that the rule must be made absolute.

Rule absolute.

A

HILTON v. ANKESSON

[COURT OF EXCHEQUER (Kelly, C.B., Channell, Pigott and Bramwell, BB.),
November 21, 1872]

[Reported 27 L.T. 519]

B

Boundary—Fence—Duty of landowner to fence to exclude neighbour's cattle.

Animal—Cattle—Straying cattle—Duty of landowner to fence against neighbour's cattle.

An owner or occupier of land, though bound to take reasonable care to prevent his cattle escaping from his land and straying on the land of another, is under no legal obligation to put up or maintain a fence to prevent his neighbour's cattle straying on his land. Such an obligation can only be founded on a statutory obligation or some agreement or covenant.

C

Notes. As to no general liability to fence, see 3 HALSBURY'S LAWS (3rd Edn.) 370 et seq.; and as to duty of occupier of premises to take reasonable care to prevent injury to neighbour by escape of cattle, see 28 HALSBURY'S LAWS (3rd Edn.) 51; and for cases see 7 DIGEST (Repl.) 286 et seq.

D

Cases referred to in argument :

Boyle v. Tamlyn (1827), 6 B. & C. 329; 9 Dow. & Ry. K.B. 430; 5 L.J.O.S.K.B. 134; 108 E.R. 473; 7 Digest (Repl.) 297, 186.

Singleton v. Williamson (1861), 7 H. & N. 410; 31 L.J.Ex. 17; 5 L.T. 644; 26 J.P. 88; 8 Jur.N.S. 60; 10 W.R. 174; 158 E.R. 533; 18 Digest (Repl.) 438, 1822.

E

Rule Nisi obtained by the plaintiff calling on the defendant to show cause why the nonsuit entered in the action should not be set aside and for a new trial, on the ground that there was evidence to go to the jury of the defendant's obligation to repair the fence and in support of the plaintiff's case.

F

The plaintiff and the defendant were occupiers of adjoining fields separated by a hedge or fence and the plaintiff brought an action against the defendant for trespass and illegally impounding the plaintiff's cattle. The defendant pleaded that he had seized the plaintiff's cattle as for a distress damage feasant. The plaintiff replied that prior to the time when the cattle were in the defendant's adjoining field, the defendant and all prior owners and occupiers of that field, had, within the memory of man, from time to time repaired and ought to repair the hedge or fence between the adjoining fields as often as was necessary in order that the cattle feeding or pasturing should not stray from one field to the other; and that in consequence of the fence being in a ruinous state the plaintiff's cattle had strayed on to the defendant's adjoining field.

G

At the trial of the action before BRAMWELL, B., and a jury at the Lewes Assizes the facts of the trespass and the seizure were admitted. A former occupier and steward of the landlord proved in evidence that the prior occupiers of the defendant's field had for fifty years done from time to time what repairs were necessary to the hedge or fence, because, as he thought, that every man was bound to keep his hedges and fences in repair but no witness was able to show that there was any legal obligation on the occupier of the defendant's field to do the repairs. The judge, thereupon, directed a nonsuit to be entered with leave to the plaintiff to move to set it aside and a rule nisi was accordingly obtained.

H

Serjeant Parry and *Joyce* showed cause against the rule.

Hawkins, Q.C., and *Grantham* supported the rule.

I

KELLY, C.B.—I am of opinion that the nonsuit was right, and that the judge was not justified in leaving any of the facts in the case as evidence of a liability

A to repair. A liability to repair a fence can only be created by Act of Parliament, or some agreement or covenant which will constitute a binding contract between the parties. Undoubtedly, there may be evidence of such an agreement or covenant by the acts of the parties, as where a person is called upon to repair, and he has repaired accordingly; in such a case, although the evidence would be by no means conclusive, it would still be evidence for the consideration of the jury. But there is no such fact here. The evidence is simply that the defendant had kept his land fenced. That, however, was no evidence of a liability to repair. If a man chooses to surround his land with a fence, he may pull the fence down again at any time. He may erect a fence to prevent his cattle from straying upon the property of his neighbours. That which he had a right to set up he has a right to pull down; and no matter how long he has had it up or repaired it, that affords no evidence of a legal liability to repair it. It would really be alarming if the law were otherwise—if a person who once set up a fence were compelled to keep it up. In this case I cannot see a particle of evidence of the liability of the defendant to repair the hedge; and the learned judge was quite right in so holding.

D **CHANNELL, B.**—I also am of opinion that this rule should be discharged. The question is whether there was a fence which the defendant was liable to repair? I really cannot see that there is any evidence whatever of any such liability. It certainly seems that for fifty years at least the fences were kept up by the defendant and his predecessors; but they were kept up for his own purposes, and not for the sake of his neighbours; and it is argued that such repairs are evidence of an obligation to repair, but no such legal obligation is to be inferred from such acts of repairing.

F **PIGOTT, B.**—I am of the same opinion that there was no evidence of a liability on the part of the defendant to repair the fence. When the rule was moved I understood that there were additional facts, such as that the defendant had repaired the fence, when it was not necessary that he should have done so for his own purposes, but now it is quite clear that that was not so. It was certainly necessary that some evidence should have been given of the obligation to repair, such as that he had been called upon by his neighbour to repair, and he had repaired accordingly.

G **BRAMWELL, B.**—I continue of the same opinion that I entertained at the trial. It is quite clear that there is no obligation to fence land that has not been fenced before. If a party is not bound to fence, he may take down any fence that he may have put up, or he may let it fall down. It is said, however, that his repairing the fence is evidence that he is bound to repair it; but as he puts it up for his own purposes he may surely take it down again. Again, it is said that the witness said he thought he was bound to repair his fence, and, therefore, he did repair it. This, however, shows no obligation to repair. There was no requisition to repair, and no repairing in consequence. To hold that a man who erects a fence, and repairs it from time to time, is bound always to continue it, would involve a serious state of things.

J *Rule discharged.*

POPPELWELL v. HODGKINSON

[COURT OF EXCHEQUER CHAMBER (Sir Alexander Cockburn, C.J., Keating, Lush, Hannen and Brett, JJ.), May 15, 1869]

[Reported L.R. 4 Exch. 248; 38 L.J.Ex. 126; 20 L.T. 578;
17 W.R. 806]

Land—Right to support—Subjacent water—Subsidence through water being drained off.

An owner of land has no natural right to the support afforded by water in or under his neighbour's land and there is no general principle of law preventing an adjacent owner from draining off the water and otherwise improving his land, even though the effect is to drain his neighbour's land and cause the surface to subside.

The owner of land in the neighbourhood of a populous town granted a part of it to the plaintiff subject to a rentcharge to be secured on the rents of cottages to be built by the plaintiff. Subsequently, the owner granted the remainder of his land to another to build a church on it. The ground lay considerably lower than the surrounding land and large quantities of rubbish had been thrown on it, and this, together with the water which drained down on it, had created a soil of a moist, spongy texture. The plaintiff had not drained, but had only levelled, his land when he built the cottages. The defendant, the contractor employed by the adjacent owner to build the church, drained the land and dug down a considerable depth to solid ground in order to secure a firm foundation. This resulted in water being drained from the plaintiff's land which subsided, causing damage to the cottages.

Held: the plaintiff had no right to subjacent support by water; as it must have been contemplated that the adjacent land would be used for building purposes no implied undertaking arose not to put the land to such purposes and take the usual steps to make it fit for building; consequently, the plaintiff's action was not maintainable.

Notes. Considered: *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; *English v. Metropolitan Water Board*, [1907] 1 K.B. 588. Referred to: *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co.*, [1895] 1 Ch. 287; *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594; *Salt Union v. Brunner, Mond & Co.*, [1906] 2 K.B. 822; *Gill v. Westlake*, [1910] A.C. 197.

As to subjacent support of water, see 12 HALSBURY'S LAWS (3rd Edn.) 605; and as to nuisances between neighbouring properties and the ordinary user of property, see 28 HALSBURY'S LAWS (3rd Edn.) 133; and for cases see 19 DIGEST (Repl.) 182.

Case referred to:

- (1) *North-Eastern Rail. Co. v. Elliott* (1860), 1 John. & H. 145; 29 L.J.Ch. 808; 6 Jur.N.S. 817; affirmed, 2 De G.F. & J. 423; 30 L.J.Ch. 160; 7 Jur.N.S. 6, L.C.; on appeal sub nom. *Elliot v. North Eastern Rail. Co.* (1863), 10 H.L.Cas. 333; 2 New Rep. 87; 32 L.J.Ch. 402; 8 L.T. 337; 27 J.P. 564; 9 Jur.N.S. 555; 11 W.R. 604; 11 E.R. 1055, H.L. 19 Digest (Repl.) 179, 1202.

Also referred to in argument:

Chasemore v. Richards (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 5 Jur.N.S. 873; 23 J.P. 596; 7 W.R. 685; 11 E.R. 140, H.L.; 44 Digest 34, 252.

Caledonian Rail. Co. v. Sprot (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 19 Digest (Repl.) 49, 271.

Earl of Lonsdale v. Littledale (1793), 2 Hy. Bl. 268.

- A** *Humphries v. Brogden* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries v. Brogden*, 15 Jur. 124; 19 Digest (Repl.) 180, 1207.
- Acton v. Blundell* (1843), 12 M. & W. 324; 13 L.J.Ex. 289; 1 L.T.O.S. 207; 152 E.R. 1223, Ex. Ch.; 19 Digest (Repl.) 160, 1054.

B **Appeal** by the plaintiff from a decision of the Court of Exchequer (MARTIN, BRAMWELL and CHANNELL, BB.) on a Special Case in which the question for the opinion of the court was whether the plaintiff was entitled to recover from the defendant damages, assessed at £50, for the tapping and drawing off of water from the plaintiff's land.

C The plaintiff was the mortgagee in receipt of the rents of land with fifteen cottages thereon, in Ely Street, Hulme, in Manchester. The defendant was a builder, and in the latter half of 1867 made the excavation for and built the walls of St. Gabriel's Church, on land separated from the plaintiff's land by a passage four feet wide. On April 21, 1835, Wilbraham Egerton, who owned the freehold of the land on which the plaintiff's cottages were afterwards built, as well as the land on which the church was afterwards built, conveyed the land for building purposes, subject to a chief-rent, to S. T. Harding. On April 11, 1864, S. T. Harding conveyed to M. J. Coleman, for building purposes, a portion of the land, on which the plaintiff's cottages were afterwards built. On April 15, 1864, M. J. Coleman mortgaged the land to the plaintiff. On April 24, 1864, S. T. Harding conveyed to M. J. Coleman the remaining part of the land, on which the plaintiff's cottages were afterwards built. On April 30, 1864, M. J. Coleman mortgaged this land to the plaintiff. On June 3, 1864, S. T. Harding conveyed to Esdaile the adjoining land, on which the excavation was made, and the church built, and by successive conveyances this land became absolutely vested in certain persons as church trustees, for the purpose of erecting a church thereon.

F The church trustees entered into a contract with defendant for making, and the defendant accordingly made, the excavations; and erected the walls of the church under the superintendence of the architect of the trustees, and with their authority. The land on which the plaintiff's cottages were erected, and also the land on which the excavations were made, and the church walls erected, were at a considerably lower level than the adjoining land, and were uneven and on a slope, at the bottom of which there had been pits of water, and these lands **G** had been used for the purpose of shooting thereon rubbish and the wet sweepings, slops, and other refuse from the streets, and were spongy and charged with moisture. M. J. Coleman, in building the plaintiff's cottages, merely levelled the surface of the land so used and did not drain it and dig the foundations to equal depths, so that some parts touched or penetrated into the natural soil, and other parts rested solely on the rubbish and refuse without previously draining the land. The cottages so built were what is termed jerry-built cottages, of the worst construction, and were constantly cracking, and could barely support themselves, and were continually undergoing repairs down to the time of the excavations made by the defendant.

I In making the excavations for the walls of the church it was necessary for the defendant to excavate down to the natural soil, and until he got a good foundation therein in some places to the depth of from ten to sixteen and even twenty feet below the level of Ely Street. In the operation of making the excavation, and in consequence of the depth to which it was necessary for the defendant to go, the wet spongy land on which the plaintiff's cottages were erected became drained, and the water drawn from under the surface. In consequence of such drainage and tapping of the water the land under the plaintiff's cottages subsided, and thereby caused the walls and structure to subside and crack to a greater extent than they had done before the excavations. The excavations and also the erection of the church walls and the filling in of the excavations were

all done with proper care, and the subsidence was attributable, not to the falling in A
of the plaintiff's land, but to the subsidence of the land caused by the drawing off
the underground water from the wet and moist land by the excavation being made
by the defendant in the adjoining land at the lower levels. The plaintiff's land
would have subsided by reason of the excavations, even if the buildings had not
been erected thereon, but the land would have sustained no appreciable damage.
The defendant was not guilty of negligence and unskilfulness. The conveyance from B
Harding to Coleman was a conveyance in fee in consideration of a rentcharge
reserved out of the land, and contained a covenant by Coleman that he, his
heirs, executors, administrators, or assigns, would pay the rentcharge, and also
within the space of six months would build, and finish upon the land conveyed
ten dwelling-houses fronting Ely Street, sufficient to cover the rent, and would keep C
them in sufficient repair.

Holker, Q.C., for the plaintiff.

Quain, Q.C., and *Crompton* for the defendant.

SIR ALEXANDER COCKBURN, C.J.—We are of opinion that the judgment of D
the court below should be affirmed. There is no general rule of law by which the
owners of land can be prevented, under such circumstances as these, from
draining off the water for the purpose of the improvement of his land. It is well
settled that an owner cannot withdraw his soil so as to deprive the adjacent
owner's land of its natural support; it is also well settled that where houses have
by length of time acquired a right of support, the owner of adjacent land cannot E
withdraw his soil so as to deprive them of that support. It is no removal of
adjacent soil which does the mischief here, but simply the effect caused by the
removal of the water through draining. It may be that when there is a grant
for a specific purpose, on the principle that no man can derogate from his own
grant, a grantor may be prevented from doing anything which would injure the
grantee's land in reference to that specific purpose for which it was granted. F
It may be in the case put by counsel for the plaintiff, by way of example, his
contention would be well founded. If persons who conveyed a part of Chat Moss
for the express purpose of making a railway upon it, were to drain some part
of the Moss so near to the railway as thereby to draw off the water and loosen
the foundation, there might perhaps be a right of action, on the principle that no
one can be allowed to derogate from his own grant; but, however that might be, G
that principle does not apply here, for this reason. The lands of both parties are
derived from a common grantor. And it must be taken as to the conveyance of
the lands of the plaintiff that they were conveyed for building purposes to this
extent, viz., that there was a stipulation that the grantee should build a sufficient
number of houses to secure the rent, but really I can see nothing which would at
all warrant the implication of a condition that the grantor would not do with the H
adjoining land that which is incident to the ordinary purposes for which land
is used, and especially to the purposes to which the grantee might anticipate
that it would be applied.

In this case the land was in the vicinity of a populous town, and both the
land conveyed, and the land retained would obviously be applied to building
purposes. Would it be under such circumstances reasonable to suppose that none I
of the adjoining land would be applied to building purposes, and if so applied it
would not be convenient to deal with it as has here been done? The buildings
might be larger or smaller, and it might, therefore, become necessary to excavate
and drain to a greater or less depth. It so happens that here a church was
built, and to make the foundations secure, it became necessary to drain somewhat
deeper than if a lighter building were erected. The argument is that the plaintiff's
land was conveyed for building purposes, but there was nothing in that to
warrant the grantee in supposing that the adjoining land being also applicable to

A building purposes, would be wanted only for buildings of precisely the same description as those on his own land. We cannot under these circumstances imply a covenant not to apply such adjoining land to those purposes, and to drain for the purpose of obtaining a solid foundation, and for the convenience and advantage of the occupiers of the buildings which might be put there. There is no general obligation at law not to drain, and the obligation can only arise from the application of the principle that a man cannot be permitted to derogate from his own grant. The grant here for building purposes could give no reason to suppose that the grantor meant to withdraw the adjacent land from the most useful and natural purposes to which it might be put, or to prevent himself from doing with it what is naturally incident to such purposes. I think, therefore, that there is no reason for implying any such covenant on the part of the grantor as is here suggested, and that our judgment must be for the defendant. I should add that the judgment of the House of Lords in *Elliot v. North Eastern Rail. Co.* (1) entirely supports the view we take of the case.

KEATING, LUSH, HANNEN and BRETT, JJ., concurred.

Appeal dismissed.

E R. v. ANDERSON

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (BOVILL, C.J., CHANNELL, B., BYLES, BLACKBURN AND LUSH, JJ.), November 16, 1868]

F [Reported L.R. 1 C.C.R. 161; 38 L.J.M.C. 12; 19 L.T. 400;
33 J.P. 100; 17 W.R. 208; 11 Cox, C.C 198]

Criminal Law—Jurisdiction—Crime committed in British ship in foreign waters.

G The prisoner, an American citizen, one of the crew of a British ship, committed manslaughter in the ship while it was in the river Garonne, within French territory, at a place below bridges where the tide ebbed and flowed and great ships went.

Held: the ship was within the Admiralty jurisdiction, and, therefore, the Central Criminal Court had jurisdiction to try the prisoner.

Notes. Section 267 of the Merchant Shipping Act, 1854, has been replaced by s. 687 of the Merchant Shipping Act, 1894 (23 HALSBURY'S STATUTES (2nd Edn.) 711). Distinguished: *The M. Moxham*, [1874-80] All E.R. Rep. 679. Applied: *R. v. Keyn* (1876), 2 Ex.D. 63; *R. v. Carr* (1882), 10 Q.B.D. 76; *The Mecca*, [1895] P. 95. Considered: *China Navigation Co. v. A.-G.*, [1932] All E.R. Rep. 626; *R. v. Gordon-Finlayson, Ex Parte An Officer*, [1941] 1 K.B. 171; *The Tollen*, [1946] 2 All E.R. 372. Referred to: *The Princess Royal* (1870), L.R. 3 A. & E. 41; *Bolivia Republic v. Indemnity Mutual Marine Assurance*, [1909] 1 K.B. 785.

I As to the limits of criminal jurisdiction, see 10 HALSBURY'S LAWS (2nd Edn.) 316 et seq.; and for cases see 14 DIGEST (Repl.) 145 et seq.

Cases referred to:

- (1) *R. v. Allen* (1837), 7 C. & P. 664; 1 Mood. C.C. 494, C.C.R.; 14 Digest (Repl.) 152, 1145.
- (2) *Thomas v. Lane*, 2 Sumner, 1.
- (3) *R. v. Jemot* (1812), Russell on Crimes and Misdemeanours (8th Edn.), p. 34.
- (4) *United States v. Coombs*, 12 Peters, 72.
- (5) *United States v. Wiltberger*, 5 Wheat. 76.

Also referred to in argument :

R. v. Depardo (1807), 1 Taunt. 26; Russ. & Ry. 134; 127 E.R. 739, C.C.R.; 14 Digest (Repl.) 155, 1181.

R. v. De Mattos (1836), 7 C. & P. 458; 14 Digest (Repl.) 155, 1182.

R. v. Lewis (1857), Dears. & B. 182; 26 L.J.M.C. 104; 29 L.T.O.S. 216; 21 J.P. 358; 3 Jur.N.S. 523; 5 W.R. 572; 7 Cox, C.C. 277, C.C.R.; 14 Digest (Repl.) 149, 1123.

R. v. Lopez (1858), Dears & B. 525; 27 L.J.M.C. 48; 30 L.T.O.S. 277; 22 J.P. 84; 4 Jur.N.S. 98; 6 W.R. 227; 7 Cox, C.C. 431, C.C.R.; 14 Digest (Repl.) 151, 1143.

United States v. Hamilton, 1 Mason, 152.

Genesee Chief v. Fitzhugh, 12 Howard, 443.

Case Stated for the opinion of the Court of Crown Cases Reserved by BYLES, J.

The prisoner, James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia which was registered in London, and was sailing under the British flag. At the time of the offence committed, the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city was by the course of the river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offence about 300 yards from the nearest shore, the river at that place being about half a mile wide. The tide flowed up to the place and beyond it. No evidence was given whether the place was or was not within the limits of the port of Bordeaux. It was objected for the prisoner that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the court had no jurisdiction to try him. BYLES, J., expressed an opinion unfavourable to the objection, but agreed to grant a Case for the opinion of the Court of Crown Cases Reserved. The prisoner was convicted of manslaughter.

Montagu Williams for the prisoner.

Poland (*Beasley* with him) for the prosecution.

BOYILL, C.J.—There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner might have been subject to the law of France, but at the same time, in point of law, it was also committed within British territory, for the prisoner was a seaman on board a merchant vessel which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew.

Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From ORTOLAN'S *REGLES INTERNATIONALES ET DIPLOMATIE DE LA MER* (4th Edn.), pp. 269-271, it appears that with regard to offences committed on board foreign vessels within French territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace; and several instances where that course was adopted are mentioned. Among these are two cases of American vessels where offences were committed on board American vessels while within French territory, and where, on the local authorities interfering, the American court claimed exclusive jurisdiction. As far as America herself is concerned, it is clear that she has by statute made regulations for persons on board her vessels in foreign parts, and we have adopted the same course of legis-

A lation. Our vessels must be subject to the law of the nation at any of whose ports they may be, and also to the law of our country, to which they belong. As to our vessels when going to foreign parts, we have the right, if we are not bound, to make regulations. America has set us a strong example that we have the right to do so. In the present case, if it were necessary to decide the question on the Merchant Shipping Act, 1854, I should have no hesitation in saying that we now
B not only legislate for British subjects on board British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now.

Independently of that statute the general law is sufficient to determine this case. Here the offence was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or
C not. If the offence had been committed on the high seas, it is clear that it would have been within the jurisdiction of the Admiralty, and the Central Criminal Court has now the same extent of jurisdiction. Does it make any difference because the vessel was in the river Garonne half-way between the sea and the head of the river? The place where the offence was committed was in a navigable
D part of the river below all bridges and where the tide ebbs and flows and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the Admiralty jurisdiction, and it is the same as if the offence had been committed on the high seas. On the whole, I come to the conclusion that the prisoner was amenable to the British law, and that the conviction was right.

E **CHANNELL, B.**—I am also of opinion that the conviction was right. Section 267 of the Merchant Shipping Act, 1854, has been referred to. I agree in the view taken by BOVILL, C.J., that it is not necessary to pray in aid that statute. When the question arises, this court must exercise the power which has been created by Act of Parliament to deal with the case. Nevertheless, this court is at
F liberty to ascertain what the international law may be, and construe the words of the statute in harmony with that if it will bear the construction. I give my judgment on the ground that the ship was within the Admiralty jurisdiction at the time the offence was committed, and that is a sufficient ground to support the conviction. That view is supported by the decisions of *R. v. Allen* (1) and *Thomas v. Lane* (2), and is also in consonance with the textbooks.

G **BYLES, J.**—I am of the same opinion. I adhere to the opinion that I expressed at the trial. A British ship is, for the purposes of this question, like a floating island, and, when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and, therefore, of the Central Criminal Court, and the offender is as amenable to British law as if he had stood on the Isle
H of Wight and committed the crime. Two English cases, *R. v. Allen* (1) and *R. v. Jemot* (3), and two American cases, *Thomas v. Lane* (2) and *United States v. Coombs* (4), decide that a crime committed on board a British vessel in a river like the one in question, where there is the flux and reflux of the tide and wherein great ships do hover, is within the jurisdiction of the Admiralty Court; and that is also the opinion expressed in KENT'S COMMENTARIES. I give no opinion
I on the question whether the case comes within s. 267 of the Merchant Shipping Act, 1854.

BLACKBURN, J.—I am of the same opinion. It is not necessary to decide whether the case comes within s. 267 of the Merchant Shipping Act, 1854. If the offence could have been properly tried in any English court, then the Central Criminal Court had jurisdiction to try it. It has been decided by a vast number of cases that a ship on the high seas, carrying a national flag, is part of the territory of that nation whose flag she carries, and all persons on board her are

to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory. From the earliest times it has been held that the maritime courts have jurisdiction over offences committed on the high seas where great ships go, which is, as it were, common ground to all nations, and that the jurisdiction extends over ships in rivers or places where great ships go as far as the tide extends. In this case, the vessel was within French territory, and subject to the local jurisdiction, if the French authorities had chosen to exercise it. Our decisions establish that the Admiralty jurisdiction extends at common law over British ships in the high seas, or in waters where great ships go as far as the tide ebbs and flows. *R. v. Allen* (1) and *R. v. Jemot* (3) are most closely in point, and establish that offences committed on board British ships in places where great ships go are within the jurisdiction of the Court of Admiralty, and consequently of the Central Criminal Court. In America it appears from *United States v. Wiltberger* (5), that it was held that the United States had no jurisdiction in the case of the crime of manslaughter committed on board a United States vessel in the river Tigris in China; but, as I understand the American cases of *Thomas v. Lane* (2) and *United States v. Coombs* (4), a rule more in conformity with the English decisions was laid down, and on those authorities I take it that the American courts would agree with us. It is clear, therefore, that a person on board a British ship is amenable to the British law just as much as a British person on board an American ship is subject to the American law. My view is that, when a person is on board a vessel sailing under the British flag, and commits a crime, that nation has a right to punish him for the crime committed by him; and clearly the same doctrine extends to those who are members of the crew of the vessel.

LUSH, J.—I am of the same opinion. I also think that it is not necessary to resort to s. 267 of the Merchant Shipping Act, 1854, to support this conviction, and I offer no opinion on the construction of that enactment. I give my judgment in this case on the ground that the offence was committed on board a British ship in a tidal river, navigable for seagoing ships, and at a spot where there is the flux and reflux of the tide, and that it was, therefore, within the jurisdiction of the Admiralty Court.

Conviction affirmed.





